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Gross Negligence

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GROSS NEGLIGENCE

I

The rule is well established that the operator of an automobile owes an invited guest a duty to exercise reasonable care in its operation, and will be liable to the guest for ordinary negligence which causes injury to him.[1]

Nevertheless, a few jurisdictions have adopted the rule that gross negligence must be shown in order to hold the operator liable to his invited guest, or stated conversely, that only slight care is required of the operator of an automobile toward his invited guest. The leading case in support of this view is *Massaletti v. Fitzroy*[2] which, after a very elaborate review and discussion of the authorities on the subject, concludes that degrees of negligence are recognized in Massachusetts, and that

> "the measure of liability of one who undertakes to carry gratis is the same as that of one who undertakes to keep gratis,"

which is only for gross negligence in that jurisdiction. Georgia, in *Epps. v. Parish*,[3] and Pennsylvania, in *Cody v. Venzie*[4], also follow the "gross negligence" doctrine.

THE WASHINGTON RULE

The latter doctrine is now firmly established in the Washington law. The first case of significance seems to be *Pinckard v. Pease*,[5] in which a guest was injured when the car skidded through a bridge railing while the owner was hurrying to take the guest (a doctor) to the bedside of the owner's mother. The court said that "the

[1] *Perkins v. Galloway*, 194 Ala. 265, L. R. A. 1916E 1190, 69 So. 875 (1915) *Beard v. Klusmeier*, 158 Ky. 153, 164 S. W 319, 50 L. R. A. (n.s.) 1100, Ann. Cas. 1915D 342 (1914) *Avery v. Thompson*, 117 Me. 120, 103 Atl. 4, L. R. A. 1918D 205 (1918) Collections of cases in 20 A. L. R. 1014, note.

[2] 228 Mass. 487, 118 N. E. 168, L. R. A. 1918C 2644, Ann. Cas. 1918B 1088, 18 N. C. C. A. 690 (1917)

[3] 26 Ga. App. 399. 106 S. E. 297 (1921).

[4] 263 Pa. 541, 107 Atl. 383 (1919). But see *Ferrell v. Solski*, 278 Pa. 565, 123 Atl. 493 (1924), where the court cited *Cody v. Venzie, supra*, as authority for the statement that the driver of an automobile was bound to exercise ordinary care to prevent harm to his guest.

[5] 115 Wash. 282, 197 Pac. 49 (1921).

degree of care which he was called upon to exercise should be measured by what a reasonable man would have done in the same circumstances," and then qualified this by saying that to hold the driver liable for negligence under these circumstances, "the negligence must have been practically gross or wilful." Although this decision did not definitely indicate the nature of the owner's liability, yet its very uncertainty may properly be regarded as the opening wedge in the departure from the general rule of liability

The next case, *Heiman v. Kloizner,*[6] coming five years later, gave the first intimation of what the court's future holding would be as to the amount of negligence which would be sufficient to impose liability upon the host for injuries suffered by his passenger guest. While declining to definitely fix the amount or kind of care required, the court did make the following observations

> "Now in the case before us, it hardly needs argument to demonstrate that appellant was not required to exercise that high degree of care in the carrying of respondent in his automobile merely as his invited guest, that he would have been required to exercise had he been carrying her in his automobile for hire. It seems equally plain that, in carrying respondent in his automobile as he did, appellant was required to in some measure exercise a higher degree of care for her safety, than he would have been required to exercise with reference to the safety of a mere trespasser on his property That is, his required care was of some degree between these two extremes."

No mention was made of the former decision of *Pinckard v. Pease, supra,* and it is possible that it was overlooked.

About three months later, when the question again arose in *Saxe v. Terry*[7] the court sitting *en banc* definitely laid down the rule that the driver (owner) of an automobile is not liable for injuries to his invited guest in the absence of a showing of at least gross negligence on the part of the driver. The court, referring to the former decision in *Heiman v. Kloizner, supra,* said

> "That opinion 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 "

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[6] 139 Wash. 655, 247 Pac. 1034 (1926).
[7] 140 Wash. 503, 250 Pac. 27 (1926)

It is apparent from this portion of the opinion that the court considered gross negligence as the only degree of negligence which could exist between the limits set out in the *Heiman* case. It is submitted that this is an unsound conclusion. In Washington a carrier is liable to its passenger for hire for slight negligence and must exercise great care,[8] while no duty exists toward a mere trespasser except to refrain from wilfully or wantonly injuring him.[9] Between the two extremes, as defined in the *Heiman* case, of slight negligence or great care on the one hand, and wanton or wilful injury, or no care at all on the other, ordinary negligence exists, as well as gross negligence.[10]

In view of the fact that *Saxe v. Terry* established the gross negligence rule in Washington wholly on the authority of *Heiman v. Kloizner,* it may be ventured that the minority rule began its existence in Washington due to a misapprehension of the court as to the effect of the prior holding.

The rule thus established by *Saxe v. Terry* has been tenaciously adhered to in every subsequent decision by the Washington court in which the question of liability of the driver to his invited guest has been raised.

Reasons for the Adoption of the Rule by Washington

The reasons for the adoption of the "gross negligence" or minority rule in Washington are not apparent from the decisions. In *Heiman v. Kloisner,* where the rule to be subsequently upheld was first hinted at, the court quoted approvingly from *Massaletti v. Fitzroy,*[11] as follows:

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[8] *Fleming v. Red Top Cab Co.,* 133 Wash. 338, 233 Pac. 639 (1925).

[9] *McConkey v. Oregon. R. & Nav. Co.,* 35 Wash. 55, 76 Pac. 526 (1904) *West v. Shaw,* 61 Wash. 227, 112 Pac. 243 (1910) *Gasch v. Rounds,* 93 Wash. 317, 160 Pac. 962 (1916) *Waller v. Smith,* 116 Wash. 645, 200 Pac. 95 (1921). And this rule applies also to injuries resulting to the trespasser from the active negligent conduct of the owner, *Kroeger v. Rounds,* 83 Wash. 68, 145 Pac. 63 (1914), where trespasser was injured by swinging crane.

[10] This is necessarily so, no matter what meaning is attributed to "wanton and wilful injury." If it is regarded as a low grade of intentional misconduct, as in Mass. (*Aiken v. Holyoke,* 184 Mass. 269, 68 N. E. 238, 1903) or as recklessness, as in Wis. (*Bolin v. Chicago etc. RR.,* 108 Wis. 333, 84 N. W 446, 1900) or as a mere failure to exercise ordinary care to avoid active injury to a *seen* trespasser, as in the Federal courts (*Sheehan v. St. Paul & Duluth R.R.,* 76 Fed. 201, 22 C. C. A. 121, 1896), the conclusion, nevertheless, follows that ordinary negligence is to be found between the limits set by the court, as well as gross negligence. Indeed, if either of the last two definitions of 'wanton and wilful injury" are accepted it is arguable that the kind of misconduct usually indicated by the term "gross negligence" has either been excluded altogether or set as the lower limit of the two extremes.

[11] *Supra.*

> "Approaching the question apart from authority, we are led to the same conclusion. *Justice requires* that the one who undertakes to perform a duty gratuitously should not be under the same measure of obligation as one who enters upon the same undertaking for pay There is an inherent difficulty in stating the difference between the measure of duty which is assumed in the two cases. But justice requires that to make out liability in case of a gratuitous undertaking, the plaintiff ought to prove where the defendant is to be paid for doing the same thing."

In the brief of the appellant in that case, which was substantially followed by the court, the point was made that

> "As a matter of right and even of common decency he ought not to accept the courtesy of a friend or stranger for his own advantage or pleasure and then, in case an accident happens through some such common and casual carelessness, sue for damages. The driver is taking as much care for the safety of the guest as he is for his own safety He has no desire or intention through any acts of omission or commission of his own to put his guest in peril. It would seem to be a just and righteous rule that when for his own pleasure or convenience one asks or accepts the hospitality of another, he takes upon himself the risk of such injury as may result from that casual or ordinary negligence which even careful drivers sometimes display"

and it is probable that the argument influenced the court in its decision.

It is apparent from the above quotation from *Massaletti v. Fitzroy* that the Massachusetts court adopted the rule of gross negligence as a matter of inherent justice. Indeed, the legislatures have in some jurisdictions deemed the rule which permits a guest to recover damages from his host for a failure to exercise ordinary care so obnoxious that they have passed measures granting the host a liberal immunity from liability to the guest. Thus in Oregon an act was passed designed to deprive a guest of redress in damages for an injury negligently inflicted upon him by his host if he was being transported without charge. This act was later held unconstitutional because it deprived the guest of any remedy whatsoever against the host.[12] A more reasonable act passed by Connecticut in 1927 releasing the owner or operator of motor vehicles from liability to gratuitous guests for damages in case of accident "unless such accident shall have been intentional on the part of said owner or operator or caused by his heedlessness or his reckless disregard

[12] *Stewart v. Houk*, 127 Ore. 589, 271 Pac. 998, 61 A. L. R. 1236 (1928).

of the rights of others," was upheld, although it barred recovery for injuries caused by ordinary negligence.[13] An Iowa statute passed in 1927,[14] which provided that the owner or operator of an automobile should not be liable to a guest unless the damage was caused by the driver's being under the influence of liquor or by his reckless operation, is still in effect, but the question of its constitutionality has not arisen. It is reasonable to suppose that its constitutionality will be upheld, however, for the act is similar in its effect to the Connecticut statute.

Due to the fact that the Supreme Court of Washington has not expressed its reasons for adopting the minority rule, it seems reasonable to conclude that the Washington court was moved, as was the Massachusetts court, and the several state legislatures, by the injustice involved in permitting a guest to accept the invitation and hospitality of his host in enjoying the automobile and then, upon being injured while riding with him, to retaliate by suing his host for damages.

SHOULD WASHINGTON HAVE ADOPTED THE MINORITY RULE?

But even though such was the attitude of the Washington courts, it is to be regretted that they have adopted the "gross negligence" rule.

By this holding, the Washington court departed from the doctrine of ordinary care which it had followed in all personal injury cases prior to that time, with the exception of the cases where a common carrier was involved,[15] and injected itself into the age old argument of the advisability of recognizing degrees of care, or conversely, of degrees of negligence. In an early case, *Wilson v. Brett*,[16] Lord Cranworth (then Baron Rolfe) made a statement which has since become very famous and has been often cited—"there is no difference between negligence and gross negligence—it is the same thing with the addition of a vituperative epithet." Some years later in the well known case of the *Steamboat New World v. King*,[17] Curtis, J., said.

"The theory that there are three degrees of negligence

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[13] *Silver v. Silver*, 108 Conn. 371, 143 Atl. 240 (1928), affirmed in *Silver v. Silver*, 74 L. Ed. Adv. Op. 67 (1929).

[14] Iowa Code 1927, sec. 5026b1.

[15] *Sears v. Seattle Consolidated Street R. Co.*, 6 Wash. 227, 33 Pac. 389, 1081 (1893) *Fleming v. Red Top Cab Co.*, 133 Wash. 338, 233 Pac. 639 (1925).

[16] 11 Mees & W 113, 115, 116, 152 Eng. Reprint 737 (1843).

[17] 16 How. 469, 14 L. Ed. 1019 (1853).

> described by the terms slight, ordinary and gross, has been introduced into the common law from some of the commentators on the Roman Law It may be doubted if these terms can be usefully applied in practice. Their meaning is not fixed or capable of being so. One degree thus described, not only may be confounded with another, but it is quite impracticable to distinguish them."

It cannot be denied that the modern tendency of the decisions and the weight of authority is to the effect that a classification of negligence into compartments or degrees is useless and in any case negligence is merely the failure to exercise ordinary care under the circumstances. Thus in *Briggs v. Spaulding*[18] the United States Supreme Court, in one of the leading cases on the subject, made the following statement with reference to the terms ordinary, gross and slight negligence

> "In each the negligence, whatever epithet we give it, is the failure to give and bestow the care which the situation demands, and hence it is more strictly accurate, perhaps, to call it simply negligence, and this seems to be the tendency of modern authorities."[19]

From these authorities it seems clear that when the Washington court deviated from the doctrine of ordinary care in this relation, it ran *contra* to the great weight of authority by reverting to the older conception of degrees of negligence. No doubt the court felt the injustice of the situation and arbitrarily ruled that a guest should not recover from his host for less than gross negligence.

But even though the Washington court did feel that the operator of an automobile was bound to exercise less care toward his invited guest than toward a pasesnger for hire, as it stated in *Heiman v. Klouzner,* and approved in *Saxe v. Terry,* it seems clear that an application of the usual rule, that of ordinary care under the circumstances, would have accomplished the desired result. The term "circumstances" would include the relations of the parties—the fact that the invited guest was a gatuitous passenger for his own benefit and therefore entitled to a less amount of care than a passenger for hire.[20]

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[18] 11 Sup. Ct. 924, 141 U. S. 132, 35 L. Ed. 662 (1890).

[19] The authorities in accord with this view are legion. For a comprehensive collection of them see 1 Thompson on Negligence, sec. 18 and notes. The Washington court has admitted that it follows the minority view

[20] Also see *Citti v. Bava* (Cal. App.), 254 Pac. 299 (1927), which held that driver owed different amount of care to guest from that owed to others in same accident, although both governed by ordinary care rule.

To go to the extent of holding that a driver is liable to his guest only for gross negligence, is really a case of judicial legislation. It is submitted that from a legal standpoint it would have been a more desirable procedure for the court to merely have applied the established ordinary care test to this situation, leaving it to the legislature to change the rule if an injustice was thereby imposed upon the operator of the automobile. That is the course which the overwhelming majority of courts have followed, and in three of the states legislation has been passed to remedy the situation by limiting or releasing the driver from liability to his guest.[21]

To sum up, the following statement may be made By judicial legislation Washington has apparently limited the liability of the driver of an automobile to his guest to practically the same extent that Connecticut did by legislation. But Washington accomplished its result only by the overturning of certain well accepted common law principles, while Connecticut did so by a more desirable method, i. e., through a retention of the ordinary care doctrine, and a legislative act to rectify the hardship which was thought to necessarily result from the application of it.

II.

The Gross Negligence Rule

Because of the fact that Washington has definitely and unequivocally adopted the "gross negligence" rule, disapproval of the term "gross negligence" and objections to the doctrine based upon the inability to understand or formulate the distinction between gross and ordinary negligence, which at various times and in divers jurisdictions have found their way into judicial opinions, are no longer of practical consequence in a discussion of the local law If the criterion of the liability of an automobile driver to his invited guest is gross negligence, it would seem that the vital problem is to determine what is meant by the term "gross negligence" as used in the Washington cases. How much evidence of negligence, or how obvious evidence of negligence must any attorney introduce on behalf of his client to avoid the direction of a verdict against him? When must a trial judge grant a nonsuit or give judgment for the defendant in an action by an invited guest against his host? If some definite answer can be given, it will undoubtedly be an aid to those lawyers and judges having for their consideration situations involving this question.[22]

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[21] See notes 12, 13 and 14, *supra.*

[22] It is too much to hope for an analysis of gross negligence that will

There is no well settled concept of gross negligence at common law. The term has been the subject of definitions which range all the way from the statement that there is no legal distinction between gross negligence and ordinary negligence, at one end of the scale,[23] to the holding at the other end that it is synonymous with wilful or wanton negligence,[24] and that the element of inadvertence is totally eliminated from it.[25]

Some courts have said that it is the want of that diligence which even careless men are accustomed to exercise,[26] and others that it is the entire absence of care.[27] It has also been defined as an intentional failure to perform a manifest duty in reckless disregard of the consequences,[28] and as such an entire want of care which would raise a presumption as to the conscious indifference as to consequences.[29] One of the most elaborate attempts to define gross negligence was made by the Massachusetts court in *Altman v. Aronson*,[30] where Rugg, C. J., said that gross negligence is "the want of even scant care," "heedless and palpable violation of legal duty respecting the rights of others," "a manifestly smaller amount of watchfulness and circumspection than the circumstances require of a person of ordinary prudence," "short of being such reckless disregard of probable consequences as is equivalent to a wilful and intentional wrong."

These selections from the hundreds of attempts of courts to

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iron out all the wrinkles. But if it can be demonstrated just what kind of test has been adopted as a criterion of gross negligence and what kind of evidence is necessary to make out a *prima facie* case, something will have been accomplished.

[23] *Wilson v. Brett*, 11 Mees. & W 113 (1843) *Milwaukee & St. P R. R. Co. v. Arms*, 91 U. S. 489, 23 L. Ed. 374 (1876).

[24] *Bouchard v. Dirigo Mut. Fire Ins Co.*, 114 Me. 361, 96 Atl. 244 (1916) *Poling v. Ohio R. Co.*, 38 W Va. 645, 18 S. E. 782, 24 L. R. A. 215 (1893).

[25] *Astin v. Chicago, Milwaukee & St. P Ry Co.*, 143 Wis. 477, 128 N. W 265, 31 L. R. A. (n.s.) 158 (1910).

[26] *Strong v. Western Union Tel. Co.*, 18 Idaho 389, 109 Pac. 910, 30 L. R. A. (n.s.) 409, Ann. Cas. 1912A 55 (1910) *Louisville & Nashville R. R. v. Smith*, 135 Ky 462, 122 S. W 806 (1909)

[27] *Helme v. Great Western Milling Co.*, 43 Cal. App. 416, 185 Pac. 510 (1919) *Farmers' Mercantile Co. v. Northern Pac. Ry. Co.*, 27 N. D. 302, 146 N. W 550 (1914).

[28] *Denman v. Johnston*, 85 Mich. 387, 48 N. W 565 (1891) *Louisville & N. R. Co. v. Orr* 121 Ala. 489, 26 So. 35 (1914)

[29] There are many other conceptions of gross negligence to be found in the common law cases. Lord Holt referred to gross negligence as dishonesty (*Coggs. v. Bernard*, 2 Ld. Rymd. 909) Judge Cooley said it was less than an exercise of ordinary care, but left it to the jury to say how much less (*Flint-Pere Marquette R. R. Co. v. Weir* 37 Mich. 111 (1877)) The only respect in which they all agree is that gross negligence is something less than an exercise of ordinary care.

[30] 231 Mass. 588, 121 N. E. 505, 4 A. L. R. 1185 (1919)

clearly state the distinction between gross negligence, and the other degrees of negligence merely illustrate that they have generally regarded it as being something more than a failure to exercise ordinary care under the circumstances, and that they have not agreed upon the type of misconduct of which one must be guilty in order to be grossly negligent. Consequently, it is obviously not determinable from the common law authorities what the Washington court had in mind when they used the term.

ITS APPLICATION IN THE WASHINGTON CASES

An examination of the Washington cases casts some light upon the question. In four of the decisions in which the right of the invited guest to recover from the driver was adjudicated, the facts were somewhat similar. In each the driver while attempting to negotiate a curve at about thirty to forty miles per hour skidded on loose gravel, or on fresh snow, injuring the guest in the resulting accident. In all of these cases the court held as a matter of law that the defendant driver was not guilty of gross negligence, and that the guest could not recover.[31]

In *Herman v. Kloizner*[32] the guest was injured when the driver's auto swerved down an embankment as a result of a collision with another car, and the court held as a matter of law that there was not sufficient evidence of negligence on the part of the driver to warrant a recovery by the guest.

Probably the strongest case on its facts for the guest, where the supreme court denied him recovery, was the case of *Klopfenstein v. Eads*.[33] There the driver stopped his truck on the traveled portion of the highway, in violation of a statute, in order to put up the curtains at the request of the guest. While doing so a logging truck approached and after giving warning and signals for the defendant to move his truck from the highway, which defendant heard and understood but disregarded, struck the truck of defendant, overturning it and killing the guest who was sitting in the truck. Again the court held as a matter of law that the defendant was not guilty of gross negligence, and that the question should not have been submitted to the jury, even though the violation of the statute constituted negligence *per se*.

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[31] *Saxe v. Terry*, 140 Wash. 503, 250 Pac. 27 (1926) *Blood v. Austin*, 149 Wash. 41, 270 Pac. 103 (1928) *Dailey v. Phoenix Inv. Co.*, 55 Wash. Dec. 477, 285 Pac. 657 (1930) *Pinckard v. Pease*, 115 Wash. 282, 197 Pac. 49 (1921).

[32] 139 Wash. 655, 247 Pac. 1034 (1926).

[33] 143 Wash. 104, 254 Pac. 854, 256 Pac. 333 (1927).

The two remaining decisions are the only ones in which a passenger guest has been allowed to recover from his host by the Washington supreme court. The first was *Adair v. Newkirk*,[34] where the facts were that at night, as the driver followed another car, an automobile with lights plainly visible to the defendant approached from the opposite direction. There was not sufficient room to pass the car in front of the defendant's automobile, but the driver "in gross disregard of the safety of his guest" attempted to do so, and in the ensuing collision with the oncoming car the guest was injured. There the court held the defendant guilty of gross negligence as a matter of law, as he showed a total disregard of all care and caution. "Therefore, where as here, there is shown no care whatever was exercised, in a situation involving great danger, the conclusion of gross negligence follows."

The other case in which recovery was allowed the guest was *Trotter v. Bullock*,[35] where the driver was intoxicated and driving at a reckless rate of speed down a city street when the guest was injured in a collision with a telephone pole.

To summarize, it may be said that the Washington court has denied recovery to the guest in six out of the eight cases which came to it for consideration, reversing trial court verdicts or finding in favor of the guest in five of these. In each case the result reached by the court was made a matter of law under the facts of that particular case as the court understood them.[36] In no case did the court explain their concept of "gross negligence," except to adopt Sherman and Redfield's[37] statement that "Gross negligence is said to be the want of slight care" (*Saxe v. Terry, Klopfenstein v. Eads, Blood v. Austin*), and to make the following statement, "A substantial distinction exists between gross negligence and ordinary negligence as well as between slight negligence and ordinary negligence, and it is one not too indefinite to be drawn by the court and acted upon by the jury," and then proceed to close the case without drawing the distinction.

However, in spite of the fact that no definite criterion was set forth by any one decision, from a consideration of the facts of the cases decided, in relation to the result reached, it appears to be

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[34] 148 Wash. 165, 268 Pac. 153 (1928)

[35] 148 Wash. 516, 269 Pac. 825 (1928).

[36] In *Blood v. Austin* the court gave a full expression to this view by holding that the trial court should have decided as a matter of law that there was no evidence of gross negligence to go to the jury. 149 Wash. 41, 270 Pac. 103 (1928)

[37] Sherman & Redfield, Law of Negligence (6th ed.), sec. 49, p. 93.

evident what meaning the court intended to convey by its use of the term "gross negligence."

It seems that to permit the invited guest to recover from the driver of the automobile in Washington, the conduct of the latter must be such as to evidence a total want of care and a reckless disregard of the probable consequences which he must have realized would follow from his act or omission to act. It is something different from negligence, which is mere inadvertence. The court has required the showing of consciousness of the result and complete indifference as to injury, which involves another element beside the mere inadvertence characteristic of negligence.[38] It has the element of consciousness, of knowledge or realization of the danger involved, of the probable consequences to follow, and a determination to act or fail to act in that state of mind. Although the state of mind is not material in the case of ordinary negligence, various terms have been used to denominate the state of mind in such a case as this as "rashly," "recklessly," "wilfully," and "wantonly" The element of inadvertence is absent. The wrong is characterized by an absence of any care on the part of the driver to avoid inflicting an injury to the guest by recklessly acting or failure to act to avoid doing such injury, and evincing a total disregard of the consequences.

The writers have encountered the same difficulties in expressing the exact concept which they believe the Washington court has identified with the term "gross negligence" that judges have experienced for centuries in attempting to define the term. Significantly, however, the conclusion reached here closely approximates that reached under the "Guest Statute" in Connecticut,[39] where it was said that "conduct indicating a reckless disregard of the rights of others is quite distinct in its characteristics from merely negligent conduct. Conduct arising from momentary thoughtlessness, inadvertence, or from an error of judgment does not indicate a reckless disregard of the rights of others."

The instructions which are used by the judges of the Superior Court of King County are in accordance with this conception of the term. As an example, the instruction which was used in the

[38] In effect this is the meaning of the frequently repeated statement of the court that the host owes only a duty of slight care to the guest, and will be liable only for gross negligence. *Blood v. Austin, supra* ("as to an invited guest one is required to exercise only slight care and will be liable only for gross negligence").

[39] *Bordonaro v. Senk*, 109 Conn. 428, 147 Atl. 136 (1929) *Ascher v. Friedman* (Conn). 147 Atl. 263 (1929).

trial of *Brainerd v. Stearns*[40] told the jury that, "You are instructed that one riding by invitation and gratuitously in another's automobile, cannot recover for injury caused by the host's negligence in driving unless it amounted to gross negligence. 'Gross negligence' as applied to the case means wilful recklessness and utter disregard for the safety of the guest, the failure to use slight care for the safety of the guest."

The conclusion reached herein is also supported by the fact that in each of the cases where recovery was denied as a matter of law, there was sufficient evidence of negligent conduct to justify a jury in returning a verdict of negligence against the driver, but there was no evidence of any state of mind except inadvertence, while in the decisions permitting the guest to recover there was the element of consciousness of the danger involved, and of indifference to the consequences, coupled with the fact that no care whatever was exercised by the driver.

It is also supported by a comparison of the Washington cases with those of other jurisdictions, which follow the ordinary care rule, and having somewhat similar facts. Despite a statement made by the Maine court[41] that, although the ordinary negligence and gross negligence rules differ as to definition, the application of the different rules to a given state of facts would effect the same result as far as liability is concerned, an examination of the authorities indicates a different conclusion. While it is true that the facts in some cases which have awarded damages to the guest under the ordinary care rule would also support a holding of gross negligence, as was observed in *Epps v. Parish*,[42] the converse of that observation does not follow Thus there are many cases in the books which have imposed liability upon the driver in favor of his invited guest by the application of the ordinary care rule, while under similar facts the Washington court has held as a matter of law that there was no gross negligence on the part of the driver.

Thus in *Pearson v. Lakin*[43] the facts were very similar to the *Heiman* case in Washington. The automobile in which the plaintiff guest and defendant driver were traveling collided with another car at an intersection, zigzagged across the street and down an

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[40] 55 Wash. Dec. 270, 284, Pac. 348 (1930)

[41] *Avery v. Thompson*, 117 Me. 120, 103 Atl. 4, L. R. A. 1918D 205 (1918).

[42] 26 Ga. App. 399, 106 S. E. 297 (1912).

[43] 147 Md. 1, 127 Atl. 387 (1925).

embankment, injuring the guest. A verdict for the plaintiff was there affirmed.

Recovery was also allowed in *Mackenzie v. Oakley,*[44] where the car skidded on the wet pavement and ran into a telegraph pole.

Likewise in *Fitzjarrel v. Boyd*[45] the guest was permitted to recover under a situation where the automobile skidded and struck a telephone pole.

The Vermont court in *Robinson v. Leonard*[46] awarded the guest damages where the defendant lost control of his car on a newly tarred road covered with gravel and went into a ditch.

Under a showing that the defendant driver lost control of his car, went off the road and hit a stump, the Texas court allowed recovery to the guest in *Cannon v. Dupree.*[47]

And in *Nicora v. Cerveri,*[48] where the automobile skidded on a curve and struck a guy wire a verdict for the guest was affirmed.

The defendant was driving too close to the edge of the road, struck a small ditch and over turned. The Nebraska court in *Bauer v. Griess*[49] affirmed a judgment for the plaintiff under those facts.

The Washington court has denied recovery in factual situations similar to each of the above cases.

The difference in result is further evidenced by a comparison of the case from other states which allow a guest to recover on a showing of a breach of a statute regulating the operation of an automobile on the highway[50] with the Washington case which has held that a breach of statute, although negligence *per se,* does not warrant a recovery by the guest,[51] apparently upon the theory that a violation of statute can only be regarded as inadvertence of some

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[44] 94 N. J. L. 66, 108 Atl. 771 (1925).
[45] 123 Md. 497, 91 Atl. 547 (1914).
[46] 100 Vt. 1, 134 Atl. 706 (1926)
[47] ——Tex. Civ. App. —— 294 S. W 298 (1927).
[48] 49 Nev. 261, 244 Pac. 897 (1926).
[49] 105 Neb. 381, 181 N. W 156 (1920).
[50] *Spring v. McCabe,* 53 Cal. App. 330, 200 Pac. 41 (1921), breach of express violation of Motor Vehicle Act limiting speed of automobiles to 35 miles per hour· *Dougherty v. Ellingson* (Cal. App.), 275 Pac. 456 (1929), failure to yield right of way to car coming from right, as provided in sec. 131(a) of the Calif. Vehicle Act (as amended by St. 1925, p. 412) *Cohen v. Silverman,* 153 Minn. 391, 190 N. W 795 (1922), breach of statute requiring car to pass to the right of the center of the intersection in making left turn. Gen. St. Minn. 1913 Sec. 2634, as amended by Chap. 472, Laws 1921 Sec. 6, p. 785.
[51] *Klopfenstein v. Eads,* 143 Wash. 104, 254 Pac. 854 (1927), breach of Rem. Comp. Stat. sec. 6347, which provides that it shall be unlawful for any person to leave any vehicle standing upon the main traveled portion of any highway.

degree, whereas gross negligence requires that attitude on the part of the defendant toward his conduct which has been characterized as recklessness and a total disregard of consequences.

Since this article was completed another "gross negligence" decision has been handed down by the Washington court. In *Eastman v. Silva*,[52] the court in discussing the sufficiency of the evidence upon which the trial court found the defendant guilty of gross negligence, said "Premising our discussion upon our own definition of 'gross negligence' as the want of slight care," etc. This statement reaffirms the view taken by the court in prior cases as to the nature of gross negligence, and lends added weight to the conclusion reached by the writers that gross negligence, as used in those cases, means a total lack of care, or a reckless disregard of probable consequences.

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[52] 56 Wash. Dec. 496 (1930).

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