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Repository Citation

Daniel O. Howard, *An Analysis of Gross Negligence*, 37 Marq. L. Rev. 334 (1954).

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AN ANALYSIS OF GROSS NEGLIGENCE

INTRODUCTION

Gross negligence is both historically and contemporaneously an important segment of our American tort and contract law. Yet, when one attempts to define "gross negligence," the concept shatters into a kaleidoscopic disarray of terms, elements and subtle gradations of meaning. It is a legal Tower of Babel, where many voices are heard, but few are really understood.¹

Negligence itself is an elastic term which is not confined within strict bounds.² It is relative as to circumstance, place and person, and what may be negligence as to one person may not be negligence as to another.³ It is basically a failure to exercise the degree of care demanded by the circumstances,⁴ or a failure to use the care which an ordinarily prudent man would use under the circumstances.⁵ It has also been said to be "conduct which falls below the standard established by law for the protection of others against unreasonably great risk of harm."⁶

However, some jurisdictions, though affirming a certain relativity in negligence, have attempted to set up distinct guide-posts of liability by adopting the theory of the three degrees of negligence, or its positive counterpart the three degrees of care.⁷ "Slight negligence" has been defined as "an absence of that degree of care and vigilance which persons of extraordinary prudence and foresight are accustomed to use."⁸ "Ordinary negligence," though variously defined, is fundamentally a failure to exercise such care as the great mass of mankind exercise under the same or similar circumstances.⁹ "Gross negligence" has been defined as a want of even slight care,¹⁰ failure to exercise

¹ *Steamboat New World v. King*, 16 How. 469, 14 L. Ed. 1019, 1021 (1853); *Raymond v. Portland R. Co.*, 100 Me. 529, 62 A. 602, 605 (1905); *Oliver v. Kantor*, 122 N.J. Eq. 205, 6 A. 2d 205, 207 (1939); HARPER, TORTS 176 (1933); POLLOCK, TORTS 457 (13th ed. 1929); PROSSER, TORTS 258 (1941).

² *Lynch v. Lynch*, 9 W. W. Harr. 1, 195 A. 799, 802 (Del. 1938); *Esposito v. St. George Swimming Club*, 255 N.Y.S. 794, 801, 143 Misc. 15 (1932); 65 C.J.S. NEGLIGENCE §1; 1 SHEARMAN and REDFIELD, NEGLIGENCE §2 (Zipp, 1941). *Contra*: *Wittstruck v. Lee*, 252 N.W. 874, 877 (S.D. 1934).

³ *Shannon v. Thomas*, 57 Cal. App. 2d 187, 134 P. 2d 522, 528 (1943); *Kent v. Miller*, 167 Va. 422, 189 S.E. 332, 334 (1937).

⁴ *Reese v. Philadelphia & R. R. Co.*, 239 U.S. 463 (1915); *Webber v. Pinyan*, 9 Cal. 2d 226, 70 P. 2d 183 (1937); *Harker v. Burlington C. R. & N. R. Co.*, 88 Iowa 409, 55 N.W. 316 (1893).

⁵ *Hewlett v. Schadel*, 68 F. 2d 502 (1934); *Yocum v. Holmes*, 258 S.W. 2d 535 (Ark. 1953); *Picket v. Waldorf System*, 241 Mass. 569, 136 N.E. 64 (1922).

⁶ RESTATEMENT, TORTS §282 (1934); PROSSER, TORTS 175 (1941).

⁷ *See, e.g.*, 20 R.C.L. §16; 65 C.J.S. NEGLIGENCE §8.

⁸ *Dreher v. Fitchburg*, 22 Wis. 675, 677 (1868).

⁹ *Clemens v. State*, 176 Wis. 289, 185 N.W. 209, 212 (1921).

¹⁰ *Krause v. Rarity*, 210 Cal. 644, 293 P. 62, 66 (1930); *Louisville & N. R. Co. v. George*, 279 Ky. 24, 129 S.W. 2d 986, 988 (1939); *Johnson v. State*, 66 Ohio St. 59, 63 N.E. 607, 609 (1902).

reasonable care,¹¹ and very great negligence.¹² Some courts have held that gross negligence remains an inadvertent act,¹³ while others hold that the element of virtual intent must be present.¹⁴ Justice Traynor, in *Donnelly v. Southern Pacific Co.*, said:

"Some jurisdictions . . . distinguish between ordinary and gross negligence. This distinction amounts to a rule of policy that a failure to exercise due care in those situations where the risk of harm is great will give rise to legal consequences harsher than those arising from negligence in less hazardous situations."¹⁵

The Wisconsin court held that, ". . . in order to constitute gross negligence there must be either a wilful intent to injure or that reckless and wanton disregard of the rights and safety of another or his property, and that willingness to inflict injury which the law deems equivalent to an intent to injure."¹⁶ This opinion is in obvious disagreement with *Altman v. Aronson* which laid down the rule that gross negligence, though of an aggravated character, fell short of being "such reckless disregard of probable consequences as is equivalent to a wilful and intentional wrong."¹⁷

What, then, considering the diversity of conflicting and contradictory decisions, is gross negligence? This question can hardly be approached, much less answered, without an understanding of the origin of the term and its historical development.

HISTORICAL DEVELOPMENT

The concept of gross negligence is an offshoot of the Roman law.¹⁸ There is some controversy at the present time as to just what the state of the Roman law was insofar as negligence is concerned. It is held by some writers that there were no degrees of negligence in Roman jurisprudence; that Roman law did not demand a higher degree of care than that of a prudent man of affairs, and that the many comparatives and superlatives found in extant documents were not used to mark technical distinctions.¹⁹ However, it would seem that at the time of Justinian²⁰ there were actually two degrees of negligence, "*culpa lata*" and "*culpa levis*."²¹ "*Culpa*" was a "fault" consist-

¹¹ *Wilson v. Etheredge*, 214 S.C. 396, 52 S.E. 2d 812, 814 (1949).

¹² *State v. Bolsinger*, 221 Minn. 154, 21 N.W. 2d 480, 487 (1946).

¹³ See notes 54, 55 *infra*.

¹⁴ *Garric v. Florida C. & P. R. Co.*, 53 S.C. 448, 31 S.E. 334 (1898); *Hays v. Gainsville Street R. Co.*, 70 Tex. 602, 8 S.W. 491 (1888).

¹⁵ 118 P. 2d 465, 469 (Cal. 1941).

¹⁶ *Bentson v. Brown*, 168 Wis. 629, 633, 203 N.W. 380 (1925).

¹⁷ 231 Mass. 588, 592 (1919).

¹⁸ BIGELOW, *TORTS* 118 (8th ed. 1907); PROSSER, *TORTS* 265 (1941); *The Three Degrees of Negligence*, 8 AM. L. REV. 655 (1874).

¹⁹ *The Three Degrees of Negligence*, *supra*, n. 18 at 663; Green, *High Care and Gross Negligence*, 23 ILL. L. REV. 15 (1928).

²⁰ 483-565 A.D.

²¹ Elliott, *Degrees of Negligence*, 6 So. CALIF. L. REV. 99 (1933).

ing of positive conduct which made performance of a contractual obligation impossible. It also included heedless omissions.²² The Roman jurist had an established standard of conduct whereby it could be determined when one was guilty of "*culpa*." This standard was not a solitary one, but was actually comprised of several standards, each of which applied to certain types of basic obligations and gave rise to corresponding degrees of "*culpa*."²³

"*Culpa lata*," or gross neglect, was a failure to use the care of any ordinary person of reasonable intelligence.²⁴ This degree of "*culpa*" seems to have had little reference to contract law, but was quite generally used in both criminal law and the field of quasi-contracts.²⁵ It set up the standard of an ordinary, reasonable man, and included those acts which even a man of grossest intellect would not have committed.²⁶

The second degree of "*culpa*" was "*culpa levis*" or ordinary fault, which was a failure to conform to the conduct of a prudent businessman.²⁷ A higher degree of diligence than that exercised by the ordinary man was demanded as the standard of conduct. "*Culpa levis*" did not have to be proved, but was presumed from the fact of injury.²⁸

The Roman law of negligence dealt mostly with contractual obligations such as bailments, but did not apply to torts, that is, wrongs which were independent of contract. Tort liability was not in any way dependent on the state of mind of the wrong-doers. It was immaterial whether a tort-feasor inflicted injury on another or his property intentionally or inadvertently, for he was required to repair the injury regardless of the circumstances.²⁹

BAILMENT

The idea of gross negligence appeared in England at the height of the Middle Ages in Bracton's *De Legibus et Consuetudinibus Angliae*.³⁰ Bracton drew heavily on the *Institutes of Justinian* and incorporated much of the Roman theory regarding degrees of negligence as it was then thought to be.³¹ Though Bracton's treatise was a major legal beacon for several centuries, his treatment of bailments lay dormant for some four hundred years. During part of this period, the ordinary bailee was held absolutely liable for any injury, and the action brought against him was properly in detinue.³² However, the bailee

²² *Id.* at 98; *The Three Degrees of Negligence, supra*, n. 18.

²³ *Supra*, n. 21.

²⁴ *Ibid.*

²⁵ *Ibid.* at 100.

²⁶ *Ibid.*

²⁷ *Ibid.*

²⁸ *Ibid.*

²⁹ *Ibid.* at 102; *The Three Degrees of Negligence, supra*, n. 18 at 663 *et. seq.*

³⁰ *High Care and Gross Negligence, supra*, n. 19 at 12.

³¹ *Ibid.*

³² Arterburn, *The Early Liability of a Bailee*, 25 MICH. L. REV. 480 (1927).

could wager at law, that is, have witnesses swear that they believed him, and thus he could defeat the action. After 1488, however, action on the case against bailees became more common. Even though the liability was less strict under the latter action, the bailee could not have his wager at law.³³ Thus *assumpsit*, a tort action, which developed into action on the case, came into the field of bailments. The bailor no longer sued on any breach of contract, but held the bailee answerable in tort.³⁴

The first real attempt to systematize the law of bailments occurred in *Coggs v. Bernard*.³⁵ In that case, the defendant undertook, without compensation, to transport some casks of brandy from one cellar to another. However, he was negligent in handling them and one of the casks splintered, causing all the brandy to flow on the ground. The plaintiff sought to hold the gratuitous bailee liable for the loss. Lord Holt in handing down his opinion, revived the dormant degrees of negligence as set forth by Bracton and outlined what is now the law of bailments. He set up six kinds of bailments and then proceeded to state the liability and degree of care which were attached to each.³⁶

Sir William Jones in his *Essay on the Law of Bailments*, published in 1781, attempted to revise some of Lord Holt's ideas and then propounded his grouping of the degrees of negligence. His work was to cement the doctrine of the degrees of negligence:

"GROSS neglect, *lata culpa* . . . is in practice considered as equivalent to DOLUS or FRAUD, itself; and consists, according to the best interpreters, in the omission of that care, which even inattentive and thoughtless men never fail to take of their property. . . ."

"ORDINARY neglect, *levis culpa*, is the want of that diligence which the generality of mankind use in their own concerns; that is, ordinary care."

"SLIGHT neglect, *levissima culpa*, is the omission of that care which very attentive and vigilant persons take of their own goods, or in other words, of very exact diligence."³⁷

However, Jones was incorrect in supposing that "*levissima culpa*" was a degree of negligence in Roman law.³⁸ Nevertheless, even after this was pointed out by later commentators, slight neglect continued to be an important part of the division of negligence into degrees.

TORTS

Once the tripartite division of negligence had become well established in the field of bailments, it is not surprising that the concept

³³ *Ibid.*

³⁴ Davidge, *Bailment*, 41 L. Q. REV. 436 (1925).

³⁵ 2 Ld. Raym. 909, 92 Eng. Rep. 107 (1703).

³⁶ *Ibid.*; *High Care and Gross Negligence*, *supra*, n. 19 at 12; *The Three Degrees of Negligence*, *supra*, n. 18 at 652.

³⁷ JONES, *ESSAY ON THE LAW OF BAILMENTS* 21 *et. seq.* (3d ed. 1828).

³⁸ *Supra*, n. 21 at 111.

carried over into the field of torts. The general contractual background of gross negligence and the other degrees were ignored in the interest of consistency and stare decisis. The first application of bailment negligence to the field of torts seems to have taken place early in the Nineteenth Century.³⁹ Justice Story, in his *Commentaries on the Law of Bailments*, was largely responsible for bringing the degrees of negligence into American law.⁴⁰

Thus it can be seen that gross negligence, which had its inception in Roman contract and criminal law, reflowered in English bailment law in the Eighteenth Century and then branched out into torts in the early Nineteenth Century. Liability in both fields, although absolute in both Roman and early English law, became gradually relative. Gross negligence as a bailment concept remained somewhat stable because of the underlying contractual relationship whereby particular duties could be ascertained, but gross negligence as a tort concept became a labyrinth of involved definitions and reasoning.

THE FOUR AMERICAN POSITIONS

Is it possible, then, to find a common denominator in American decisions, whereby gross negligence could be defined in a manner which would be acceptable to all or even most jurisdictions in the United States? The answer to this question is, apparently, in the negative when the elements comprising gross negligence are considered. Gross negligence in American law cannot be defined in any exact manner when it is separated from a particular jurisdiction.⁴¹

Since it is not possible to define gross negligence as such, the basic American attitudes toward the term should be pointed out. Roughly speaking, there are four general categories of reasoning into which gross negligence must fall. Two of these categories of reasoning affirm gross negligence as a meaningful term, and two of them deny the concept any real significance.

The fundamental conflict in those states, which have retained gross negligence in their substantive law, is whether gross negligence differs from ordinary negligence only as a matter of *degree* or whether the difference is really one of *kind*. Intent is the key factor differentiating the two views, for once the element of intent, whether it be implied or actual, is added, a different kind of negligence comes into being. Wisconsin serves as a good example of those states which hold that gross negligence is a different kind of negligence. In *Wedel v. Klein*,⁴² the court held that ordinary negligence and gross negligence were dis-

³⁹ HARPER, TORTS 152 (1938); PROSSER, TORTS 170 (1941).

⁴⁰ *High Care and Gross Negligence*, *supra*, n. 19 at 7.

⁴¹ *Supra*, n. 21 at 115.

⁴² 229 Wis. 419, 422, 282 N.W. 606, 607 (1938); *accord*, *State ex rel Zent v. Yanny*, 244 Wis. 342, 345 (1943).

tinct kinds of negligence, since the former constituted inadvertence while the latter fell within the area of actual or constructive intent to harm. Other decisions emanating from the same supreme court declared that inadvertence must be absent from gross negligence,⁴³ and that wilful or wanton misconduct must be present.⁴⁴ It should be noted that, in Wisconsin, gross negligence does not include ordinary negligence and that proof of the former does not prove the latter.⁴⁵ The Supreme Court of Michigan, in holding that gross negligence and ordinary negligence were of a different character and that gross negligence was not merely a higher degree of negligence, declared:

"Ordinary negligence does not signify the wantonness or wilfulness that are necessary elements of gross negligence which, however, does include ordinary negligence combined with a wilful and wanton disregard for public safety."⁴⁶

A Federal case, based on Texas law, sums up quite well the position of those courts which agree with the Wisconsin view:

"Gross negligence connotes a conscious indifference to the safety of others. Recovery therefore is confined to cases where the negligence is wilful or so gross as to indicate wantonness, recklessness, or malice. The plaintiff must show, not merely that the defendant could or should have foreseen and prevented the injury, but that he acted intentionally or with a degree of negligence which approximates a fixed purpose to bring about the injury of which the plaintiff complains. Mere indifference to another's safety is not enough."⁴⁷

The Wisconsin view on gross negligence is, however, an unorthodox legal position.⁴⁸ Those courts which continue to regard gross negligence as one of the divisions of negligence, but deny the element of intent, have come to regard the difference between gross and ordinary negligence as merely a matter of *degree* of negligence.⁴⁹ This concept has been expressed in many ways. It has been held to be negligence of an aggravated character,⁵⁰ the absence of slight care,⁵¹ great or much

⁴³ Willard v. Chicago & N. W. Ry. Co., 150 Wis. 234, 136 N.W. 646 (1912); Astin v. Chicago M. & St. P. R. Co., 143 Wis. 477, 128 N.W. 265 (1910); Prentiss v. Strand, 116 Wis. 647, 93 N.W. 816 (1902).

⁴⁴ Kuchler v. Milwaukee E. R. & L. Co., 157 Wis. 107, 146 N.W. 1133; Willard v. Chicago, *supra*, n. 43.

⁴⁵ Rideout v. Winnebago Traction Co., 123 Wis. 297, 101 N.W. 672, 675 (1904).

⁴⁶ Wieczorek v. Merskin, 208 Mich. 145, 13 N.W. 2d 239, 240 (1944); *accord*, Louisville etc., R. Co. v. Orr, 121 Ala. 489, 26 So. 35 (1899).

⁴⁷ Helms v. Universal Atlas Cement Co., 202 F. 2d 421, 423 (5th Cir., 1953).

⁴⁸ *Supra*, n. 21 at 117.

⁴⁹ Dinardi v. Herook, 105 N.E. 2d 197 (Mass. 1952); James v. Krebeck, 142 Neb. 757, 7 N.W. 2d 637 (1943); Oliver v. Kantor, *supra*, n. 1; Sorrell v. White, 103 Vt. 277, 153 A. 359 (1931); Thornhill v. Thornhill, 172 Va. 553, 2 S.E. 2d 318 (1939).

⁵⁰ Altman v. Aronson, *supra*, n. 17.

⁵¹ Louisville & N. R. Co. v. George, *supra*, n. 10 at 988.

negligence,⁵² and as such heedless and reckless disregard of the rights of another as should shock fair minded men.⁵³ Professor Chapin pointed out that negligence must be distinguished from intentional wrongs since it presupposes culpable inadvertence. The terms wilful negligence or wanton negligence, he says, are actually contradictions in terms.⁵⁴ A Virginia court seconded this contention by declaring that ordinary and gross negligence differ in degree of inattention, while both differ in kind from intentional conduct which ought to be known to have a tendency to harm.⁵⁵ In *Kastel v. Stieber*, a California case, it was held that:

"We should not confuse 'gross negligence' with 'wilful misconduct' because there is a clear distinction between the two terms. . . . Whenever the element of knowledge and wilfulness enters into the act, it ceases to be negligence. . . ."⁵⁶

The majority of states and numerous legal writers totally reject the term gross negligence as a degree or kind of negligence. This move was an inevitable reaction to the confusion engendered by attempts to subdivide negligence into neat compartments. The difficulty, in applying the degrees of negligence to concrete cases, led the Supreme Court of the United States to declare that it disapproved of attempts to fix the degrees of negligence by legal definitions because, after all, negligence meant only the absence of the care necessary under the circumstances.⁵⁷ A small number of states which joined the revolt stopped at a kind of halfway house. They rejected gross negligence and the lesser degrees of negligence as having no distinctive meaning or importance. Instead, they adopted the positive expression of departmentalized negligence, the degrees of care. The circumstances, they felt, merely called for different degrees of care:⁵⁸

"We do not recognize degrees of negligence; . . . The law recognizes degrees in care, very high care, and ordinary care, but the failure to exercise the highest degree of care required is only negligence, whilst failure to exercise ordinary care is also negligence, neither more nor less."⁵⁹

The fourth category of state decisions reject both degrees of care and of negligence. This view appears to be the trend of legal reasoning

⁵² *James v. Krebeck*, *supra*, n. 49.

⁵³ *Krueger v. Taylor*, 132 F. 2d 736 (D.C. Cir., 1943); *Carrol v. Miller*, 175 Va. 388, 9 S.E. 2d 322, 326 (1940).

⁵⁴ CHAPIN, *TORTS* 499, 500 (1917).

⁵⁵ *Thornhill v. Thornhill*, *supra*, n. 49 at 322.

⁵⁶ 83 Cal. Dec. 249, 8 P. 2d 474, 478 (1932).

⁵⁷ *Oregon Co. v. Roe*, 176 F. 715, 718 (9th Cir., 1910); *Preston v. Prather*, 137 U.S. 604, 608 (1890); *Milwaukee & St. Paul Ry. Co. v. Arms*, 91 U.S. 489, 494 (1875); *Steamboat New World v. King*, *supra*, n. 1 at 474.

⁵⁸ *Diamond State Iron Co. v. Giles*, 7 Houst. 557, 11 A. 189 (Del. 1887); *Murray v. De Luxe Motor Stages of Ill.*, 133 S.W. 2d 1074 (Mo. 1939).

⁵⁹ *Young v. St. Louis I. M. & S. Ry. Co.*, 227 Mo. 307, 127 S.W. 19, 26 (1910).

today.⁶⁰ Rolfe, B., in *Wilson v. Brett*,⁶¹ began the assault against gross negligence by declaring that he could see no difference between negligence and gross negligence, that gross negligence was merely negligence with a vituperative epithet. The Federal Courts, early in their history, began to disapprove of gross negligence as a division of negligence.⁶² In *N.Y.C. R R Co. v. Lockwood*, the United States Supreme Court held that:

“... negligence, whatever epithet we give it, is failure to bestow the care and skill which the situation demands; and hence it is more strictly accurate, perhaps, to call it simply ‘negligence’.”⁶³

But it is interesting to note, in the *Lockwood* case, the United States Supreme Court modified its earlier decisions by refusing to reject degrees of care or diligence. Thus, if there is anything of a “Federal” rule, it is that there are no degrees of negligence, but that there are degrees of care.⁶⁴

State decisions, rejecting the “degree” theories, indicate that although the *amount* of care required varies with the circumstances, the *degree* of care remains the same—appropriate care under the circumstances.⁶⁵ The underlying idea is that perilous situations call for greater care and precaution than slightly dangerous ones, not because the measure of duty is greater, but because the precautions which a reasonable man would take are greater. As Professor Harper said:

“... there are no degrees of care, as a matter of law; there are merely different amounts of care as a matter of fact.”⁶⁶

RELATED PROBLEMS

There are a number of other questions which must be considered in any analysis of gross negligence in order to complete the concept. First, is gross negligence a positive or a negative entity? This question has perhaps been answered. Jurisdictions, holding that gross negligence involves intentional conduct, arrive at the conclusion that gross negligence is positive in nature,⁶⁷ while all other jurisdictions view gross negligence as a negative term.⁶⁸

⁶⁰ PROSSER, TORTS 38 (1941).

⁶¹ 11 M. & W. 113, 152 Eng. Rep. 737 (1843).

⁶² *Steamboat New World v. King*, *supra*, n. 1; *supra*, n. 60.

⁶³ 17 Wall. 357, 383 (1873).

⁶⁴ *Briggs v. Spaulding*, 141 U.S. 132, 151 (1891); *Kelly v. Malott*, 135 F. 74, 76 (7th Cir., 1905).

⁶⁵ *Thompson v. Ashba*, 102 N.E. 2d 519, 521 (Ind. 1951); *Indiana Ins. Co. v. Handlon*, 24 N.E. 2d 1003, 1006 (Ind. 1940); *Nadeau v. Fogg*, 70 A. 2d 730, 732, (Me. 1950); *Rea v. Simowitz*, 35 S.E. 2d 871, 874 (N.C. 1945); Note, *YALE L. J.* 555 (1922).

⁶⁶ HARPER, TORTS 74 (1938).

⁶⁷ *Helms v. Universal Atlas Cement Co.*, *supra*, n. 47; *Bennett v. Howard*, 170 S.W. 2d 709, 713 (Tex. 1943).

⁶⁸ *Davenport v. Southern R. Co.*, 135 F. 960, 967 (1905); *Giminez v. Rissen*, 12 Cal. App. 2d 152, 55 P. 2d 292, 296 (1936); *State v. Arnold*, 3 Terry 47, 27

Second, is gross negligence a definition or merely a description? Courts, holding that gross negligence is a degree or kind of negligence, agree that it is a definition. Jurisdictions, which have done away with the subdivisions of negligence and care, consider the term as one merely of description.⁶⁹

And last of all, is gross negligence conduct or is it a state of mind? The great weight of authority today is that gross negligence is conduct evaluated without regard to the particular state of mind of the actor.⁷⁰ It is then unreasonably dangerous conduct under the circumstances:

"The individual's actual mental characteristics and qualities, capacities and habits, reactions and processes, are not, then, among the circumstances which the law considers in determining whether (a defendant's) conduct was under the circumstances, reasonably safe."⁷¹

The law sets up an external standard for the protection of society, the ordinary, reasonable man. The law seeks to protect society from conduct, not states of mind, which is unreasonably likely to cause harm. Thus, the particular mental failing which causes gross negligence is unimportant in determining liability.⁷²

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A. 2d 81, 83 (1942); *Sellman v. Hess*, 15 Wash. 2d 310, 130 P. 2d 688, 689 (1942).

⁶⁹ CLARK, TORTS 134 (1922); 3 COOLEY, TORTS §478 (4th ed., Haggard, 1932).

⁷⁰ BIGELOW, TORTS 108, 109 (8th ed. 1907); HARPER, TORTS 71 (1938); PROSSER, TORTS 30 (1941); Edgerton, *Negligence, Inadvertence, and Indifference; The Relation of Mental States to Negligence*, 39 HARV. L. REV. 849 (1926); Terry, *Negligence*, 29 HARV. L. REV. 40 (1915).

⁷¹ *Negligence, Inadvertence, and Indifference; The Relation of Mental States to Negligence, supra*, n. 70 at 857.

⁷² *Ibid.* at 856 *et. seq.*