Roberts v. Johnson—A Welcome Change Tainted By An Outmoded Approach To Statutory Interpretation

In 1974, the Washington State Legislature repealed its automobile guest statute,[1] intending to establish ordinary negligence as the proper standard of liability in host-guest automobile tort actions.[2] Nevertheless, in March 1978, in *Lau v. Nelson,*[3] the Washington Supreme Court, ignoring clear indicia of legislative intent, held that the repeal of the guest statute revived the common law of this state, which, like the guest statute, predicated a guest's recovery on proving the host grossly negligent. Having effectively reinstated the very law the legislature repealed, the *Lau* court declined to decide whether the majority rule of ordinary negligence[4] should replace Washington's common law rule of gross negligence.[5]

In December 1978, in *Roberts v. Johnson,*[6] the court resolved that issue by overruling *Lau* and abandoning gross negligence in favor of ordinary negligence as the applicable standard of liability. This laudatory and long overdue result was tainted, however, by the court's specific reaffirmation of *Lau*'s holding that the repeal of a statute reinstates the common law regardless of the legislative intent behind the repeal. The court's failure to ascertain and implement the legislative intent is the unfortunate manifestation of a rigid, insensitive, and rule-oriented approach to statutory interpretation.[7]

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1. Act of Feb. 11, 1974, ch. 3. § 1, 1974 Wash. Laws, 1st Ex. Sess. 2 (repealed 1974).

2. *See* text accompanying notes 40-42 *infra.*

3. 89 Wash. 2d 772, 575 P.2d 719 (1978).

4. Under the majority rule, an automobile driver, like the driver of a horse and buggy, owed a duty of ordinary care for the safety of his guest. *See, e.g.,* Beard v. Klusmeier, 158 Ky. 153, 164 S.W. 319 (1914). This is now the common law standard in 49 states including Washington. *See generally* 2 F. HARPER & F. JAMES, THE LAW OF TORTS § 16.15 (1956). Georgia is the only remaining jurisdiction adhering to a common law requirement of gross negligence. *See* note 71 *infra.*

5. Because Lau v. Nelson came before the court on discretionary review, the court limited its inquiry to two issues: (1) whether the courts were to give the repealing act a retroactive or prospective application; and (2) whether the repeal of the guest statute reinstated the common law rule of this jurisdiction predicating recovery on a finding of gross negligence.

6. 91 Wash. 2d 182, 588 P.2d 201 (1978) (This case was misspelled in the advance sheets as Robberts v. Johnson. The error will be corrected in the bound volume of Washington Reports.).

7. Because the *Lau* court revived gross negligence rather than implementing the legislative intent behind the repeal of the guest statute, Vivian Lau was denied a cause

In June 1977, Debbra Roberts instituted an action in the Superior Court for Yakima County[8] to recover damages for injuries sustained while riding in an automobile owned and operated by Randall Johnson. The trial court granted defendant's motion for summary judgment because his conduct did not constitute gross negligence.[9] The supreme court reversed the trial court, thereby overruling *Lau* and a long line of cases predicating a guest's recovery on a finding of gross negligence.[10]

In the 1926 decision of *Heiman v. Kloizner*,[11] the Washington Supreme Court first addressed the question of a host driver's liability to his guest. The court held that an automobile driver must exercise a higher degree of care for the safety of a guest than for the safety of a mere trespasser, but a lesser degree of care than that required for the safety of a passenger for hire. Shortly after *Heiman, Saxe v. Terry*[12] established Washington's common law requirement of gross negligence. Although *Heiman* did not definitely establish the required standard of care, the *Saxe* court interpreted *Heiman* as requiring a showing of gross negligence before an invited guest could recover.[13] The *Saxe* court offered no analysis, however, and logic does not support its conclusion.

Recognizing three standards of care, *Saxe* defined gross neg-

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of action that today would be valid under *Roberts*. It is unfortunate that the court's approach to statutory interpretation resulted in such an inequity.

8. Roberts v. Johnson, No. 77-2-00729-6 (Super. Ct. Yakima County Mar. 2, 1978).

9. In granting summary judgment, the court concluded that: (1) the appellant was a non-paying guest of the respondent; (2) the common law of the state of Washington required gross negligence on the part of the respondent; and (3) the actions of respondent would not support a finding of gross negligence. *Id.*

10. *See, e.g.*, Brewer v. Copeland, 86 Wash. 2d 58, 542 P.2d 445 (1975); Ketchum v. Wood, 73 Wash. 2d 335, 438 P.2d 596 (1968); Osborn v. Chapman, 62 Wash. 2d 495, 384 P.2d 117 (1963); Meath v. Northern Pac. Ry., 179 Wash. 177, 36 P.2d 533 (1934); Connolly v. Derby, 167 Wash. 286, 9 P.2d 93 (1932); Saxe v. Terry, 140 Wash. 503, 250 P. 27 (1926); Heiman v. Kloizner, 139 Wash. 655, 247 P. 1034 (1926).

11. 139 Wash. 655, 247 P. 1034 (1926).

12. 140 Wash. 503, 250 P. 27 (1926). The court held that an automobile driver was liable to an invited guest only for gross negligence. Additionally, the court held that the evidence was insufficient to establish gross negligence where it appeared the defendant was on a hunting trip, anxious to reach the hunting ground as soon as possible, and when approaching a curve before daylight at a speed of 25 miles an hour, skidded on a wet road and went into a ditch.

13. The court stated:

> That opinion [*Heiman*] does not definitely fix the degree of lack of care which must be shown by an invited guest before liability will result. It holds that that degree is somewhere between that required where the carriage is one for hire and that necessary to be exercised with reference to the safety of a mere trespasser. From that it must follow that before an invited guest can recover a showing of gross negligence is necessary.

Id. at 507, 250 P. at 28.

ligence as the want of slight care, ordinary negligence as the want of ordinary care, and slight negligence as the want of great care.[14] Applying these standards to the *Heiman* holding, the requisite care would lie somewhere between that required for the care of a passenger for hire[15] and that required for the care of a mere trespasser;[16] that is, somewhere between great care and slight care. The area between these two extremes is some species of ordinary care. Under the *Saxe* court's own definition, then, want of ordinary care results in ordinary negligence and, although varying degrees of ordinary negligence may exist,[17] common logic precludes the inclusion of gross negligence.

The court did not recognize this error in judicial reasoning until *Roberts.* In *Roberts,* Justice Rosellini indicated the *Saxe* court, in assuming that a paid carrier was obligated to exercise no more than ordinary care for the safety of its passengers, misconceived the rule with respect to the liability of a carrier for hire, which requires the highest degree of care.[18] "Had the court had the correct rule in mind, there would have been no obstacle to the adoption of the requirement of ordinary care in the host-guest situation."[19]

The *Roberts* court indicated that however mistakenly Washington's common law rule was conceived, the court should not abandon it and adopt the majority rule of ordinary care without

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14. *Id.*

15. Washington common law requires a common carrier for hire to use the highest degree of care for the safety of passengers. *See, e.g.,* Benjamin v. City of Seattle, 74 Wash. 2d 832, 447 P.2d 172 (1968); Boyd v. City of Edmonds, 64 Wash. 2d 94, 390 P.2d 706 (1964); Fleming v. Red Top Cab Co., 133 Wash. 338, 233 P. 639 (1925); Southhard v. Seattle Elec. Co., 71 Wash. 434, 128 P. 1063 (1912).

16. Washington common law indicates that a property owner owes no duty to a trespasser except to refrain from willful and intentional injury. *See, e.g.,* Winter v. Mackner, 68 Wash. 2d 943, 416 P.2d 453 (1966); Gasch v. Rounds, 93 Wash. 317, 160 P. 962 (1916); Barnhardt v. Chicago, M. & St. P. Ry., 89 Wash. 304, 154 P. 441 (1916); Evans v. Miller, 8 Wash. App. 364, 507 P. 2d 887 (1973).

17. *See* W. PROSSER, HANDBOOK OF THE LAW OF TORTS § 33 (4th ed. 1971) [hereinafter cited as PROSSER].

18. *See* note 15 *supra.* Although this explanation would account for the erroneous conclusion reached in *Saxe,* it is difficult to believe that the Washington Supreme Court was unaware of the duty a common carrier owed its passengers. This is especially true considering three of the justices concurring in *Saxe* also concurred in Fleming v. Red Top Cab Co., 133 Wash. 338, 233 P. 693 (1925), which established the standard of care for a common carrier one year earlier. A more plausible explanation might be that the *Saxe* court believed a common carrier owed the highest standard of care to its passengers and a landowner owed no affirmative duty to a trespasser. Under this dichotomy, slight care would fall between that care owed a passenger for hire (great care) and that care owed to a mere trespasser (no care).

19. 91 Wash. 2d at 185, 588 P.2d at 203.

inquiring into the validity of the majority rule as a rational standard of liability. In analyzing the rationality of the majority rule, the court noted one should consider the nature of the activity to which the rule relates. Acknowledging the operation of a motor vehicle is a dangerous undertaking, the court emphasized that aside from the former guest statute, no other ordinance or statute condones the exercise of less than ordinary care in the operation of motor vehicles.

Recognizing the need for consistency, the court stressed that, in addition to legislation requiring ordinary care in the operation of motor vehicles, the developing common law of Washington also recognizes the duty of ordinary care in any activities that may create an unreasonable risk of harm to others. The court noted that where a landowner's activities create an unreasonable risk of harm, a duty exists to exercise reasonable care to avoid injuring a person permissibly on the land whose presence is or should be known to the landowner.[20] Accordingly, the court reasoned that if a landowner as host has a duty to exercise reasonable care toward a guest on the host's premises, then a host owes that same duty to a passenger in his automobile where the risk of harm is ordinarily much greater. In so holding, the court has placed an automobile host's duty within the common bounds of civil responsibility.

The court noted that adopting a standard of ordinary care necessitated overruling *Lau v. Nelson*[21] only to the extent *Lau* applied the rule of gross negligence: "Insofar as it held that the repeal of a statute restores the rule at common law, however, the opinion was correct and is reaffirmed."[22] In reaffirming *Lau* on this ground, the court perpetuated an egregious error in statutory interpretation by failing to effectuate the legislative intent behind the 1974 repeal of Washington's guest statute.

In *Lau,* Justice Rosellini, without supporting authority, indicated the repeal of Washington's guest statute revived the common law of this state which, like the guest statute, predicated a guest's recovery on a showing of gross negligence.[23] Apparently

20. *Id.* at 186, 588 P.2d at 203. *See also* Potts v. Amis, 62 Wash. 2d 777, 384 P.2d 825 (1963). In Memel v. Reimer, 85 Wash. 2d 685, 538 P.2d 517 (1975), the court held that a possessor of land has a duty to exercise reasonable care towards licensees on his property with respect to any known dangerous condition when he can reasonably anticipate the licensee will not discover the condition or realize its risks; this duty is met by either warning the licensee of the danger or making the condition safe.

21. 89 Wash. 2d 772, 575 P.2d 719 (1978).

22. 91 Wash. 2d at 188, 588 P.2d at 203.

23. 89 Wash. 2d at 776, 575 P.2d at 721-22.

the court relied on the maxim laid down in *State v. Frater*[24] that "the legislative repeal of a statute which is merely declaratory of the common law,[25] in the absence of a new statute stating some other rule, leaves the common law in effect."[26] *Frater,* however, recognized that the revival of the common law was consistent with the legislative intent[27] behind the repealing statute there in question.[28] This deference to legislative intent was implicit in the rule set forth in *Frater* and, therefore, the rule was inapplicable to the situation in *Lau* because the legislative intent clearly opposed reinstatement of the common law rule.[29] Additionally, the *Lau* holding suggests the legislature acted needlessly in repealing the guest-host statute in 1974 when the repeal would have no effect on the law. Such a suggestion conflicts with the presumption that a legislature does not engage in unnecessary or meaningless legislation.[30]

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24. 18 Wash. 2d 546, 140 P.2d 272 (1943). Although the *Lau* court cited no authority for the proposition that the repeal of a statute revives the common law, the briefs for petitioner, respondent and amicus curiae relied on *Frater.* Brief for Petitioner at 25, Brief for Respondent at 20-21, Brief of Amicus Curiae at 11-12, Lau v. Nelson, 89 Wash. 2d 772, 575 P.2d 719 (1978).

25. The Washington Supreme Court has held on several occasions that Washington's guest statute is a codification of the common law. *See, e.g.,* Lau v. Nelson, 89 Wash. 2d 772, 575 P.2d 719 (1978); Shea v. Olson, 185 Wash. 143, 53 P.2d 615 (1936). On other occasions, however, the court has indicated that the guest statute is in derogation of the common law. *See, e.g.,* Brown v. Gamble, 60 Wash. 2d 376, 374 P.2d 151 (1962) (since the guest statute is in derogation of the common law it is to be strictly construed); Miller v. Treat, 57 Wash. 2d 524, 358 P.2d 143 (1960) (the host-guest statute is in derogation of the common law and, therefore, must be strictly construed). In these latter cases the court was apparently referring to the majority common law rule, which, unlike Washington's common law rule, predicated liability on ordinary negligence.

26. 18 Wash. 2d at 553, 140 P.2d at 275 (footnote added).

27. One author defines legislative intent as

> [w]hat the moving parties behind the statute subjectively intended to say by the language they used. The term should be distinguished from "legislative purpose," with which it is commonly confused and which should be used to refer only to the ulterior purpose of the statute. It is coextensive, therefore, with immediate legislative purpose, the purpose that the statute is designed to immediately accomplish. The term is also used to refer to the intent that is objectively manifested; that is, apparent legislative intent.

R. DICKERSON, THE INTERPRETATION AND APPLICATION OF STATUTES 285 (1975).

28. The court stated: "It would seem that the legislature by making this change in the statute, deemed that no occasion existed for reenactment of the former section 1672 . . . ." 18 Wash. 2d at 555, 140 P.2d at 276. Therefore, the rule in *Frater* should read: the legislative repeal of a statute which is merely declaratory of the common law, in the absence of a statute stating some other rule, leaves the common law in effect, *provided there is no legislative intent to the contrary.*

29. *See* text accompanying notes 40-42 *infra.*

30. State v. Wanrow, 88 Wash. 2d 221, 559 P.2d 548 (1977) (it is presumed that the legislature does not engage in unnecessary or meaningless legislation); Knowles v. Holly,

The *Lau* court recognized petitioner's argument that the legislature, in repealing the guest statute, intended to substitute, not the common law rule of this jurisdiction, but rather the rule followed in the majority of jurisdictions requiring only a showing of ordinary negligence. Conceding the court followed the minority view when it adopted a standard of slight care, Justice Rosellini stated that nothing in the language of the repealing act disclosed an intent to adopt some other rule because "[s]uch an intent could have been expressed *only* by an amendatory act."[31] Nevertheless, because a repealing act[32] is as much a piece of positive legislation as the statute it rescinds, the court's search for legislative intent cannot stop with the language of the act. The primary purpose behind all statutory interpretation is to ascertain and effectuate the intent of the legislature.[33] The first and best source from which to ascertain the meaning of a statute is the text of the act.[34] In construing a repealing statute,[35] however, intrinsic aids[36]

82 Wash. 2d 694, 513 P.2d 18 (1973); Roza Irrigation Dist. v. State, 80 Wash. 2d 633, 497 P.2d 166 (1972).

31. 89 Wash. 2d at 776, 575 P.2d at 772 (emphasis added). This statement indicates that no amount of legislative history illustrating an intent to abandon gross negligence as a standard of liability would suffice in the absence of an explicit textual statement. Although the Virginia legislature, under similar circumstances, had the insight to amend its guest statute to ordinary negligence, VA. CODE § 8.01-63 (1977), an amendatory act should not be the only way of accomplishing that goal. Such an assertion is inconsistent with the court's primary obligation to ascertain and effectuate the legislative intent behind the statute. *See* note 33 *infra*.

32. *Black's Law Dictionary* defines a repeal as "[t]he abrogation or annulling of a previously existing law by the enactment of a subsequent statute which declares that the former law shall be revoked and abrogated . . . ." BLACK'S LAW DICTIONARY 1463 (rev. 4th ed. 1968).

33. *See, e.g.*, Purse Seine Vessel Owners Ass'n v. Moos, 88 Wash. 2d 799, 567 P.2d 205 (1977) (statutes must be interpreted in accordance with the intent of the legislature) (Rosellini, J., writing for the court); Dominick v. Christensen, 87 Wash. 2d 25, 548 P.2d 541 (1976) (the primary objective of statutory construction is to carry out the intent of the legislature) (Rosellini, J., concurring); Hartman v. Washington State Game Comm'n, 85 Wash. 2d 176, 532 P.2d 614 (1975) (the essential objective in interpreting the meaning of a statute is to ascertain and give effect to the intent of the legislature) (Rosellini, J., concurring); Amburn v. Daly, 81 Wash. 2d 241, 501 P.2d 178 (1972) (in construing revised statutes and connected acts of repeal, the court is obligated to observe great caution to avoid giving an effect to the acts not contemplated by the legislature); Grafell v. Honeysuckle, 30 Wash. 2d 390, 191 P.2d 858 (1948); Lynch v. Department of Labor & Indus., 19 Wash. 2d 802, 145 P.2d 265 (1944); McKenzie v. Mukilteo Water Dist., 4 Wash. 2d 103, 102 P.2d 251 (1940). *See also* E. CRAWFORD, STATUTORY CONSTRUCTION § 158 (1940); R. DICKERSON, *supra* note 27, at 13.

34. *See* E. CRAWFORD, *supra* note 33, at § 203; R. DICKERSON, supra note 27, at 104. *See also* Behrens v. Commercial Water Dist., 107 Wash. 155, 191 P. 892 (1919).

35. *See* note 32 *supra*.

36. Intrinsic aids are those derived solely from the statute. They include the words, grammar, punctuation, title, definition sections, and interpretation clauses. *See* E. CRAWFORD, *supra* note 33, at § 203.

to interpretation normally are nonexistent. When intrinsic aids are of limited assistance, the court may look to extrinsic aids,[37] such as legislative history[38] and the social context in which the statute is enacted.[39]

Several statements made during the recorded discussion in the House Judiciary Committee reveal an intent to abandon gross negligence as the applicable standard of liability in host-guest cases. These statements, summarized and recorded in the committee's bill report, indicate the principle argument supporting the repeal of the guest statute was that "by removing the host-guest statute, you remove an unfair obstacle for relief for accident victims."[40] Although awkwardly phrased, the following statement, made during the committee hearing, supports the assertions contained in the committee report:

> The primary concern that initiated this bill was judicially from a constitutional standpoint in the California Supreme Court, as well as local courts and legislatures, to recognize that the possibility of fraud in some instances does not justify deprivation of a cause of action to people who generally deserve a cause of action.[41]

Although this statement does not carry the same probative weight as the statements contained in the committee report,[42] the two, taken together, strongly indicate an intent to change the law by removing the gross negligence requirement.

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37. Extrinsic aids consist of evidence of legislative intent, purpose, or meaning that is outside the text of the statute. *See* R. DICKERSON, *supra* note 27, at 284.

38. Ample precedent exists in Washington common law to support judicial inquiry into legislative history. *See, e.g.*, Lynch v. Department of Labor & Indus., 19 Wash. 2d 802, 145 P.2d 265 (1944); Ayers v. City of Tacoma, 6 Wash. 2d 545, 108 P.2d 348 (1940); Shelton Hotel Co. v. Bates, 4 Wash. 2d 498, 104 P.2d 478 (1940); State v. Superior Court, 70 Wash. 545, 127 P. 120 (1912).

39. *See, e.g.*, State v. Brotherhood of Friends, 41 Wash. 2d 133, 146, 247 P. 2d 787, 795 (1952); Linn v. Reid, 114 Wash. 609, 196 P. 13 (1921).

40. STAFF OF HOUSE JUDICIARY COMM., 43d WASH. LEGIS. SESS., 3d EX. SESS., REPORT ON S. 2046 (1974).

41. *Hearings on S. 2046 before House Judiciary Committee*, 43d Wash. Legis. Sess., 3d Ex. Sess. (1974) (statement by Rep. Kelly).

Traditionally, proponents advance two reasons justifying the host-guest rule. First, they assert that drivers who gratuitously offer their hospitality should be protected from suits by ungrateful guests, and, second, they argue that the host-guest rule aids in eliminating the possibility of collusive lawsuits in which the host fraudulently confesses negligence to permit a guest passenger to recover from the host's liability insurance carrier. *See* Brown v. Merlo, 8 Cal. 3d 855, 506 P.2d 112, 106 Cal. Rptr. 388 (1973); Brewer v. Copeland, 86 Wash. 2d 58, 63, 542 P.2d 445, 449 (1975); Lascher, *Hard Laws Make Bad Cases—Lots of Them*, 9 SANTA CLARA LAW. 1, 15 (1968).

42. *See* text accompanying notes 50-53 *infra*.

Nevertheless, to accord these statements any probative weight, the court must find them reliable. Generally, the most persuasive element of legislative history is the legislative committee report recommending the statute's enactment.[43] The United States Supreme Court has noted that a "committee report represents the considered and collective understanding of those Congressmen involved in drafting and studying proposed legislation."[44] Accordingly, federal courts often resort to the reports of standing committees to ascertain legislative intent.[45] At the state level, legislatures do not routinely make formal committee reports. To the extent committee reports are available, however, state courts now tend to permit their use to aid statutory interpretation.[46] Although Washington has begun to record legislative histories, the supreme court has not ruled directly on the probative value of state committee reports. Nevertheless, because committee reports are considered the most persuasive indicia of legislative intent,[47] and because the Washington Supreme Court has recognized its obligation to implement that intent,[48] the court should find the statements contained in the House Judiciary Committee's report highly probative indications of an intent to establish ordinary negligence as the applicable standard of liability.[49]

Although committee reports are among the more reliable sources of legislative intent,[50] some doubt exists as to whether the committee hearings and debates should receive equal probative weight. The courts of several states[51] use discussions before committees as aids in determining legislative intent. In at least one state,[52] however, statements by members of the committee as to

43. *See* note 45 *infra* and accompanying text. *See also* G. FOLSOM, LEGISLATIVE HISTORY 33 (1972).

44. Zuber v. Allen, 396 U.S. 168, 186 (1969).

45. *See, e.g.*, Housing Auth. of Omaha v. United States Hous. Auth., 468 F.2d 1 (8th Cir. 1972) (committee reports have been said to be the most persuasive indicia of congressional intent). *See also* C. SANDS, STATUTES AND STATUTORY CONSTRUCTION § 48.06 n.1 (4th ed. 1973).

46. *See, e.g.*, State v. Chase, 224 Or. 112, 355 P.2d 631 (1960); Mullis v. Celanese Corp., 234 S.C. 380, 108 S.E.2d 547 (1959).

47. *See* note 45 *supra*.

48. *See* note 33 *supra* and accompanying text.

49. *See* note 69 *infra*.

50. Other reliable sources of legislative intent include special committee reports, conference committee reports, and the reports of commissions to revise statutes. C. SANDS, *supra* note 45, at §§ 48.07-.09.

51. *See, e.g.*, Sato v. Hall, 191 Cal. 510, 217 P. 520 (1923); Kuperschmid v. Globe Brief Case Corp., 185 Misc. 748, 58 N.Y.S.2d 71 (App. Div. 1945).

52. Peck v. Fanion, 124 Conn. 549, 1 A.2d 143 (1938).

their understanding of a proposition are inadmissible. One reason for this aversion is the questionable reliability of the statement because of the state's inability to maintain official records of the hearings.[53] At the federal level, however, the government maintains official verbatim records of committee hearings. Consequently, federal courts recognize statements by members of the committee as indicative of legislative intent.[54] Although Washington has not ruled definitively on the probative value of committee hearings, nothing should prevent the court from taking the position of the federal courts because the Washington Legislature recorded and transcribed the hearing in question.[55] Therefore, both the committee report and the hearing transcript offer probative evidence of an intent wholly inconsistent with the court's revival of gross negligence.[56]

Furthermore, the court's adherence to its position concerning revival is especially specious considering the court's acknowledgement of legislative disinterest in the continuation of the standard of gross negligence. Logically, it is difficult to comprehend how the Washington Supreme Court can acknowledge an obligation to effectuate legislative intent,[57] recognize that intent,[58] and then

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53. *See, e.g.*, Litchfield v. City of Bridgeport, 103 Conn. 565, 131 A. 560 (1925); State v. Blake, 69 Conn. 64, 36 A. 1019 (1897). *See also* C. SANDS, *supra* note 45, at § 48.10.

54. *See, e.g.*, Chicago & N.W. Ry. v. United Transp. Union, 402 U.S. 570 (1971); Mastro Plastic Corp. v. NLRB, 350 U.S. 270 (1956).

55. Because many major committees only recently began taping their committee hearings, there is a paucity of pre-1974 legislative history. The bill in question, Senate Bill 2046, went through the Senate Judiciary Committee a few months before the committee commenced taping those meetings. The Bill, however, also went through the House Judiciary Committee which recorded and transcribed the meeting.

56. The *Lau* court not only failed to effectuate the legislative intent pertaining to the applicable standard of liability, but also failed to ascertain such intent when it held that the repealing act would be given a retroactive application. During the second reading of the repealing act on the floor of the Senate, Senator Woody discussed retroactivity. Addressing Senator Francis, Chairman of the Senate Judiciary Committee, Senator Woody inquired for the record as to whether this act would have any retroactive effect. Senator Francis responded:

> [T]here is no express intention in the bill to have it apply to any occurrence which took place before the effective date of the act and accordingly I would have to relate it back to general law which is, I think, quite clear that the law in force at the time of an event is the law which applies, and accordingly I see no basis upon which it could be given any retroactive effect.

1974 WASH. SENATE JOURNAL, 3d EX. SESS. 65. This response indicates the drafter's clear intention that the repealing act was to operate prospectively rather than retrospectively.

57. *See* note 33 *supra* and accompanying text.

58. The court implicitly recognized legislative intent when making the following statements: (1) "we decline to abandon a standard of liability which has been consistently adhered to and has, until the 1974 repeal, enjoyed legislative approval," Lau v. Nelson, 89 Wash. 2d 772, 776-77, 575 P.2d 719, 722 (1978); (2) "[i]t is not unreasonable to assume

revive a rule of law inconsistent with such intent. Unfortunately, in reaffirming *Lau* on the point of revival, the Washington Supreme Court has done just that.

Apart from a thorough analysis of the available legislative history, the court must also give great weight and serious consideration to contemporary facts and circumstances surrounding the repeal.[59] In recent years, both commentators and the courts have questioned the legitimacy of guest statutes.[60] Accordingly, courts and legislatures across the nation either have repealed[61] or declared unconstitutional[62] fifteen of the existing twenty-seven guest statutes. Furthermore, no state has enacted a guest statute or similar provision since 1939.[63] Thus, the national trend is toward a limitation on the applicability of guest statutes. Locally, the Washington Legislature[64] considered the repealing act a companion measure to the comparative negligence bill[65] and the no-fault insurance bill.[66] The no-fault insurance bill provided benefits to all occupants of the vehicle, regardless of their status as paying or non-paying passengers. Thus, allowing recovery under the proposed no-fault insurance bill would have been inconsistent with denying recovery under the guest statute.[67] Moreover, the

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that, in repealing the last of these statutes, the legislature perceived their inconsistency with other statutes governing the conduct of drivers," Roberts v. Johnson, 91 Wash. 2d 182, 186, 588 P.2d 201, 203 (1978); and (3) "[i]n view of the fact that . . . the legislature has manifested a disinterest in [the guest statute's] continuation, . . . longevity alone does not justify its retention." *Id.* at 187-88, 588 P.2d at 204 . Each of these statements demonstrates that the court was aware of an intent to change the standard of liability.

59. *See, e.g.*, State v. Brotherhood of Friends, 41 Wash. 2d 133, 146, 247 P.2d 787, 795 (1952); Linn v. Reid, 114 Wash. 609, 196 P. 13 (1921).

60. *See, e.g.*, Brown v. Merlo, 8 Cal. 3d 855, 506 P.2d 212, 106 Cal. Rptr. 388 (1973); Thompson v. Hagan, 96 Idaho 19, 523 P.2d 1365 (1974); Henry v. Bauder, 213 Kan. 751, 518 P.2d 362 (1974); PROSSER, *supra* note 17, at 186-87; Allen, *Why Do Courts Coddle Auto Indemnity Companies?*, 61 AM. L. REV. 77 (1927); Lascher, *supra* note 41, at 10.

61. For a list of those states repealing their guest statutes, see D. BLASHFIELD, AUTOMOBILE LAW AND PRACTICE § 211.3 (1965 & Supp. 1977).

62. For a list of states that have declared their guest statutes unconstitutional, see *id.*

63. *See* Comment, *The Constitutionality of Automobile Guest Statutes: A Roadmap to the Recent Equal Protection Challenges*, 1975 B.Y.U. L. REV. 99, 99 n.1.

64. "This bill should be considered a companion bill to S.B. 2045 (the comparative negligence bill) and to the no-fault insurance bills." STAFF OF HOUSE JUDICIARY COMM., 43d WASH. LEGIS. SESS., 3d EX. SESS., REPORT ON S. 2046 (1974).

65. S. 2045, 43d Wash. Legis. Sess., 3d Ex. Sess. (1974) (codified at WASH. REV. CODE § 4.22.010 (1976)).

66. S. 2044, 43d Wash. Legis. Sess., 3d Ex. Sess. (1974) (this bill never passed the Senate).

67. Under the typical no-fault statute, all guest passengers injured in the state receive the benefits of no-fault insurance at least up to the statutory amount. An unusual anomaly exists in states with both no-fault insurance and guest statutes. Several such states,

host-guest rule contravenes the spirit of Washington's comparative negligence statute,[68] because the purpose behind that legislation was to avoid wholesale denial of recovery to an injured person who was only partially responsible for the injuries sustained. The guest statute, however, denies recovery to a guest unless the driver was grossly negligent, even if the guest was totally faultless.

These contemporary circumstances, combined with the legislative history, offer convincing proof that the legislature attempted to change the status of the law when it repealed the guest statute. Thus, it is sophistry to argue that in repealing the guest statute the legislature intended to return to the common law standard—the same standard existing prior to the repeal.[69]

In conclusion, the *Roberts* court's abandonment of gross negligence in favor of ordinary negligence is consistent with both the standard of care articulated in *Heiman v. Kloizner*[70] fifty-three years ago, and general theories of tort liability in Washington. Although the court has now placed Washington among the majority of jurisdictions recognizing ordinary negligence as the applicable standard of liability in host-guest automobile cases,[71] this abandonment of gross negligence is tainted by the court's failure to implement the legislative intent behind the 1974 repeal of Washington's guest statute. The court, limiting itself to the text of the repealing statute, demonstrates a misconception as to the appropriate sources for assessing legislative intent. Extrinsic aids

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realizing that it would be inequitable to allow recovery to a guest up to the statutory maximum under the no-fault plan and yet require that he prove gross negligence for a common law recovery, amended their guest statutes allowing a guest to recover for ordinary negligence on the part of the driver. *See, e.g.*, MASS. ANN. LAWS. ch. 231, § 85L (Michie/Law. Co-op Supp. 1972). *See also* Note, *The Present Status of Automobile Guest Statutes*, 59 CORNELL L. REV. 659, 684-85 (1974).

68. WASH. REV. CODE § 4.22.010 (1976).

69. There is, however, another possible way to interpret the legislature's intent; that is, the legislature intended to change the standard of liability to ordinary negligence but had the good sense to leave the future evolution of the negligence concept to the common law because the precise standard of care to be applied in various circumstances is an issue that does not relate well to statutory directive. Thus, the actions of a sensitive legislature have been frustrated by an insensitive court and an opportunity to enhance the working relationship between the judicial and legislative institutions has been lost.

70. 139 Wash. 655, 247 P. 1034 (1926).

71. Georgia is the only remaining jurisdiction adhering to a common law requirement of gross negligence. *See* Epps v. Parrish, 26 Ga. App. 399, 106 S.E. 297 (1921). The Georgia Court of Appeals, stating that its common law host-guest rule was an unconstitutional violation of both state and federal equal protection standards, concluded that it was powerless to so hold because "[w]herever the [Georgia] Supreme Court has set up 'an established marked line, though crooked,' we have no power to overrule it." Bickford v. Nolen, 142 Ga. App. 256, 262, 235 S.E.2d 743, 747 (1977).

to interpretation, such as legislative history and social context, are tools inherently better suited than legal maxims for a sensitive assessment of legislative intent. Because the Washington Legislature is beginning to record officially its legislative history, the court should recognize such reliable sources and give deference to legislative intent when interpreting new, amendatory, and repealing acts.

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