Washington Law Review

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

6-1-1966

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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).

injury damages from the host-driver of Car One, alleging the latter's negligence. The host-driver of Car One counterclaimed for property damage, alleging negligence on the part of the driver of Car Two. Since the three claims arose from the same accident, the two actions were consolidated, over the objection of plaintiff, and tried to a single jury. The verdict in the action between the two drivers was that neither driver was entitled to recover against the other. In the wrongful death action the jury rendered its verdict in favor of the driver of Car Two. The trial judge, though aware that the verdicts seemed inconsistent, denied plaintiff's request for submission of special interrogatories to the jury to explain the apparent inconsistency, sustaining the driver of Car Two's objection to such inquiry. Plaintiff alone appealed, contending, *inter alia,* that the verdicts were inconsistent because the jury, in not finding in favor of either driver in their action against each other, must necessarily have found both drivers to have been negligent, and that, since the negligence of the host-driver cannot be imputed to the guest-passenger,[1] plaintiff was entitled to recover against the necessarily negligent driver of Car Two. In an en banc opinion, the Washington Supreme Court affirmed.[2] *Held:* After verdicts have been rendered in actions consolidated for trial, special interrogatories may not be submitted to the jury to explain an apparent inconsistency when the pleadings, evidence, and instructions of the court support a possible finding that the verdicts are consistent. *Hawley v. Mellem,* 66 Wash. Dec. 2d 753, 405 P.2d 243 (1965).

Separate claims may be consolidated for trial at the discretion of the trial judge.[3] Authority is split on the effect of verdicts rendered by the same jury in consolidated cases. Some jurisdictions treat the verdicts as being rendered by separate juries, since that would have been the result if the cases had not been consolidated for trial; under this view, there is no requirement that the verdicts be consistent.[4] The other view is to recognize that separate verdicts rendered in consolidated cases are, in fact, rendered by the same jury and therefore must be consistent because the same jurors are reaching verdicts by

[1] Knight v. Borgan, 52 Wn. 2d 219, 324 P.2d 797 (1958); Winston v. Bacon, 8 Wn. 2d 216, 111 P.2d 764 (1941); Allen v. Walla Walla Valley Ry. Co., 96 Wash. 397, 165 Pac. 99 (1917).

[2] The vote for affirmance was 6-3.

[3] Sage v. Northern Pac. Ry. Co., 62 Wn. 2d 6, 380 P.2d 856 (1963); State *ex rel.* Sperry v. Superior Court, 41 Wn. 2d 670, 251 P.2d 164 (1952); State *ex rel.* Shaffer v. Superior Court, 184 Wash. 316, 50 P.2d 917 (1935).

[4] See, *e.g.,* Aragon v. Kasulka, 68 N.M. 310, 361 P.2d 719 (1961), and cases cited therein.

evaluating the same evidence.[5] The Washington court has expressed its preference for the more realistic approach that verdicts rendered in consolidated cases tried before the same jury must be consistent.[6] The rendering of inconsistent verdicts is sufficient ground on which to base the granting of a new trial, the theory being that one or the other of the parties did not receive a fair trial.[7]

The court in the principal case met plaintiff's argument—that the driver of Car Two must necessarily have been negligent—by hypothesizing that the jury may have found that neither driver proved the other's negligence by a fair preponderance of the evidence, such being the burden of proof on the party asserting negligence.[8] In other words, the court speculated that the evidence of negligence in the action between the two drivers was found by the jury to be equally balanced.[9] If such explanation be attached to the jury's verdict denying recovery to either driver, then the verdict in favor of the driver of Car Two in plaintiff's wrongful death action was not inconsistent, since under the court's reasoning the negligence of the driver of Car Two was never established. The court invoked the rule that the jury's verdict will not be disturbed on appeal if it is supported by substantial evidence.[10] To support this position, the court cited evidence in the record which tended to prove that the driver of Car Two was not negligent.[11]

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[5] See, *e.g.*, Detrixhe v. McQuigg, 316 P.2d 617 (Okla. 1957).

[6] Mitchell v. Rice, 183 Wash. 402, 48 P.2d 949 (1935); Maddock v. McNiven, 139 Wash. 412, 247 Pac. 467 (1926).

[7] *Ibid.* That a party did not receive a fair trial is a ground for new trial under WASH. R. PLEAD., PRAC., PROC. 59.04W(1). See also note 18 *infra*.

[8] Wilson v. Northern Pac. Ry. Co., 44 Wn. 2d 122, 265 P.2d 815 (1954); Hutton v. Martin, 41 Wn. 2d 780, 252 P.2d 581 (1953).

[9] It should be noted that the jury was instructed, 66 Wash. Dec. 2d at 760, 405 P.2d at 247:

> If the evidence is equally balanced on the issues of negligence or proximate cause so that it does not preponderate in favor of the party making the charge, then he or she has failed to fulfill his burden of proof, and your finding must be against the party making such charge.

But see text accompanying note 14 *infra*.

[10] Allen v. Fish, 64 Wn. 2d 665, 393 P.2d 621 (1964).

[11] The court found the following evidence to be substantial, so as to invoke the rule:

> Two witnesses testified that they were following [Car One] as it proceeded west on Second Avenue, and that the signal light was red when [the driver of Car One] entered the intersection. They also testified that [the driver of Car One] did not slow down when he entered the intersection. [The driver of Car Two] testified that he entered the intersection on a green light. Another witness, who was following [Car Two], testified that [the driver of Car Two] entered the intersection on either a green or an amber light.

66 Wash. Dec. 2d at 760, 405 P.2d at 248. The question raised, of course, is why the jury denied recovery to the driver of Car Two in his action against the driver of

In a strong dissent, Judge Hamilton reached the "inescapable"[12] conclusion that one or both drivers must have been negligent, because "*the evidence indisputably establishes the collision involved occurred within the controlled intersection, that one of the drivers entered the intersection against a red light, and that neither driver saw the other until the instant before or at impact.*"[13] It was Judge Hamilton's opinion that the verdicts were indeed inconsistent, and he urged that a "a jury should not be permitted to abdicate its responsibility of deciding the issues involved upon the basis that the evidence was 'equally balanced.' "[14]

The reasoning of the majority in reaching the conclusion that the verdicts were consistent is not convincing. As brought out in the dissent, the physical circumstances surrounding the collision compel a conclusion that negligence of one or both drivers was the proximate cause of the collision. There was no evidence that the traffic control signal was not functioning properly. Each driver approached and entered the intersection without stopping.[15] The cycle of a traffic signal is such that the color red always faces one direction or the other. In order for a collision to have occurred midway in the intersection, it would seem clear that one of the drivers must have entered the intersection against a red light.[16] Thus, in the action between the two drivers, the issue of negligence on the part of one or both[17] drivers was clearly before the jury. Yet the court reached the improbable conclusion that the jury found the evidence of negligence between the drivers to be equally balanced. The court, perhaps unwittingly, is condoning a practice which would permit jurors to avoid deciding difficult issues, and is allowing such a shirking of responsibility to stand as the basis for a final judgment.[18]

Car One. Since the driver of Car Two was a party to the appeal only as respondent, having elected not to cross-appeal, the court was not called upon to decide whether he was entitled to a new trial on his claim against the driver of Car One.

[12] 66 Wash. Dec. 2d at 763, 405 P.2d at 249.

[13] *Ibid.*

[14] *Ibid.*

[15] 66 Wash. Dec. 2d at 755, 405 P.2d at 244.

[16] Ordinarily the driver of an automobile who is confronted by a red traffic light at an intersection must stop, and one who enters an intersection against a red light may be guilty of negligence, gross negligence, or negligence per se. 3 BLASHFIELD, AUTOMOBILE LAW AND PRACTICE 102 (3d ed. 1965).

[17] The driver who entered the intersection facing the green light could also have been negligent. See Lanegan v. Crauford, 49 Wn. 2d 562, 304 P.2d 953 (1956).

[18] Whether failure to decide issues fairly presented is an irregularity in the proceedings of the jury, a ground for new trial under WASH. R. PLEAD., PRAC., PROC. 59.04W(1), or misconduct under Rule 59.04W(2), is a question which has not been considered by the Washington court. Arguably such failure might also be a substantial failure of justice under Rule 59.04W(9). Various problems are inherent, how-

The meaning of the jury's seemingly inconsistent verdicts in the principal case need not have been left to interpretation by hypothesis or speculation. The question could have been resolved at the trial if the jury had been allowed to explain the meaning of its verdicts in response to special interrogatories. Yet the court held "special interrogatories to explain a verdict are improper,"[19] citing as authority *Coleman v. George*,[20] and *Gardner v. Malone*.[21] It is doubtful that these cases support the court's proposition. In *Coleman*, the issue to be decided was whether affidavits of jurors revealing the manner of the jurors' deliberations could be admitted as evidence of juror misconduct, a ground for new trial.[22] The court there held that the affidavits were inadmissible because they divulged what considerations entered into a juror's deliberations or controlled his actions in arriving at the verdict, citing *Gardner* as authority. In *Gardner*, the court set forth the rule that affidavits of jurors' misconduct tending to show the *fact* of misconduct were admissible, but affidavits were not admissible which tended to show the *effects* of misconduct, *i.e.*, how the facts operated to influence the jurors' decision, it being the province of the trial judge to determine such effects. *Coleman* and *Gardner* support the proposition that motives behind a verdict may not be made the subject of inquiry, but those cases should not be read as authority that *any* inquiry to explain a verdict is improper. Plaintiff in the principal case requested the trial court to interrogate the jury as to the intent of its verdicts,[23] not as to the jury's motive in reaching the verdicts. That the trial court could make such inquiry is not without precedent.[24] The court in the principal case failed to distinguish between the question posed to the jury, "*Why* did you decide," which would be improper under the *Gardner* test, and the question, "*What* did you decide," which would not be prohibited by the rule. The trial court denied plaintiff's request for special interrogatories,

ever, in the use of this argument as a ground for a new trial. See Trautman, *New Trials for Failure of Substantial Justice*, 37 WASH. L. REV. 367 (1962).

[19] 66 Wash. Dec. 2d at 759, 405 P.2d at 247.

[20] 62 Wn. 2d 840, 384 P.2d 871 (1963).

[21] 60 Wn. 2d 836, 376 P.2d 651, 379 P.2d 918 (1962), 38 WASH. L. REV. 339 (1963).

[22] WASH. R. PLEAD., PRAC., PROC. 59.04W(2).

[23] 66 Wash. Dec. 2d at 762, 405 P.2d at 248.

[24] See, *e.g.*, Smith v. S. & F. Construction Co., 62 Wn. 2d 479, 481, 383 P.2d 300, 301 (1963), in which it was stated:

> A trial court is justified in making such inquiry of jurors as to enable it to understand their will and intention, and their answers to such inquiry will be looked upon as an aid in the rendering of a proper judgment.

Cf. Haney v. Cheatham, 8 Wn. 2d 310, 111 P.2d 1003 (1941) (not error for judge to send jury back to reconsider an inconsistent verdict).

apparently on the ground that plaintiff waived her right to such interrogatories when she failed to make the request with the judge's instructions to the jury.[25] The appellate court reached the same conclusion.[26] It should be noted, however, that at the time plaintiff had her opportunity to submit special interrogatories she had no reason to suspect that the verdicts would be inconsistent. It seems a harsh result to hold that waiver had occurred, thus, in effect, charging parties in a consolidated trial with the foresight to anticipate that the jury will render inconsistent verdicts.

Considering the facts in the principal case—that plaintiff objected to consolidation in the first instance and that the trial judge recognized and pointed out the inconsistency of the verdicts—it would seem that the court should have been particularly amenable to any contention by plaintiff that she did not receive a fair trial. Yet the court, far from being amenable, appears to have gone out of its way in finding a basis on which to affirm the judgment against plaintiff. While plaintiff should not be entitled to judgment against the driver of Car Two on the basis of her contention on appeal (it being equally arguable that the driver of Car Two should have been awarded recovery against the driver of Car One), an order for a new trial would have been appropriate. Certainly the public policy in favor of ending litigation is far outweighed by the policy that substantial justice should be rendered in the courts. In the principal case, there is manifest doubt that justice was done at the trial level. The appellate decision did not alleviate that doubt.

[25] Before the causes were submitted to the jury, the question of special interrogatories was discussed in chambers, and it was agreed that no special interrogatories would be submitted. Plaintiff took no exception. Brief of Respondents, pp. 35-36.

[26] 66 Wash. Dec. 2d at 759, 405 P.2d at 247.