Washington Law Review

Volume 41
Number 3 *The Common Market—A Symposium; Annual Survey of Washington Law*

6-1-1966

Definition of Gross Negligence under the Guest Statute

anon

It seems quite likely that the decision in the principal case is the unfortunate consequence of this type of procedure. The net effect of this procedure is that the court tends to be result-oriented. As it appears to have operated in the principal case, the assigned judge wrote an opinion to which the other justices joined or dissented *on result,* and careful attention to theory was neglected. The writer of the majority opinion in the principal case was the author of the concurring opinion in *Feigenbaum,* in which he concurred in the result but disagreed with the abolition of assumption of risk. The writer of the majority opinion in *Feigenbaum* signed the majority opinion in the principal case.[27] It is possible that the latter judge changed his mind, or that the language regarding abolition was unimportant—or that, because of workload pressure, the inconsistency was never discussed and resolved. If the inconsistency is attributable to the decisional procedure forced by the court's tremendous workload, then measures must be taken to improve the situation. An inviting solution is a proposed constitutional amendment which would provide an intermediate appellate court.[28] In conjunction with an intermediate court, the supreme court should have discretionary appellate jurisdiction so that it would have greater control over its workload.

DEFINITION OF GROSS NEGLIGENCE UNDER THE GUEST STATUTE

On a bright summer morning, defendant slowed her automobile, intending to make a left turn. The road stretched dry and straight before her for more than a mile. She turned on her left signal blinker, observed a truck in the distance coming toward her, and looked in her rear view mirror. Seeing a car pulling out to pass her, she slowed further and waited for it to go by. Then she turned abruptly to the left and drove straight into the path of the oncoming truck. Plaintiff passenger, seriously injured in the collision, sued defendant, alleging gross negligence. The trial court sustained defendant's challenge to the evidence, ruling as a matter of law that defendant's actions did

[27] Judge Ott, who wrote the "majority" opinion in *Feigenbaum,* signed the majority opinion in the principal case. Judge Donworth signed the majority opinions in both cases, and Judge Hamilton, who joined Judges Ott and Donworth in *Feigenbaum,* dissented in the principal case, but not because he reasoned that assumption of risk had been abolished in the earlier case.

[28] Washington Judicial Council, Revision of Judicial Article IV of the Washington Constitution (2d proposed draft, docket No. 100, 1962).

not constitute gross negligence within the meaning of the guest statute.[1] On appeal, the Washington Supreme Court, sitting en banc, reversed and remanded. *Held*: In a factual setting involving a high degree of risk, the exercise of some care does not, as a matter of law, preclude the existence of gross negligence. *Nist v. Tudor*, 67 Wash. Dec. 2d 317, 407 P.2d 798 (1965).[2]

In Washington, the rule that the host driver is liable to his guest passenger only for gross negligence originated in a series of decisions between 1921 and 1926.[3] A study of cases through 1930 reveals that the court consistently defined gross negligence as the failure to exercise slight care, and interpreted failure to exercise slight care as requiring conduct evidencing a total lack of care or reckless disregard for the safety of the passenger.[4] In these early cases, the court frequently ruled that the evidence, although obviously showing negligence, was insufficient as a matter of law to take the issue of gross negligence to the jury.[5] Without changing the basic definition of gross negligence, the court began, in about 1933, increasingly to leave the question of gross negligence to the jury under factual patterns indicating obvious negligence.[6]

After enactment of the guest statute in 1933,[7] which limited recovery to cases of intentional injury, the court was not faced with the

---

[1] WASH. REV. CODE § 46.08.080 (1961).

[2] Two other cases decided on the same day involved related questions under the guest statute. In Dole v. Goebel, 67 Wash. Dec. 2d 332, 407 P.2d 807 (1965), the court held that where defendant skidded into a collision in the wrong lane in a construction area marked with thirteen warning signs in two miles, the unexplained presence of his car in that lane was sufficient to take the issue of gross negligence to the jury, and that the instruction "'gross negligence' means the failure to use slight care for the safety of the guest passengers" was sufficient. In Hansen v. Pauley, 67 Wash. Dec. 2d 339, 407 P.2d 811 (1965), the court affirmed an order granting a new trial where the following instruction had been given:

> The term "failure to exercise slight care" ... means to operate a motor vehicle with such a degree of inattention, or rashness or recklessness as evinces a total want of care for the safety of the occupants of the motor vehicle.

[3] Saxe v. Terry, 140 Wash. 503, 250 Pac. 27 (1926); Heiman v. Kloizner, 139 Wash. 655, 247 Pac. 1034 (1926); Pinckard v. Pease, 115 Wash. 282, 197 Pac. 49 (1921).

[4] Meachem & Mickelwait, *Gross Negligence*, 5 WASH. L. REV. 91 (1930).

[5] Lothspeich v. Morrell, 173 Wash. 55, 21 P.2d 287 (1933); Dawson v. Foster, 169 Wash. 516, 14 P.2d 458 (1932); Craig v. McAtee, 160 Wash. 337, 295 Pac. 146 (1931); Dailey v. Phoenix Inv. Co., 155 Wash. 597, 285 Pac. 657 (1930); Blood v. Austin, 149 Wash. 41, 270 Pac. 103 (1928); Klopfenstein v. Eads, 143 Wash. 104, 254 Pac. 854, 256 Pac. 333 (1927); Saxe v. Terry, 140 Wash. 503, 250 Pac. 27 (1926).

[6] Nenezich v. Elich, 183 Wash. 657, 49 P.2d 33 (1935); Pickering v. Stearns, 182 Wash. 234, 46 P.2d 394 (1935); Devereaux v. Blanchard, 174 Wash. 673, 26 P.2d 82 (1933).

[7] Laws of 1933, ch. 18. See also Richards, *The Washington Automobile Guest Statute*, 12 WASH. L. REV. 138 (1937); Richards, *Another Decade Under the Guest Statute*, 24 WASH. L. REV. 101 (1949).

problem of reconciling these two lines of authority. In 1957, however, the statute was amended to provide intoxication and gross negligence as additional grounds for recovery.[8] In *Crowley v. Barto*,[9] the first definitive case arising after the 1957 amendment, the court adopted its more recent position, rejecting the contention that gross negligence means an "utter disregard" for the safety of the passenger.[10] Without discussing the earlier cases,[11] the court equated "utter disregard" with intentional neglect or wanton misconduct, concluding that this type of conduct is in no way connected with negligence,[12] and adopted the position that gross negligence is the failure to exercise slight care.

The court in the principal case recognized at the outset that the term "gross negligence" has "universally escaped definition" and that "every qualifying word added to sharpen the phrase seems to obscure in about the same degree as it clarifies."[13] After reviewing the prior Washington decisions,[14] various "academic" authorities,[15] and a sampling of cases from other jurisdictions,[16] the court concluded that, although its application has produced inconsistent results, no better concept of gross negligence has been found than its often repeated statement that gross negligence is the failure to exercise slight care. Apparently conceding that this statement itself conveys little meaning, the court attempted to relate it to ordinary negligence concepts and, despite its prior warning, to amplify the definition. Reasoning from the basic proposition that gross negligence is an aggravated form of negligence, the court con-

[8] Laws of 1957, ch. 132, noted 32 WASH. L. REV. 210 (1957). The amendment also added the requirement that proof of the cause of action be corroborated by evidence independent of, or in addition to, testimony of the parties. As the basic policy behind guest statutes is often said to be prevention of collusion between parties to fleece insurance companies, this addition indicates that the legislature has adopted another means for effectuating the policy. This may explain the court's recent trend toward liberalizing the basis for recovery under "gross negligence."

[9] 59 Wn. 2d 280, 367 P.2d 828 (1962), 38 WASH. L. REV. 357 (1963).

[10] *Id.* at 284-85, 367 P.2d at 831.

[11] See cases cited note 5 *supra.*

[12] 59 Wn. 2d. at 285, 367 P.2d at 831.

[13] 67 Wash. Dec. 2d at 320, 407 P.2d at 800.

[14] The court concluded from its review that, "although the definition of gross negligence as the failure to exercise slight care has remained constant, its application has not been uniform." *Id.* at 323, 407 P.2d at 802.

[15] The court cited 4 BLASHFIELD, CYCLOPEDIA OF AUTOMOBILE LAW AND PRACTICE § 2322 (1946); HARPER, LAW OF TORTS § 74 (1933); 2 HARPER & JAMES, LAW OF TORTS § 16.15 (1956); PROSSER, TORTS §§ 33, 77 (2d ed. 1955); PROSSER, TORTS § 34 (3d ed. 1964); 38 WASH. L. REV. 357 (1963).

[16] The court cited Dinardi v. Herook, 328 Mass. 572, 105 N.E.2d 197 (1952) (gross negligence determined by seconds of inattention); Williamson v. McKenna, 223 Ore. 366, 354 P.2d 56 (1960) (exhaustive state-by-state review of treatment of gross negligence in guest statutes); Cutler v. Gulf States Util. Co., 361 S.W.2d 221 (Tex. Civ. App. 1962); Atwell v. Watson, 204 Va. 624, 133 S.E.2d 552 (1963).

cluded that it must be governed by ordinary negligence concepts, such as the foreseeability of the risk and the amount of care exercised under the circumstances. The court defined failure to exercise slight care as "not the total absence of care but care substantially or appreciably less than the quantum of care inhering in ordinary negligence."[17] Correlatively, gross negligence is "negligence substantially or appreciably greater than ordinary negligence."[18] Applying these definitions to the facts of the principal case, the court decided that, since defendant exercised little or no care in relation to the hazards presented by the approaching truck, "her acts and omissions in turning suddenly into so obvious a danger supplied evidence" from which the jury could have found that she was grossly negligent.[19]

The decision in the principal case reaffirms the position taken by the court in *Crowley* that gross negligence differs quantitatively rather than qualitatively from ordinary negligence. In committing itself to the position that gross negligence lies somewhere between a reckless disregard of safety and negligence, on a scale of misconduct, the court has undertaken a definitional task recognized by most authorities and by the court itself as nearly impossible.[20] Although the court acknowledged the difficulties,[21] it recognized that, since the legislature had used the term, the court has a duty to provide "a workable means by which the trial court and jury may apply gross negligence to concrete situations."[22]

Although the court's definitional attempt seems clearly to have failed,[23] it did add to its previous concept of gross negligence two significant refinements which seem to clarify the type of conduct the court has in mind. The first refinement added by the court is that slight care does not mean a complete lack of care. The defendant may have exercised some care and still fail to meet the standard of slight care.[24] The second refinement added by the court lies in its emphasis on the hazards presented by the situation confronting defendant.

---

[17] 67 Wash. Dec. 2d at 326, 407 P.2d at 804.
[18] *Id.* at 326, 407 P.2d at 803.
[19] *Id.* at 326-27, 407 P.2d at 804.
[20] See, *e.g.*, 67 Wash. Dec. 2d at 320, 324, 407 P.2d at 800, 802-03. PROSSER, TORTS 150 (2d ed. 1955).
[21] 67 Wash. Dec. 2d at 320, 324, 407 P.2d at 800, 802-03.
[22] *Id.* at 325, 407 P.2d at 803.
[23] "Negligence substantially and appreciably greater than ordinary negligence," seems no clearer than gross negligence standing alone. "Care substantially or appreciably less than the quantum of care inhering in ordinary negligence," seems less clear than failure to exercise slight care.
[24] The dissent argues that "a degree of care which is so small that it can fit

The significance of the second refinement is that it seems to indicate a willingness by the court to add the element of aggravated risk to its previous formulation of gross negligence. The court's previous formulation, which was solely in terms of failure to exercise slight care, ignored the idea that negligence is basically a matter of risk.[25] By formulating gross negligence in terms of both aggravated risk and an aggravated departure from ordinary care, the court should be able to provide a clearer idea of the type of conduct it has in mind.

It would seem that the two elements of gross negligence, as thus formulated, would operate on a sliding scale. As the gravity of the risk increases, the amount of care demanded by ordinary prudence also increases, thus accounting for the court's position that the defendant may be exercising more care than none and still fail to meet the standard of slight care. Correlatively, as the gravity of the risk decreases, the amount of care demanded by ordinary prudence decreases, and a more extreme departure from ordinary care should be required before gross negligence may be found.

Although the court may never be able to escape the inherently nebulous qualities of gross negligence in formulating a definition, it should be able to move closer to its goal of providing a workable means by which trial court and jury may apply gross negligence to concrete situations by formulating a definition in terms of aggravated risk as well as aggravated departure from ordinary care.

PROPRIETY OF SPECIAL INTERROGATORIES TO EXPLAIN INCONSISTENT VERDICTS IN CONSOLIDATED ACTIONS

Two automobiles, approaching at right angles to each other, collided midway in an intersection controlled by a traffic signal. The guest-passenger in Car One was fatally injured. The administratrix of his estate (hereinafter referred to as plaintiff) brought a wrongful death action against the driver of Car Two, alleging negligence. In a separate action the driver of Car Two sought property and personal

between 'slight' and 'none' is imperceptible" under any ordinary definition of "slight." It further argues, 67 Wash. Dec. 2d at 330-31, 407 P.2d at 806, that:

> [W]hile at first blush it would seem that the majority have conjured up a quantity of care which is less than slight, as the term is ordinarily understood, I think that the actual and practical effect of the opinion may be simply to enlarge the concept of "slight". . . .

[25] PROSSER, TORTS 119-20 (2d ed. 1955).