Washington Law Review

Volume 38
Issue 2 *Washington Case Law—1962*

7-1-1963

Torts—Gross Negligence Under the Guest Statute

Dwayne Copple

brought by employees against their employers. Hopefully the *Siragusa* reasoning will precipitate a return to first principles of analysis in more than just employer-employee cases. *Siragusa* could well mark the beginning of clarification of an entire area of tort law, now befuddled by the maxim *volenti non fit injuria.*

VIRGINIA A. OLDOW

Gross Negligence Under the Guest Statute. The first definitive interpretation of "gross negligence" within the meaning of the 1957 amendment to the Host-Guest Statute[1] has been given by the Washington court in the case of *Crowley v. Barto.*[2]

In this case the administrator of the estate of the deceased brought a wrongful death action against the defendant, who had been driving an automobile in which the deceased was a guest. From a judgment of dismissal following a verdict in favor of the defendant, the plaintiff appealed, alleging error in the giving of this instruction on the definition of "gross negligence":

> The term 'gross negligence' as applied to this case means an *utter disregard* in the operation of a motor vehicle by the host driver for the safety of a guest passenger. It is the failure of the host driver to use slight care for the safety of the guest passenger. (Emphasis added.)[3]

In reversing the judgment of dismissal the appellate court took the position that "utter disregard" meant something more than oversight or failure to act, but in addition involved "willful or intentional negligence." The standard of positive disregard is applied only to cases of "wanton misconduct" and not to cases of "gross negligence," and so is inconsistent with the standard set by the Guest Statute. "Gross negligence" instructions should be phrased only in terms of "absence of slight care" and not in terms of "utter disregard."

By defining "gross negligence" in this way the court has restored the rule prevailing in Washington prior to the enactment of the Guest Statute in 1933,[4] a rule which the statute was presumably passed to avoid. If one admits that it really was the intention of the legislature

[1] R.C.W. 46.08.080. As amended the statute makes the host liable to the guest if "the accident was intentional on the part of the owner or operator, or the result of said owner's or operator's gross negligence or intoxication." Before the 1957 amendment the host was liable only if the accident was intentional. For a critique of the amendment by Professor Richards, see Note, 32 WASH. L. REV. 210 (1957).

[2] 59 Wn.2d 280, 367 P.2d 828 (1962).

[3] Crowley v. Barto, 59 Wn.2d 280, 282, 367 P.2d 828, 829 (1962).

[4] Shea v. Olson, 185 Wash. 143, 53 P.2d 615 (1936).

to restore this pre-1933 rule, then "absence of slight care" is a correct way of defining it.[5] From this standpoint the court's decision in the case is sound.

The difficulty arises when we try to attach meaning to the phrase "absence of slight care," and it is in this respect that the *Crowley* decision is disappointing.

In the first place, it is not at all certain that "gross negligence," as it is used in the guest statutes, is inconsistent with "wanton misconduct," since the majority of states which have adopted guest statutes using a "gross negligence" standard have interpreted that standard as necessitating a reckless disregard of the rights of others amounting to "wanton misconduct."

The courts of Michigan,[6] Kansas,[7] South Dakota,[8] North Dakota,[9] Virginia,[10] and Florida[11] all have faced the admittedly awkward problem of defining guest statute "gross negligence," and all have decided that it does not describe a type of conduct distinct from and less culpable than "wanton or reckless misconduct." Most recently, the Oregon Supreme Court, in an exhaustive opinion,[12] examined the state of the authorities and decided that so far as the practical administration of justice was concerned "gross negligence" and "wanton misconduct" were the same. The court fully examined the minute possibilities of distinction between "gross negligence" and "wanton misconduct,"[13] but noted the liklihood of confusion if "gross negligence" were treated as a separate class of wrongdoing.[14] It reasoned that the difficulties inhering in a practical separation of the two classes were prohibitive. Significantly, in the *Crowley* opinion the court cites cases from none of these jurisdictions.

The Texas court, which uses a "reckless disregard" standard, has discussed "gross negligence" as if the two terms were synonymous.[15] Massachusetts, although it apparently attempts to distinguish "gross

[5] Craig v. McAtee, 160 Wash. 337, 295 Pac. 146 (1931); Klopfenstein v. Eads, 143 Wash. 104, 254 Pac. 854 (1927); Saxe v. Terry, 140 Wash. 503, 250 Pac. 27 (1926).

[6] Finkler v. Zimmer, 258 Mich. 336, 241 N.W. 851 (1932).

[7] *In re* Wright's Estate, 170 Kan. 600, 228 P.2d 911 (1951); Stout v. Gallemore, 138 Kan. 385, 26 P.2d 573 (1933).

[8] Melby v. Anderson, 266 N.W. 135 (S.Dak. 1936). South Dakota has since deleted the words "gross negligence" from its statute.

[9] Posey v. Krogh, 65 N.Dak. 490, 259 N.W. 757 (1935); Rokusek v. Bertsch, 78 N.Dak. 420, 50 N.W.2d 657 (1951).

[10] Millard v. Cohen, 187 Va. 44, 46 S.E.2d 2 (1948).

[11] Dewald v. Quarnstrom, 60 So. 2d 919 (Fla. 1952).

[12] Williamson v. McKenna, 223 Or. 366, 354 P.2d 56 (1960).

[13] 354 P.2d at 66.

[14] *Ibid.*

[15] Gough v. Fincher, 228 S.W.2d 541, 544 (Tex. Civ. App. 1950).

negligence" from "wanton misconduct,"[16] nevertheless phrases the standard in terms of "utter disregard,"[17] and several writers have concluded that there is little distinction between "gross negligence" in Massachusetts and "wanton misconduct" in other states.[18]

The Washington court has itself stated, "[W]e do not think it can be said that heedlessness or reckless disregard for the rights of others establishes any rule of liability varying appreciably from that of gross negligence."[19]

There is a second important difficulty with the court's decision in the *Crowley* case. Many of the guest statute cases involve jury trials, and the jury needs an understandable instruction to serve as a basis for decision. A jury instruction incorporating a definition of "gross negligence" simply as "absence of slight care" is so devoid of content, and so empty of meaning, that no jury is likely to give it an intelligent appraisal.[20]

On the other hand, "wanton misconduct" does have meaning,[21] and does provide something understandable. As defined by the *Restatement of Torts*,[22] "wanton misconduct" is distinct from simple negligence in that it involves a mental state in which the actor intends to do the act and knows that there is a strong probability that serious harm will be inflicted on another. It is distinct from intentional wrongdoing in that he does not intend to inflict the harm. Rather, he is indifferent and does not care whether harm results.

When one places simple negligence at one end of the scale and intentional wrongdoing at the other, there is little room for distinctions in any third class of conduct which intervenes, whether that conduct be characterized as an aggravated form of negligence or as exhibiting some sort of quasi-intent.[23] The distinction between "gross negligence" and "simple negligence" has in fact been simply this: acts which are "grossly negligent" are so regarded because of the relative amount of deliberateness or indifference to consequences with which they are

---

[16] Altman v. Aronson, 231 Mass. 588, 121 N.E. 505 (1919).
[17] Manning v. Simpson, 261 Mass. 494, 159 N.E. 440 (1928).
[18] Note, 35 MICH. L. REV. 804 (1937); Note, 18 CORNELL L.Q. 621, 627 (1932).
[19] Craig v. McAtee, 160 Wash. 337, 295 Pac. 146, 148 (1931). See Eubanks v. Kielsmeier, 171 Wash. 484, 18 P.2d 48 (1933).
[20] Note, 32 WASH. L. REV. 210 (1957).
[21] Williamson v. McKenna, 223 Or. 366, 354 P.2d 56 (1960); PROSSER, TORTS § 33 (2d ed. 1955).
[22] RESTATEMENT, TORTS § 500 (1934).
[23] "Since recklessness often is inferred from any highly dangerous conduct there seldom is any clear distinction between 'wanton' and 'gross' negligence." PROSSER, TORTS 151 (2d ed. 1955).

done,[24] and this indifference to consequences is the same thing as a species of "wanton or reckless conduct."[25]

Where is the line to be drawn? Is inadvertence enough to amount to "gross negligence"? If so, why is it any different from simple negligence? If not, why is it any different from "wanton misconduct," which takes into consideration states of mind? When is conduct serious enough to be "gross" but not serious enough to be in "utter disregard"? What are the tests, the factors and the language which will guide the court in making a delineation, no matter how imprecise, between "absence of slight care" and "failure to use reasonable care under the circumstances?" Most important, how can a jury give a verdict which accurately reflects the court's language and do it with some consistency? Is it not impossible unless we move up the scale to the point at which the defendant has become conscious of the danger and elects to encounter it, or at least becomes indifferent to it?

The continued and puzzling inclination of legislatures to use "gross negligence" as a standard of care in host-guest statutes presents any court with an obvious challenge. By defining "gross negligence" simply as "absence of slight care" the Washington court has taken the easy way out. The expectable result of this decision is more work for the court, as both juries and trial judges struggle to find meaning in a phrase than has no meaning.

DWAYNE COPPLE

Recovery for Intentional Infliction of Emotional Injury. Until recently, a plaintiff who had suffered emotional injury normally had to show an accompanying physical harm in order to maintain a successful action for damages. His ability to recover for severe emotional distress unaccompanied by physical injury is being recognized by an increasing number of jurisdictions. The current situation is marked by the unsettled nature of the law. Reluctance to grant relief for such an injury has been based upon a desire to avoid not only fictitious claims, but also the litigation of trivialities and bad manners. However, even before this change in attitude by the courts, if some independent tort, such as assault, battery, or false imprisonment could be made out, that cause of action served as a peg upon which to hang the recovery for emotional injury, and recovery was freely permitted. In recent years the courts have tended to recognize the intentional

[24] Williamson v. McKenna, 223 Or. 366, 354 P.2d 56 (1960); Note, 35 MICH. L. REV. 804 (1937).

[25] RESTATEMENT, TORTS § 500 (1934).