1140 POSITION ON HIGHWAY ON MEETING AND PASSING; VIOLATION EXCUSED

Driving a motor vehicle on the wrong side of the roadway at the time of (or immediately before) a collision is negligence unless there was an explanation satisfactory to you that the driver was free from negligence in being on the wrong side of the roadway.

(Falling asleep at the wheel is not a satisfactory explanation. It is negligence itself.)

(If a driver is on the wrong side of the roadway as he or she approaches an oncoming car at such time and distance from the point of collision that the oncoming driver would be obliged to take some precaution to avoid an accident by reducing speed, stopping, or changing course of travel, then the driver is negligent with respect to yielding one-half of the travelable portion of the roadway, even though the driver may have returned to the proper side of the roadway before the impact.)

[Any of the following paragraphs may be used where appropriate:

(a) A driver is not negligent in failing to operate a vehicle on the right-hand side of the roadway when it is impossible to know where the right-hand side of the roadway is by reason of circumstances which occur suddenly and without warning and over which the driver had no control and for which the driver was in no way responsible, such as (glaring headlights of an oncoming automobile) (a sudden cloud of dust).

(b) A driver is not negligent in failing to operate a vehicle upon the right side of the roadway when it is impossible to do so because the vehicle, suddenly and without warning, due to mechanical failure such as (a blow-out) (other mechanical failure) caused the

driver to lose control. This rule does not apply if the driver knew or in the exercise of ordinary care should have known of the faulty mechanical condition prior to the accident.

(c) (Skidding; see Wis JI-Civil 1280.)]

COMMENT

This instruction was approved in 1977 and revised in 2002 and 2008. Editorial changes were made in 1992 to address gender references in the instruction.

See Wis. Stat. §§ 346.05 and 346.06 and notes to these sections in Wis. Stat. Ann. The term "roadway" is defined in Wis. Stat. § 340.01(54).

Position on highway is covered in Wis JI-Civil 1135, Position on Highway on Meeting and Passing, parts of which should be used here.

Mere operation of a motor vehicle on the wrong side of highway is prima facie negligence, a genuine inference of fact and not a mere legal presumption which inference can be overcome only by an explanation of nonnegligence that the jury is bound to accept, Kempfer v. Bois, 255 Wis. 312, 314, 38 N.W.2d 483 (1949); Zeinemann v. Gasser, 251 Wis. 238, 243, 29 N.W.2d 49 (1947) (skidding); Hamilton v. Reinemann, 233 Wis. 572, 581, 290 N.W. 194 (1940) (tractor-trailer jack-knifing); Booth v. Frankenstein, 209 Wis. 362, 365-66, 245 N.W. 191 (1932) (blow-out of tire involved in impact rejected by jury as explanation, presumption of deceased's due care dropped out by wrong-side driving inference of negligence); approved to be given in exact words of Kempfer v. Bois, as applicable to both drivers in Schwartz v. Schneuriger, 269 Wis. 535, 545, 69 N.W.2d 756 (1955) (jury accepted defendant's explanation of last minute swing to left to avoid plaintiff who was driving in center). Kempfer v. Bois expressly overruled that part of Seligman v. Hammond, 205 Wis. 199, 204, 236 N.W. 115 (1931), which held that burden was to prove wrong-side driving was caused by negligence.

"The inference of negligence when one invades the wrong lane is a vigorous one; the inference is not dissipated unless the driver so invading the wrong lane proves that he was without fault." Voigt v. Voigt, 22 Wis.2d 573, 584, 126 N.W.2d 653 (1964).

Goldenberg v. Daane, 13 Wis.2d 98, 104, 108 N.W.2d 187 (1961), states that when some evidence of nonnegligence in wrong-side driving is introduced, there is no occasion to instruct on the inference of negligence from wrong-side driving. This is directly contrary to Schwartz v. Schneuriger, supra, and in conflict with statement in Voigt v. Voigt that wrong-side driver has "burden of going forward with evidence to prove that such invasion was non-negligent." The ultimate burden of course is on party asking a "yes" to the ultimate negligence question.

Sleeping is not a nonnegligent explanation. Theisen v. Milwaukee Auto Mut. Ins. Co., 18 Wis.2d 91, 118 N.W.2d 140 (1962).

As to wrong-side driving with last minute switch-back to right side, see Havens v. Havens, 266 Wis. 282, 63 N.W.2d 86 (1954); Stevens v. Farmers Mut. Auto Ins. Co., 268 Wis. 25, 66 N.W.2d 668 (1954); Schwartz v. Schneuriger, supra; Nothem v. Berenschot, 3 Wis.2d 585, 89 N.W.2d 289 (1958).

As to dust as an unexpected condition, see Johnson v. Prideaux, 176 Wis. 375, 378, 187 N.W. 207 (1922). As to glaring headlights, see Odya v. Quade, 4 Wis.2d 63, 72, 90 N.W. 96 (1958).

See Bunkfeldt v. Country Mut. Ins. Co., 29 Wis.2d 179, 184, 138 N.W.2d 271 (1965), where evidence of mechanical failure was insufficient to rebut the inference of negligence which arose from wrong-side driving.

As to negligence concurring with unexpected mechanical failure nevertheless being a cause, see Foellmi v. Smith, 15 Wis.2d 274, 280, 112 N.W.2d 712 (1961).

Instructions on unexpected mechanical failure, especially where no collision with another, vehicle is involved, may be submitted under management and control, if the driver has warning of some abnormal operation probably caused by a defective condition, it being the driver's duty to stop and investigate. See Kowalke v. Farmers Mut. Auto Ins. Co., 3 Wis.2d 389, 401, 88 N.W.2d 747 (1958).