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Torts—Assumption of Risk

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as to what "inheres" in Washington verdicts. Hence, all effects are to be excluded, as are those facts which are "linked to the juror's motive, intent or belief."

The nebulousness of the Washington test, and indeed, of the whole logical quagmire of "effects" and "inherent facts," is but symptomatic of a second and more fundamental problem: What is the real basis of the "inherent fact" concept? While a fact-effect distinction has some basis in reason, to speak of facts which do and do not "inhere" has no logical significance, save as a conclusion. It is pure sophistry to say that such statements by a juror as,[53] *We don't want D to lose his ranch* or *I know D is guilty because he is a member of that gang,* are any less "linked to the juror's motive, intent, or belief" than *I rode horses for years and that accident was the rider's fault* or *I will not read the court's instructions, because the law is* ... or *plaintiff's damages are $2000 plus $2000, which equals $5000.* Whether each statement was or was not made is a fact. The "linking" test prescribed by the court cannot separate these facts into two distinct categories—"inhering" and "non-inhering"—nor can any other verbal shorthand. At best, such tests may aid in classifying the results and predicting future decisions. The real question for the court in each case is whether this is the sort of fact which *should* be allowed to impeach the verdict. This is simply a policy decision. The Washington court has tried to formulate a workable rule in light of the conflicting interests of stability and justice in the individual case. Absent meaningful data showing how juries actually reach verdicts and the effect on this process of allowing impeachment—and looking to what the cases decide, not what they say—one cannot say that the Washington court has not developed a salutary and workable compromise.

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TORTS

Assumption of the Risk. In *Siragusa v. Swedish Hospital*[1] the Washington Supreme Court abolished the assumption of risk defense in suits brought by employees against their employers. Overruling prior decisions that were inconsistent, the court held that an employer has a duty to exercise reasonable care to provide his employees with a rea-

[53] These statements are paraphrases of the affidavits in various Washington cases rather than quotes, since in many of the cases the exact language of the affidavits has not been set out.

[1] 160 Wash. Dec. 314, 373 P.2d 767 (1962).

sonably safe place to work, and *may not assert as a defense* to an action based on his breach of that duty, that the injured employee was aware or should have known of the negligently maintained condition. The court adopted the position of the Missouri and North Carolina courts that the employee never assumes the risks arising from the employer's negligence, but only those which remain after the master has exercised ordinary care.[2]

The action was brought by Maria Siragusa, a nurse's aide, for personal injuries she received while attending patients in a six-bed ward. As was customary practice, she had closed the door to the ward. Mounted on the inside of the door was a metal hook which enabled personnel to open it with a forearm. At the time of the accident the plaintiff was using a washbasin located directly behind the door and within its inward swing. A patient in a wheelchair entered the room, pushing the door inward and causing the metal hook to strike the plaintiff in the upper portion of her back. The plaintiff's theory was that her employer had been negligent for failing to provide her with a reasonably safe place to work. The defendant hospital interposed the usual triad of defenses[3] used in cases of this nature, *viz.*, no negligence, contributory negligence, and assumption of the risk. The trial court dismissed the action, ruling as a matter of law that the plaintiff assumed the risk of harm.[4]

Though recognizing this ruling to be consistent with prior Washington decisions, and though no argument had been made regarding the efficacy of the doctrine (the plaintiff had predicated the trial court's error solely on its refusal to submit the issue of her assumption of the risk to the jury)[5] the court went directly to the merits and declared both

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[2] In support of its decision the court cited these cases: Hines v. Continental Baking Co., 334 S.W.2d 140 (Mo. 1960); Markley v. Kansas City So. Ry., 338 Mo. 436, 90 S.W.2d 409 (1936); George v. St. L. & S.F. Ry., 225 Mo. 364, 125 S.W. 196 (1910); Devlin v. Wabash, St. L. & P. Ry., 87 Mo. 545 (1885); West v. Fontana Mining Corp., 198 N.C. 150, 150 S.E. 884 (1929); Maulden v. High Point Bending & Chair Co., 196 N.C. 122, 144 S.E. 557 (1928); Yarborough v. F. C. Geer Co., 171 N.C. 334, 88 S.E. 474 (1916); Leggett v. Atlantic Coast Line Ry., 152 N.C. 110, 67 S.E. 249 (1910); Bennett v. Carolina Mfg. Co., 147 N.C. 620, 61 S.E. 463 (1908); Sibbert v. Scotland Cotton Mills, 145 N.C. 308, 59 S.E. 79 (1907).

[3] See, *e.g.*, Richter v. Razore, 56 Wn.2d 580, 354 P.2d 706 (1960); Jobe v. Spokane Gas & Fuel Co., 73 Wash. 1, 131 Pac. 235 (1913). See generally PROSSER, TORTS §§ 67-68 (2d ed. 1955).

[4] The ruling apparently meant that even if, on the facts, the hospital had been negligent, the plaintiff was barred from recovery because she knew or should have known of the condition and danger created thereby. By remaining in the employment she "assumed the risk" of injury.

[5] The plaintiff's knowledge and appreciation, actual or imputed, of the risk are factual issues often best left to the jury. Blanco v. Sun Ranches, Inc., 38 Wn.2d

the doctrinal concept and term inappropriate. The court remanded, directing that the injured nurse's aide recover for her injury if the jury finds that it resulted from her employer's failure to use reasonable care to provide a safe place to work,[6] unless the plaintiff be found to have unreasonably exposed herself to the danger.[7] The plaintiff's knowledge and appreciation of the risk of injury from the door swinging against her now has relevance only in determining if the hospital was negligent toward her, or if she was contributorily negligent.

The doctrine of assumption of the risk is a particular use of the maxim *volenti non fit injuria*.[8] Concise definition is rendered impossible by the varied senses in which courts have used the doctrine.[9] It has been said that it is a defense which arises out of the contract[10] of employment and which precludes the employee's right to recover in all cases in which he knew and appreciated the risk which caused his injury.[11] In Washington an exception to this rule was made in cases where the employee had been induced to remain at work by his employer's promise to remedy the defect, and was injured before he knew that the promise had not been kept or before a reasonable time had elapsed.[12]

894, 234 P.2d 499 (1951), applies a subjective test. See generally, PROSSER, TORTS § 55 (2d ed. 1955) and, with specific reference to cases of master and servant, *id.* § 68.

[6] *Siragusa* does not make the employer an insurer of his employee's safety. The employer's liability is based on his negligence, his failure to use reasonable care under the circumstances to provide his employee with a reasonably safe place to work.

[7] An employee's recovery will be barred by his "contributory negligence" if his conduct in encountering the danger or failure to exercise care for his self-protection was unreasonable under the circumstances. This is to be distinguished from "assumption of risk" where an employee's conduct may have been entirely reasonable and still his recovery could, under prior cases, have been barred. See Walsh v. West Coast Coal Mines, Inc., 31 Wn.2d 396, 197 P.2d 233 (1948); PROSSER, TORTS § 55, at 394 (2d ed. 1955).

[8] "He who consents cannot receive an injury." BLACK, LAW DICTIONARY 1746 (4th ed. 1951). Walsh v. West Coast Coal Mines, Inc., 31 Wn.2d 396, 197 P.2d 233 (1948), a case dealing with landowner and invitee, states that only the doctrine of "assumption of risk" applies to cases of master and servant. The maxim *volenti non fit injuria* is appropriate to other situations. This is called a "distinction without a difference" and a minority idea in PROSSER, TORTS § 55 n.86 (2d ed. 1955). In this regard it is interesting to note that the *Walsh* rule relating to "assumption of risk" was cited as controlling in Focht v. Johnson, 51 Wn.2d 47, 315 P.2d 633 (1957), a case involving landlord and tenant.

[9] See 2 HARPER & JAMES, TORTS § 21.1 (1956); PROSSER, TORTS § 55 (2d ed. 1955).

[10] See Myers v. Little Church, 37 Wn.2d 897, 227 P.2d 165 (1951); 3 LABATT, MASTER AND SERVANT § 1163 (2d ed. 1913). *But see* PROSSER, TORTS § 55 (2d ed. 1955) where the doctrine is considered a creature of tort law, a later development in the law of negligence.

[11] PROSSER, TORTS § 68 (2d ed. 1955); 3 LABATT, *op. cit. supra* note 10, § 1165.

[12] See, *e.g.*, Johnson v. North Coast Stevedoring Co., 109 Wash. 236, 186 Pac. 663 (1920); Murphy v. Pacific Tel. & Tel. Co., 68 Wash. 643, 124 Pac. 114 (1912). *Cf.*, Focht v. Johnson, 51 Wn.2d 47, 315 P.2d 633 (1957); Ebding v. Foster, 34 Wn.2d 539, 209 P.2d 367 (1949).

An English case, *Priestley v. Fowler*,[13] gave the doctrine its real impetus. The socio-economic climate which spurred its acceptance was oriented completely toward the employer of capital.[14] Even so, early courts apparently felt that the employer should exercise some care for the protection of his servants, since opinions were phrased in terms of the master's owing a duty of reasonable care. However, the expanding industrial society provided an economic counter-balance to the social desirability of enforcing such a duty.[15] Most courts[16] adopted the doctrinal blindfold of "assumption of risk" to justify what, viewed in historical context, seemed a practically sound result.

With the establishment of industry came a slow movement toward social reform. The protective attitude with which today's society regards the workman originated in the early 1900's. Industrial profits increased to the extent that workplant safeguards were considered practical. It was generally accepted that industry (the employer) should bear the burden of reasonably protecting against hazardous conditions in the plant or paying for its neglect. Insuring against the cost burdens of injury became accepted and expected. The employer could absorb the expense in the price of his product. Passage of workmen's compensation legislation expressed this shift in opinion.[17] Even with the advent of such legislation, courts adhered to the assumption doctrine, holding the employee to assume the risk of industrial injury.

Early expression of dissatisfaction with the rule can be found in Washington case law. The rather isolated case of *Hull v. Davenport*[18] expressly limited the application of the doctrine it considered "harsh at best" to situations where the plaintiff was necessarily contributorily negligent. In another early case[19] the court equivocally espoused the rule later adopted in *Siragusa*, that a servant "assumes those dangers only which are inherent in and which exist from the nature of business,

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[13] 3 M.&W. 1, 19 ENG. RUL. CAS. 102 (1837), a case of master and servant cited in 3 LABATT, *op. cit. supra* note 9 § 893 n.5 (2d ed. 1913); PROSSER, TORTS § 55 n.80 (2d ed. 1955).

[14] 35 Am. Jur. *Master & Servant* § 294 (1941).

[15] Black, J., summarizes the history in Tiller v. Atlantic Coast Line Ry., 318 U.S. 54 (1943).

[16] The exceptions, Missouri and North Carolina, refused to hold that the servant assumed the risk of his master's negligence. 56 C.J.S. *Master & Servant* § 362 nn.64 & 67 (1948).

[17] Unlike the principal case where liability is based on the employer's negligence, workmen's compensation is a form of strict liability. However, the theory embodied in the legislation and which probably influenced the Court in *Siragusa* is that industrial losses are costs of production and "the cost of the product should bear the blood of the workmen." PROSSER, TORTS § 69 at 382 (2d ed. 1955).

[18] 93 Wash. 16, 159 Pac. 1072 (1916).

[19] Howland v. Standard Milling & Logging Co., 50 Wash. 34, 96 Pac. 686 (1908).

those dangers against which there is no absolute protection, not those caused by some negligent act of the master . . . ."[20] This case was cited and followed by two others.[21] It was not clear in any of these cases that the plaintiff knew or appreciated the danger; the same result could have been reached without these words; and subsequent opinions apparently overlooked or ignored them.[22]

The recent and conventional statement of the rule regarding the employer's duty and defense is found in *Focht v. Johnson:*[23]

> While it is the legal duty of an employer to furnish his employees a reasonably safe place to work, it is also the rule that one who, as servant or employee, enters into the service of another, assumes by his contract of employment the risk of all dangers ordinarily incident to the work upon which he engages . . . and also the extraordinary risks of employment if they are open and apparent, although due directly to the master's negligence.[24]

Two recent cases[25] were decided under the principle of *Focht.* They are of significance in appreciating the new position of the court regarding the employer's responsibility toward his employees. Typical of Washington's prior holdings is the case of *Richter v. Razore,*[26] decided in 1960. In *Richter,* a long-time bowling alley worker was injured when he caught his fingers in the unguarded gears of a pin-setting machine. The plaintiff was aware that no guard was on the machine and appreciated the danger thereby created. He alleged that his employer had been negligent in not placing a guard on the machine to protect people working around it. (The manufacturer did make such a guard available.) The court in a unanimous opinion held, "It is our conclusion that, although the condition of the pinsetting machine constituted an extraordinary risk created by the negligence of respondent employers . . . appellant assumed the risk, and is thus precluded from recovering for the injury he sustained."[27]

[20] *Id.* at 38, 96 Pac. 686, 687-88 (1908).

[21] Blair v. City of Spokane, 66 Wash. 399, 119 Pac. 839 (1911); Arneson v. Grant Smith & Co., 120 Wash. 98, 206 Pac. 960 (1922).

[22] *E.g.,* Imbler v. Spokane, P. & S. Ry., 164 Wash. 299, 2 P.2d 895 (1931), cited the cases to support the proposition that the danger must be obvious or known by the plaintiff before he will be held to have assumed the risk of injury. In Jobe v. Spokane Gas & Fuel Co., 73 Wash. 1, 131 Pac. 235 (1913), the language was acknowledged but otherwise essentially ignored.

[23] 51 Wn.2d 47, 315 P.2d 633 (1957).

[24] The quotation is derived from two cases, Walsh v. West Coast Coal Mines, Inc., 31 Wn.2d 396, 406, 197 P.2d 233, 238 (1948), and Cummins v. Dufault, 18 Wn.2d 274, 280-82, 139 P.2d 308, 311-12 (1943).

[25] Richter v. Razore, 56 Wn.2d 580, 354 P.2d 706 (1960); Walsh v. Richey-Gilbert Co., 55 Wn.2d 190, 346 P.2d 1010 (1959).

[26] 56 Wn.2d 580, 354 P.2d 706 (1960).

[27] *Id.* at 583, 354 P.2d 706, 708-09 (1960).

The *result* reached in *Richter* or in any other given case might well remain unchanged under the *Siragusa* rule. It is probable that the court has used the doctrine in many cases to bar a plaintiff's recovery when other concepts could more appropriately have been used. In several cases it appears that the employer owed his employee "no duty"[28] as to the particular danger. In others it seemed, under the circumstances, that a "reasonably safe place to work"[29] had been provided. And in many cases the plaintiff's "contributory negligence"[30] was apparent. However, from a more literal reading of the cases it appears that the court limited the employer's responsibility to warning the employee of hidden dangers or to making the premises as safe as they appeared to be.

It was not until 1962 and *Siragusa* that the Washington court clearly gave decisional recognition and judicial acceptance to changed policy. The cases proved that a warning often served neither as adequate protection nor as an inducement to the employee to leave his position. And, in view of the number of benefits society confers upon workmen who are injured, such as public welfare, aid to dependent children and rehabilitation programs, it was expectable that the Washington court require employers to do more to guard against such injuries. Holding that the exculpating assumption of risk doctrine was outdated, the court abandoned it. Now the Washington employer must use reasonable care to provide a reasonably safe place to work or else pay for his neglect.[31] Washington leads most[32] jurisdictions in giving judicial recognition to socio-economic developments in employer-employee relationships.

[28] *E.g.*, Cotton v. Morck Hotel Co., 32 Wn.2d 326, 201 P.2d 711 (1949); Dahl v. Puget Sound Iron & Steel Works, 77 Wash. 126, 137 Pac. 315 (1913); Week v. Fremont Mill Co., 3 Wash. 629, 29 Pac. 215 (1892). In the above cases the employer reasonably may not have known of the particular danger. See also Walsh v. Richey-Gilbert Co., 55 Wn.2d 190, 346 P.2d 1010 (1959), where the danger may have been due to natural orchard conditions or the employee may have expressly relieved the employer from any liability for possible injury.

[29] *E.g.*, Walsh v. Richey-Gilbert Co., 55 Wn.2d 190, 346 P.2d 1010 (1959); Eiban v. Widsteen, 31 Wn.2d 655, 198 P.2d 667 (1948); De Haas v. Cascade Frozen Foods, Inc., 23 Wn.2d 754, 162 P.2d 284 (1945); Stanke v. Spokane, C. D'Alene & P. Ry., 181 Wash. 472, 43 P.2d 961 (1935); Griffith v. Washington Water Power Co., 102 Wash. 78, 172 Pac. 822, *aff'd on rehearing*, 104 Wash. 694, 176 Pac. 343 (1918); Lewis v. Simpson, 3 Wash. 641, 29 Pac. 207 (1892).

[30] *E.g.*, Richter v. Razore, 56 Wn.2d 580, 354 P.2d 706 (1960); Ebding v. Foster, 34 Wn.2d 539, 209 P.2d 367 (1949); Scheiber v. Grigsby, 28 Wn.2d 322, 182 P.2d 745 (1947); De Haas v. Cascade Frozen Foods, Inc., 23 Wn.2d 754, 162 P.2d 284 (1945); Cummins v. Dufault, 18 Wn.2d 274, 139 P.2d 308 (1943); Brandon v. Globe Inv. Co., 108 Wash. 360, 184 Pac. 325 (1919); Lewis v. Simpson, 3 Wash. 641, 29 Pac. 207 (1892).

[31] Siragusa v. Swedish Hospital, 160 Wash. Dec. 314, 373 P.2d 767 (1962). It is as if the court had said, "And this time we mean it!"

[32] With the exceptions of Missouri and North Carolina. See note 16, *supra*.

Equally as significant as Washington's abandonment of the concept embodied in "assumption of risk," is its rejection of the doctrinal terminology. Judge Hunter's was not an easy task since the phrase has enjoyed a long history. He began by recognizing that to make employees assume the risks of danger "ordinarily incident" to their employment really means that "the master is under no duty to protect the servant with regard to such risks and any injuries, therefore, are not due to the master's negligence."[33] Further, Judge Hunter noted that the present operation of the doctrine "is to reduce substantially or strictly limit the asserted duty of care owed by the employer to his employees."[34] The employer is "only under a duty to give warning of the dangerous condition."[35] The holding in *Siragusa* was therefore phrased not in terms of "assumption of risk" but exclusively in terms of the employer's "duty."[36]

The logical analysis employed by the court in *Siragusa* is one generally favored by leading text writers.[37] Professor James argues that the term "assumption of risk" as used is "purely duplicative of other more widely understood concepts, such as scope of duty or contributory negligence."[38] Another writer[39] asserts that it was purely an "accident of litigation" which caused the courts to consider cases in terms of the servant's assumption of the risk rather than the master's duty to protect the servant against those risks.

As before noted, it is a very real possibility that prior Washington decisions used "assumption of the risk" as a handy phrase to justify barring the plaintiff's recovery when he would have been precluded from recovery for another more conceptually accurate reason. But the opinions which merely substitute the phrase for analysis in terms of duty or contributory negligence do not justify the use of the doctrinal language. Rather they illustrate the confusion and redundancy which the assumption doctrine permits and lend support to its banishment from case discussion.

Precise analysis requires decision of personal injury actions in

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[33] Siragusa v. Swedish Hospital, 160 Wash. Dec. 314, 321, 373 P.2d 767, 772 (1962).
[34] *Ibid.*
[35] *Ibid.*
[36] *Id.* at 322, 373 P.2d 767, 772-73 (1962).
[37] See generally, 2 HARPER & JAMES, TORTS § 21.8 (1956) ; 3 LABATT, MASTER AND SERVANT § 893 (2d ed. 1913). *Cf.*, PROSSER, TORTS § 55 (2d ed. 1955), which states that the defense might have some merit in focusing attention on the element of consent or voluntary acceptance of a known risk.
[38] 2 HARPER & JAMES, TORTS § 21.8 at 1191 (1956). This is essentially a reprint of James, *Assumption of Risk*, 61 YALE L.J. 141 (1952).
[39] 3 LABATT, *op. cit., supra* note 37 § 893.

terms of the defendant's duty toward the person injured, with the plaintiff's contributory negligence as the only affirmative defense. Earlier courts might well have said, when in fact they did hold, that the employer need only warn his employee of dangers that the employee could not be expected to recognize. The duty concept is the essence of a negligence action.[40] Before one can be held negligent he must have failed in a duty owed to another. As used in tort law, "duty" is primarily the court's way of implementing social ideas about who is best able to bear the costs of the injury or the reasonable elimination of its cause.[41] A realistic adjustment of the duty to be imposed on any given class of potential defendants (such as employers, landowners, or gratuitous lenders) is possible. It involves a recognition and weighing of policy considerations which vary with the defendant. Fair appraisal will make it clear whether a given standard of care is justifiable. In each case, a typical variants will influence the determination of whether the particular defendant indeed fulfilled his duty of care. Such analysis will produce understandable decisions as well as individual justice. It is to be appreciated that today's court, in *Siragusa,* did not indulge in any fiction, but simply determined the duty to be imposed on an employer and remanded the case for the jury to find whether the employer had fulfilled that duty.

A possible source of confusion regarding the court's analytical approach was introduced by the majority's quotation from Missouri opinions and reinforced by Judge Ott's concurring opinion regarding proper jury instructions. The Missouri language, favored by Judge Ott, is that "a servant never assumes risks arising from negligence for which the master is liable, but only those which remain after the master has exercised ordinary care."[42] Missouri courts uniformly repeat this language. However, mere repetition does not produce conceptual accuracy. Precise analysis can be preserved by remembering that the court adopted the *position* of the Missouri court, not its terminology.[43] The *Siragusa* opinion did not set out new limits for the doctrine of assumption of the risk; in effect it abolished it as a defense in suits

[40] See generally PROSSER, TORTS §§ 35, 36 (2d ed. 1955).
[41] *Id.* § 36.
[42] Siragusa v. Swedish Hospital, 160 Wash. 314, 323-24, 373 P.2d 767, 774 (1962).
[43] Dictum in Glass v. Carnation Co., 160 Wash. Dec. 346, 373 P.2d 775 (1962) reiterates the logically inconsistent wording of the Missouri decisions. However, in a later decision, Judge Finley accurately stated the *Siragusa* holding when he said, "[T]his court has eliminated the doctrine of assumption of risk, regarding employer-employee relationships, from the jurisprudence of this state." Handler v. Osman, 160 Wash. Dec. 803, 806, 376 P.2d 439, 442 (1962).

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).