GROSS NEGLIGENCE AND THE GUEST PASSENGER

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Motorists who invite or permit persons to ride gratuitously in their vehicles have created and lent emphasis to many vexing legal problems in Canada. Although the so-called "gratuitous" or "guest" passenger has been coming before the courts for centuries, the advent of the automobile has brought him there in increasing numbers and awakened the interest of the legislatures. The problems stem from attempts to find or supply an answer to a seemingly simple question. If such a passenger suffers injury or death or loss to his property, what is or should be the test for liability, if any, on the part of his driver?

Insofar as the common law in Canada is concerned, the 1926 decision of the Supreme Court of Canada in *Armand* v. *Carr*[1] has established that liability hinges on whether or not the driver exercised due and reasonable care. In all common-law provinces, however, legislation has altered the situation. The enactments range from prohibiting a right of action to requiring that "gross negligence" or "wilful and wanton misconduct" be shown before liability is imposed.[2] This intervention has not met with universal acclaim. Many lawyers are of the opinion that it is an unjust and uncalled for interference with common-law rights.[3] Others, amongst

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[1] [1926] S.C.R. 575, [1926] 3 D.L.R. 592.

[2] Ont. Highway Traffic Act, R.S.O., 1950, c. 167, s. 50(2); B.C. Motor Vehicles Act, S.B.C., 1957, c. 39, s. 73; Nfld. Highway Traffic Act, R.S. Nfld., 1952, c. 94, s. 80(1); N.S. Motor Vehicle Act, R.S.N.S., 1954, c. 184, s. 203(1); P.E.I. Highway Traffic Act, R.S.P.E.I., 1951, c. 73, s. 70(1); N.B. Motor Vehicle Act, R.S.N.B., 1955, c. 13, s. 242(1); Man. Highway Traffic Act, R.S.M., 1954, c. 112, s. 99(1); Alta. Vehicles and Highway Traffic Act, R.S.A., 1955, c. 356, s. 132(1); Sask. Vehicles Act, R.S.S., 1953, c. 344, s.151(2).

[3] Close upon the heels of the enactment of such legislation in New Brunswick in 1934, the Bar of that province passed a resolution demanding the restoration of the gratuitous passengers' common-law rights.

whom judges are not the least vocal, complain of an inherent obscurity in the phrase "gross negligence".[4]

Armand v. *Carr* put the gratuitous passenger in the same position as any other person killed, injured or otherwise harmed by a vehicle. The courts have not always reached the same conclusion. In fact, the Judicial Committee of the Privy Council and the Supreme Court of Canada itself previously gave voice to an entirely different opinion.[5]

In 1703 Chief Justice Holt, in dealing with a gratuitous bailment in the English case of *Coggs* v. *Bernard*,[6] introduced the phrase "gross negligence" to the language of the common law. The test for liability with respect to one who has undertaken to do a thing gratuitously should not, he felt, be as stringent as where reward was involved. Such a person would have to be shown to have been guilty of gross negligence before liability would attach. *Giblin* v. *McMullen*,[7] an 1868 English decision, set gross negligence as the test for liability arising out of the gratuitous transportation of goods. This was applied as recently as 1954, by the Appeal Division of the New Brunswick Supreme Court in *Piper* v. *Geldart*.[8] And as early as 1869, the Judicial Committee of the Privy Council stated in *Moffatt* v. *Bateman*[9] that gross negligence was the test for liability to a gratuitous passenger.

The possibility of the *Moffatt* decision being successfully challenged as *obiter* must be pointed out. In overruling the trial decision their lordships said that there was no negligence of any description. They went on to say, however, that they could not "help coming to the conclusion, that the case should have been withdrawn from the jury at the close of the plaintiff's case, on the ground that he had offered no evidence to establish a case of gross negligence against the defendant."[10] Whether the true ground of the decision was that there was no negligence of any description or that there had been a failure to establish gross negligence is perhaps a debatable point but there can be little doubt as to the view of the law entertained by the Privy Council.

In 1917, the Supreme Court of Massachussets showed no hesi-

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[4] See *infra*, footnotes 22 to 27 inclusive.
[5] See *infra*, footnote 9; *Nightingale* v. *Union Colliery Co.* (1904), 35 S.C.R. 65.
[6] (1703), 2 Ld. Raym. 909, 92 E.R. 107.
[7] (1868), L.R. 2 P.C. 317.
[8] (1954), 33 M.P.R. 171, [1954] 2 D.L.R. 97.
[9] (1869), L.R. 3 P.C. 115.
[10] *Ibid.*, at p. 124. Curiously enough, if one reads *Armand* v. *Carr*, carefully *supra*, footnote 1, it is also open to the accusation that it is *obiter*.

tation in *Massaletti* v. *Fitzroy*[11] in regarding the *Moffatt* decision as establishing that gross negligence had to be shown. This American case is of great interest because it is based almost exclusively on English authorities. Loring J., who delivered the lengthy judgment, referred to *Coggs* v. *Bernard*,[12] *Giblin* v. *McMullan*,[13] and also to Smith's Leading Cases in which it was stated that there is no distinction between the measure of liability in the case of a gratuitous bailment (gross negligence) and a gratuitous transportation.[14] This, he said, had been left untouched in succeeding editions by such eminent editors as Mr. Justice (then Mr.) Keating, Mr. Justice (then Mr.) Willes, Lord (then Mr.) Collins and Mr. Arbuthnot.[15] *Moffatt* v. *Bateman* had extended the same principle to another form of gratuitous transportation. "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."[16]

On the whole, it is not too surprising that in 1904 the Supreme Court of Canada also followed *Moffatt* v. *Bateman* in *Nightingale* v. *Union Colliery Co.*[17] The unanimous decision, written by Nesbitt J., stated: "The highest that the position of the deceased can be put is that he was riding on the engine in question by tacit permission. The rule laid down in *Moffatt* v. *Bateman* is that, in the case of a gratuitous passenger, gross negligence must be shown,

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[11] (1917), 228 Mass. 487.
[12] *Supra*, footnote 6.
[13] *Supra*, footnote 7.
[14] *Ibid.*, at pp. 495, 505.
[15] *Ibid.*, at p. 506.
[16] *Ibid*, at p. 510. Loring J. refers to *West* v. *Poor* (1907), 196 Mass. 183, decided by the Supreme Court of Massachusetts, which held that the driver of a gratuitous passenger is liable to the same extent as a gratuitous bailee and quotes the following words: ". . . the nearest analogy that occurs to us is that of a self-invited guest in whose presence the host acquiesces and whose enjoyment he seeks to promote, or that of a gratuitous bailee. In the former case the degree of care required is that of licensor of licensee . . . which, as has often been said, requires only that the licensor shall not set traps for the licensee and shall refrain from reckless, *wilful or wanton misconduct* tending to injure him. . . . In the latter case, in order to render the bailee liable, it must appear that he has been guilty of culpable negligence . . . we think it well settled, that a bailee for safe keeping, without reward, is not responsible for the article deposited, without proof that the loss was occasioned by bad faith, or *gross negligence*. . . ." Note the italicized words. Nova Scotia was the first province to introduce in 1931 the "Gross negligence or wilful and wanton misconduct" wording. No one is quite sure where this phrase originated. There is a suggestion that it came from the so-called "Hoover Code", a uniform Vehicle Code prepared in the United States in 1926 as a model for state motor vehicle legislation. Whatever the truth of the matter, it seems reasonable to suppose that the *Massaletti* case played some part in the origin of the "Gross negligence and wilful or wanton misconduct" wording.
[17] *Supra*, footnote 5, at p. 67.

and there cannot be any pretense that the evidence in this case fulfills that description. *The recent case of Harris* v. *Perry and Co. was pressed upon us. . . . If the case is assumed to be a departure from the law as previously laid down, we would not follow it.*" Twenty-two years later, however, in *Armand* v. *Carr*,[18] we find Anglin C.J. stating "We regard this [reasonable care] as the test of the responsibility of one who undertakes the carriage of another gratuitously . . . *Harris* v. *Perry and Co.*, [1903] 2 K.B. 219 . . . rather than some lower standard, which counsel for the appellant argued is *implied* in the decision of this court in *Nightingale* v. *Union Colliery Co.*"

The lower standard was, of course, "implied" in the *Nightingale* case by the use of the prefix "gross". Whether this was in fact what Nesbitt J. intended to imply, and if so, whether or not he was correct, was something Anglin C.J. was as prepared to devote time to considering as Alexander was the Gordian Knot. Nesbitt J. was not merely implicit but explicit in rejecting *Harris* v. *Perry and Co.*,[19] the very case which Anglin C.J. chose to follow. Like Alexander, one blow from the Chief Justice destroyed a puzzle that had intrigued all who had essayed to solve it.

Insofar as the common law was concerned, the Chief Justice had rid himself, and other judges, from any obligation to consider "gross negligence" in connection with gratuitous passenger cases. A scant year later, however, he found himself confronted with it again, this time in an enactment dealing with snow removal.[20] His words in this case, at least, throw some light on his attitude in *Armand* v. *Carr:* "The term 'gross negligence' . . . is not susceptible of definition".[21] Further edification is supplied by reference to what other eminent authorities have had to say. Willes J., in *Grill* v. *General Iron Screw Collier Co.*,[22] said: ". . . the law laid down in *Wyld* v. *Rickford*[23] and upheld and recognized in the Exchequer Chamber in the judgment of Compton J., in *Beal* v. *South Devon Railway*[24] . . . [was that] it is wholly immaterial whether the particular want of care is labelled 'negligence' or 'gross negligence'. . . . The word 'gross' is a word which . . . is used as a description and not as a definition."[25] In *Wilson* v. *Brett*,[26] Rolfe B. (afterwards

[18] *Supra*, footnote 1, at p. 597. [19] [1903] 2 K.B. 219.
[20] *Holland* v. *Toronto*, [1927] S.C.R. 242, [1927] 1 D.L.R. 99.
[21] *Ibid.*, at p. 102 (D.L.R.).
[22] (1866), L.R. 1 C.P. 612, 35 L.J.C.P. 321, at p. 331.
[23] (1841), 8 M. & W. 443.
[24] (1860), 5 H. & N. 875, appeal 3 H. & C. 337.
[25] 15 C.E.D. (Ont., 2nd), p. 283: "The use of the term 'gross negligence' is only one way of stating that less care is required in some cases than in

Lord Cranworth) said: "I said I could see no difference between negligence and gross negligence; that it was the same thing with the addition of a vituperative epithet." And, in a more recent case, *Pentecost* v. *London District Auditors*, Lynskey J. says: "Epithets applied to negligence, so far as the common law is concerned, are meaningless . . . a man is either guilty of negligence or he is not."[27]

A negligent act, in other words, is a negligent act. Beven says that the degrees of "slight", "ordinary" and "gross" are unknown to the common law.[28] Estey J. in *Cowper* v. *Studer*[29] states: ". . . there are no degrees of negligence." Perhaps an apt analogy is a law prohibiting persons from stepping across a specified line. It would be ridiculous to accuse a man of having made a "slight" step across in contradistinction to a "gross" step. In either case, he has been guilty of a breach of the law. To Anglin C.J. the "line" was reasonable care; a "slight" step or a "gross" step was immaterial and "not susceptible of definition".[30]

Such a bald description of common-law negligence would perhaps leave Chief Justice Anglin and the others just quoted a trifle uncomfortable. Because a grasp of the true nature of negligence is necessary to an understanding of "gross" negligence, some attention must be given to a description of some sort which is adequate to that purpose. Salmond and Charlesworth are quite terse in their

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others, and it is more correct and scientific to define the degrees [standards?] of care than the degrees of negligence." Also Montague Smith J. in *Grill* v. *General Iron Screw Collier*, *supra*, footnote 22: "There is no doubt that the expression 'gross negligence' is to be found in some of the decisions; but it is only one mode of expressing, perhaps, that in a particular case there is a less degree of care required than there might be in other cases."

[26] (1843), 11 M. & W. 113, at pp. 115, 116.

[27] [1951] 2 K.B. 759. The term "gross negligence" has been judicially discussed in a large number of cases. A brief survey of its history is supplied in *Giblin* v. *McMullen*, *supra*, footnote 7, at p. 336. Lord Chelmsford writes as follows: "From the time of Lord Holt's celebrated judgment in *Coggs* v. *Bernard* (1703), 2 Ld. Raym. 909, 92 E.R. 107 in which he classified and distinguished the different degrees of negligence for which the different kinds of Bailees are answerable, the negligence which must be established against a gratuitous Bailee has been called 'gross negligence'. This term had been used from that period, without objection, as a short and convenient mode of describing the degree of responsibility which attaches upon a Bailee of this class. At last Lord Cransworth (then Baron Rolfe), in the case of *Wilson* v. *Brett* (1843), 11 M. & W. 113 (152 E.R. 737) objected to it, saying that he 'could see no difference between negligence and gross negligence; that it was the same thing, with the addition of a vituperative epithet'. And this critical observation has been since approved of by other eminent judges." Despite this criticism, the Privy Council found in *Giblin* v. *McMullen* that gross negligence was a notion acceptable to the common law.

[28] On Negligence (4th ed., 1928), vol. 1, p. 15.

[29] [1951] 2 D.L.R. 81, at p. 91 (S.Ct. Can.)

[30] *Holland* v. *Toronto*, *supra*, footnote 20.

versions. Reduced to essentials, Salmond says: "In the law of Torts, negligence has *two meanings* . . ."[31] and Charlesworth claims that negligence has *three meanings.*[32] This arithmetical dispute is more apparent than real. It does serve to illustrate, however, the difficulty they encountered in giving expression to their highly erudite notions of negligence. The more deeply one explores the cases involving negligence the more formidable a task it becomes to give a brief but accurate statement of the law. This is why Salmond and Charlesworth felt the need to speak of various meanings. Some qualification, some shifting of direction was regarded as necessary if any such statement was to approximate an all embracing definition.

Charlesworth, having yielded to these pressures, felt free to proceed to a bolder definition: "Negligence is a Tort, which is the breach of a duty to take care imposed by common or statute law resulting in damage to the complainant."[33] Boldness breeds boldness and it is now proposed to amend this definition slightly: "Negligence is a Tort, and is the breach of a duty owed to the complainant, imposed by common or statute law, to avoid causing harm to the complainant and which results in harm to the complainant.".

The significant changes here are two: the first restricts the duty to one owed the complainant (to eliminate such duties as may arise out of contract or trust, the original and amended Charlesworth definitions say: "Negligence is a Tort . . .") and the second removes the expression "to take care" and replaces it with "to avoid causing harm". This last is the most important; the word "negligence" has acquired a different significance in our courts than it has in our dictionaries. To deal with the suggested amendments in the order in which they occur it is clear that negligence does not involve a blanket duty not to cause injury to another. As the definition stresses, negligence is a breach of a duty imposed by common or statute law. "There is no liability for negligence unless there is in the particular case a legal duty to take care, and this duty must be one which is owed to the plaintiff himself and not merely to others."[34] "English law does not recognize a duty in the air, so

[31] On Torts (11th. ed., 1953), p. 36: "In the Law of Torts, negligence has two meanings: (1) An independent Tort . . . : (2) A mode of committing some other Torts."

[32] On Negligence (3rd ed., 1956), p. 1: "In current forensic speech negligence has three meanings. They are (1) a state of mind in which it is opposed to intention, (2) careless conduct, and (3) the breach of a duty to take care imposed by common or statute law."

[33] *Ibid.*, p. 10.

[34] Salmond on Torts (9th Ed., 1936), p. 456.

to speak, that is, a duty to undertake that no one shall suffer from one's carelessness."[35] Salmond explains that in Roman law there was liability wherever there was damage unjustifiably done. The English law of negligence, however, developed from the "days of strict pleading" where an action "was brought in case for negligence" and "founded upon the defendants' duty, just as the obligation of a promise was necessary to found an action in *assumpsit*. And now the requirement of a duty is a firmly established and fundamental principle in the action of negligence."[36]

Subject to some qualification, it may be cautiously asserted that the true nature of the law of negligence is that it is nothing more or less than a body or group of legal duties. Where they are imposed by statute it can hardly be said that any general principle must govern the legislatures.[37] This is equally true of the courts. In *Donoghue* v. *Stevenson*, Lord Atkin said: "It is remarkable how difficult it is to find in the English authorities statements of general application defining the relations between parties that give rise to the duty."[38] And Asquith L.J., in *Candler* v. *Crane, Christmas & Co.*, said that the categories of negligence have been built up ". . . in disconnected slabs exhibiting no organic unity of structure. These categories attracting the duty [have] been added to and subtracted from from time to time. But no attempt [has] been made in the past to rationalize them, to find a common denominator between road users, bailees, surgeons, occupiers, and so on, which would explain why they should be bound to a duty of care and some other classes who might be expected equally to be so bound should be exempted. . . ."[39]

The removal of "to take care" from the original definition,

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[35] *Bottomley* v. *Bannister*, [1932] 1 K.B. 458, per Greer L.J. at p. 476.

[36] Salmond *op. cit.*, *supra*, footnote 34, p. 457.

[37] Shawcross, The Law of Motor Insurance (1935), p. 17: ". . . the breach of a duty imposed by a statute which gives rise to damage to an individual is a Tort which has now come to be known as statutory negligence." See *Monk* v. *Warbey* (1934), 50 T.L.R. 263. "So clearly is the action of negligence now recognized as an individual tort that the House of Lords in *Lochgelly Iron and Coal Co.* v. *McMullan* has now settled that an action for breach of a statutory duty is an action of negligence." Salmond, *op. cit.*, *supra*, footnote 34, p. 455. Charlesworth (1st ed.), p. 8 points out "In order to exclude breaches of duty created by contract or trust and embodied in statutory form, we may include in our definition the statement that negligence is a tort." He says this in order to make it clear that "Breach of statutory duty may be negligence, but whether or not it is so is independent of the fact that it is embodied in statutory form." In other words, only those duties imposed by statute which are in their nature precautions for the safety of others and their property involve the concept of statutory negligence.

[38] (1932), 101 L.J.P.C. 119. [1932] A.C. 562, per Lord Atkin, at p. 579.

[39] [1951] 2 K.B. 164, at p. 188.

however as stated, is the most important of the two amendments. If we are to develop a usable concept of negligence we must avoid any mention of carelessness. The word "negligence" has undergone a sea-change in its travels through the courts. To speak of it as carelessness, or to include any reference to carelessness in its definition is to be unadvisedly metonymical, inaccurate and misleading.

In *Lochgelly Iron & Coal Co.* v. *McMullan*, Lord Wright said: "In strict legal analysis, negligence means more than heedless or careless conduct, whether in omission or commission; it properly connotes the complex concept of duty, breach and damage thereby suffered by the person to whom the duty was owing."[40] Slesser J., in *Sharp* v. *Avery*, said: "It is fatally easy by transposing the word 'careless' into negligence to dismiss from one's mind the essential problem . . . namely, whether or not there was in any particular case a failure of a duty."[41] And Beven says: "Negligence, as a juristic word, in practice connotes only default in duty. How the default arises is immaterial. A duty is to be performed; but the person obliged to perform it fails to do so."[42]

Every careless act is not a "negligent" one and every "negligent act" is not a careless one. A wilful act, for example, can be negligence. "It is no defence to prove that the defendant intentionally inflicted the damage in question and did not cause it by mere carelessness. If the driver of a heavy lorry deliberately runs into a bicycle and destroys it he can be sued for negligence, just as if he had destroyed it by careless driving."[43] And, as long ago as 1860, Bramwell B. said: "It is said that the act of the defendant was wilful, and therefore the plaintiff cannot recover on this declaration; but the action was negligent as well as wilful."[44]

Acts in which carelessness is not even a consideration can be

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[40] [1934] A.C. 1, at p. 25.

[41] (1938), 4 All E.R. 85, at p. 88.

[42] Beven, *op. cit.*, *supra*, footnote 28, p. 3. " 'The ideas of negligence and duty are strictly correlative,' said Bowen L.J. (*Thomas* v. *Quartermaine* (1887), 18 Q.B. 685, at p. 694) ' and there is no such thing as negligence in the abstract; negligence is simply neglect of some care which we are bound to exercise towards somebody.' This duty of carefulness is not universal; it does not extend to all occasions, and all persons, and all modes of activity. 'The mere fact that a man is injured by another's act gives in itself no cause of action; if the act is deliberate, the party injured will have no claim in law even though the injury is intentional, so long as the other party is merely exercising a legal right; if the act involves lack of due care, again no case of actionable negligence will arise unless the duty to be careful exists' (*Grant* v. *Australian Knitting Mills*, [1936] A.C. 85, at p. 103, per Lord Wright)" Salmond, *op. cit.*, *supra*, footnote 31, p. 495.

[43] Charlesworth on Negligence (2nd. ed. 1947), p. 9.

[44] *Emblen* v. *Myers* (1860), 6 H. & N. 54.

negligence. In *Lochgelly Iron & Coal Co.* v. *McMullan*,[45] the plaintiff had been injured as a result of his employer's failure to shore up a roof as required by statute. It was argued by the defence that if this failure could not be considered a careless act in the circumstances then there could be no negligence. Lord Wright, in dealing with this contention, said: "In my opinion that state of facts [the failure to shore up the roof as required] constitutes negligence of the employer, and I am unable to conceive of any accurate definition of negligence which would exclude it. . . . I cannot think that the true position is . . . that in such cases negligence only exists where the tribunal of fact agrees with the legislature that the precaution is one that ought to be taken."[46] If the statute required that every miner be supplied with a rabbit's foot that would end the matter (aside from the practical necessity of establishing that the harm complained of resulted from a failure to comply).

While it is undoubtedly true that most cases of record involve breaches of duty through carelessness this does not affect the validity of the above. As Lord MacMillan said in *Donoghue* v. *Stevenson*:[47] "The law takes no cognizance of carelessness in the abstract. It concerns itself with carelessness only where there is a duty to take care and where failure in that duty has caused damage.".

In *Saulsky* v. *Toronto*,[48] the defendant municipality had erected a gate in a public park where it was crossed by a railway track and employed a man to lower the gate when a train was approaching. In crossing the track when the gate was up and the watchman away from his post, the plaintiff was struck by a train. This could be described as carelessness but it was held that there was no liability on the defendant as it owed the complainant no duty to maintain either the gate or the watchman. Lord Esher in *LeLievre* v. *Gould* said (providing us with an example of the judicial use of "negligence" both in its legal and its dictionary sense): "The question of liability for negligence [legal] cannot arise at all until it is established that the man who has been negligent [dictionary: careless] owed some duty to the person who seeks to make him liable for his negligence."[49]

"Negligence is a Tort, and is the breach of a duty owed to the

[45] *Supra*, footnote 40, at p. 25. At p. 23, he also says: "Whereas at the ordinary law the standard of duty must be fixed by the verdict of a jury, the statutory duty is conclusively fixed by the statute."

[46] *Ibid.*

[47] *Supra*, footnote 38, at p. 146 (L.J.P.C.).

[48] (1907), 15 O.L.R. 13.

[49] *Lelievre* v. *Gould*, [1893] 1 Q.B. 491, at p. 497.

complainant, imposed by common or statute law, to avoid causing harm to the complainant and which results in harm to the complainant.". This is the amended Charlesworth definition. It merely says what negligence is. Aside from its reference to statutes, it does not say how the legal duties it mentions came about, it allows no scope for further growth in the number and nature of such duties and it fails to recognize the fact that negligence has grown from a minor to a major role in the law of torts. Surely the definition begs the question? As Salmond says, however: "It seems clear that English law recognizes no general right not to be damaged by another . . . not even if that other acts in bad faith and intending to cause the damage."[50] but ". . . the common law has not proved powerless to attach new liabilities and create new duties where experience has proved that it is desirable . . . *the avenue to the development of the law is the action on the case for negligence.* . . . When relationships come before the court which have not previously been the subject of judicial decisions the court is unfettered in its power to grant or refuse a remedy for negligence. The action on the case for negligence has no limits set upon its territory, save by previous decisions upon such specific relationships as have come before the courts. 'The categories of negligence are never closed.'"[51] It depends on the courts and legislatures how far and how fast the scope of the law of negligence will be extended.

Armed with this brief survey of the law of negligence we are now in a position to assess the proper significance of "gross negligence". With our minds freed from any such inaccurate "inarticulate major premise" as that negligence is carelessness or is a blanket duty to avoid causing harm, and apprised of the knowledge that it consists of a group of often unrelated duties imposed by law, we can be quite objective in this assessment. To say that an act or omission is "negligent" in the legal sense of that word is to use it in much the same sense as "criminal" is used by lawyers as opposed to moralists. To a lawyer, an act is criminal only if the Criminal Code says it is. This, of course, is not to equate the two words; it is merely to emphasize that the popular meaning of negligence must not be permitted to lead us astray. To understand negligence we must not only look beyond but ignore the dictionary; we must look at the law and the law alone.

When we left gross negligence to discuss the law of negligence as a whole, our ears were ringing with such phrases as "vituper-

[50] *Op. cit., supra,* footnote 31, p. 19.
[51] *Ibid.,* p. 47.

ative epithet" and "meaningless" which had been used by eminent jurists to give expression to their reaction to the word "gross". It seems evident that we must admit that a negligent act is a negligent act. Breach of duty is a breach of a duty whether it be by a hair or a mile. To say that such a breach has been "gross", "terrible", "frightful" or "absolutely awful" is to adopt a condemning tone but is not otherwise relevant. From this aspect, vituperative epithets and meaningless these words would undoubtedly be.

To proceed from this and declare, as though logic and consistency made it inevitable, that gross negligence is therefore devoid of all meaning or significance is, it would seem, to be guilty of a *nonsequitur*. As Charlesworth says: "It [gross negligence] is an expression in regular use among lawyers and to deny it a meaning would be pedantic.".[52] The truth of the matter seems to be that "gross" has no reference to the quality of the breach; it refers to one (or a class) of the duties imposed by law. It is simply a tag or label. A breach of it is a negligent act, not a "grossly" or an "awfully" negligent act.

The law of negligence involves many duties. Many of these, in turn, involve what may be characterized as "standards of care" owed by one to another in certain circumstances. There are here three variables, the last in its turn contemplating an infinite number of variables of its own. Who the "one" is, who the "another" is and what the "certain circumstances" are will dictate whether or not there is a duty owed to observe a standard of care and also, it may be argued, what that standard is.

A distinction must be drawn between a "standard of care" and the "amount of care" required to observe it. A standard of care is a measuring stick with which the conduct of a defendant is compared. The amount of care is the amount or degree of care or skill which the defendant is expected to exercise in order to observe this standard of care. Salmond says: "The law of Torts does not recognize different standards of care. . . . The sole standard is the care that would be shown in the circumstances by a reasonably careful man and the sole form of negligence is the failure to use this amount of care." And he goes on to say: "It is true, indeed, that this amount will be different in different cases, for a reasonable man will not show the same anxious care when handling an umbrella as when handling a sword. . . . But this is a different thing from recognizing different legal standards of care; the test of negligence is the same in all cases."[53]

[52] *Op. cit., supra*, footnote 32, p. 5.
[53] *Op. cit., supra*, footnote 31, p. 511.

It will be noted that Salmond is emphatic with respect to there being only one standard of care . . . the reasonable man. Charlesworth, however, is less categorical; he says: "The standard of care *usually* adopted is that of the reasonable man."[54] Chief Justice Anglin in *Armand* v. *Carr* felt that the *Nightingale* case in holding that gross negligence must be established implied some "lower standard" than the reasonable man.[55] It was an implication he chose to ignore but it is doubtful that today's jurisprudence will permit us to follow suit.

As a standard of care, even the reasonable man has not always met with accolades. Insofar as it purports to be an objective test it has its drawbacks. Goddard L.J. said: "Of course, different minds have different ideas as to what is moderate, and seeking for a mean, a normal or an average, where there is really no guide is very like Lord Bowen's illustration of a blind man looking for a black hat in a dark room",[56] and Lord Coleridge says: "To me, the entire uselessness of such rules [laid down in previous cases for the guidance of judges in applying the 'reasonable man'] as practical guides lies in the inherent vagueness of the word 'reasonable', the absolute impossibility of finding a definite standard, to be expressed in language for the fairness and the reason of mankind, even of Judges."[57]

That gross negligence refers to another standard of care possibly even more vague is a notion unlikely to find favour with judges required to apply the law or with legal writers who are required to cast it into intelligible form. This, however, is precisely what this article seeks to establish. With respect to authors such as Salmond who contend that the reasonable man is the only standard of care, it should be pointed out that he at least was careful to confine this view to the common law. Legislation with gross negligence as the test for liability, however, has forced its way through the armour surrounding this traditional opinion. Certainly it does not permit the courts to dispose of the phrase as brusquely as did *Armand* v. *Carr*.[58]

Chief Justice Anglin, who was responsible for this celebrated decision, bowed to the edict of the legislature in the snow removal case and although he felt gross negligence was "not susceptible of definition" he nonetheless applied it. Other judges displaying

[54] *Op. cit., supra,* footnote 32, p. 23.
[55] *Supra,* footnote 1, at p. 597.
[56] *Mills* v. *Stanway Coaches, Ltd.,* [1940] 2 K.B. 334, at p. 349.
[57] *Dublin, Wicklow, & Wexford Railway Co.* v. *Slattery* (1878), 3 A.C. 1155, at p. 1197.
[58] *Supra,* footnote 1.

similar or varying degrees of reluctance to grant it a place in the law of negligence have, in the course of their struggles, found it a niche. That this has, up to the present time, still to be openly acknowledged by any eminent authority is not too disturbing. One has only to read what is writ large between the lines and to take a realistic view of the collective effect of the many cases in order to be satisfied that such an open acknowledgment cannot be far off. What is more, it seems clear that the new found home of gross negligence has been capable of discovery long before the first enactment of such legislation. An unnecessarily restrictive view of negligence has prevented its welcome into the fold. In forcing the door the legislatures have demonstrated that it need never have been closed in the first place.

II

Though our jurisprudence for the most part scrupulously avoids admitting that gross negligence refers to a different standard of care than the reasonable man, judges have had to say and do something. What they did say and do, particularly the latter, like the blades of the circus knife-thrower, traces a rough outline of that at which they were taking aim.

The first group of authorities to be considered will be divided into two categories: those which state or imply that gross negligence refers to something other than the reasonable man and those which are more explicit and use words indicating that a different standard of care is involved. The purpose behind the first category is to demonstrate that gross negligence cannot be dismissed as having no significance, that it interjects something that is somehow different into the law of negligence. The second category indicates the essential nature of this something, namely, that it is another standard of care. Judicial attempts to delineate and describe this standard will be dealt with later.

In *Cowper* v. *Studer*, Estey J. of the Supreme Court of Canada, provides an example of the first category. He says: "The Legislature . . . *effected a change in the common law* . . . Before the adoption of this provision . . . such a passenger [gratuitous] could recover from the driver or owner for any injuries suffered by reason of the driver's failure to use that care which a reasonable man would have exercised in the same or similar circumstances: *Armand* v. *Carr*."[59] Locke J., in the same case, bemoaned the fact that when the legislature wished to restrict the liability of a driver

[59] *Supra*, footnote 29, at p. 91.

to a gratuitous passenger "to cases where the negligence complained of was of a *different character* to that which had before [reasonable man] been sufficient" it had not chosen a "more definite term than gross negligence".[60] Chief Justice McDonald in *Murdock* v. *O'Sullivan & O'Sullivan* said: "Prior to 1938 a gratuitous passenger in this Province [B.C.] stood in the same position as any other plaintiff when suing the driver of a motor car causing injuries to the plaintiff. In that year our Legislature took away that right. In 1942 the door was opened again, *but only partly* . . . . It was provided that an action lies by such passenger in a case where there has been gross negligence on the part of the driver contributing to the plaintiff's injuries."[61]

In the second category, we have Graham J., of the Supreme Court of Nova Scotia, in *McCulloch* v. *Murray*, "I think . . . that the intention of the statute is to express a *standard of care* . . . ."[62] In *Armand* v. *Carr*, although the Supreme Court of Canada rejected gross negligence as the test to be applied in gratuitous passenger cases, Chief Justice Anglin referred to its use in *Nightingale* v. *Union Colliery Co.*, as implying "some lower *standard*"[63] than the reasonable man of *Harris* v. *Perry*.[64] In the same vein, Salmond, after his denial of the existence of any standard of care other than the reasonable man, made mention of *Coggs* v. *Bernard*[65] and its "unfortunate attempt" to introduce gross negligence. Fortunately, in his view, no well-bred common-law judge would acknowledge the introduction. He leaves little doubt, however, that he regarded gross negligence as an attempt to create a new standard of care.[66]

[60] *Ibid.*, at p. 94.

[61] [1943] 3 D.L.R. 773, at p. 773, [1944] S.C.R. 143.

[62] [1941] 3 D.L.R. 42, at p. 57, affirmed [1942] S.C.R. 141, [1942] 2 D.L.R. 179.

[63] *Supra*, footnote 1, at p. 597.

[64] *Supra*, footnote 19.

[65] *Supra*, footnote 6.

[66] *Op. cit.*, *supra*, footnote 31, p. 511. The following cases are instances of courts refusing to find gross negligence where "ordinary" negligence existed: *Polisthe* v. *Einfield* (1956), 64 Man. R. 133 — absent-minded act not gross negligence; *Daman* v. *Kenick* (1953), 9 W.W.R. (N.S.) 429 (Man. K.B.) running into ditch — not gross negligence; *Schiffner* v. *C.P.R.* (1951), 2 W.W.R. (N.S.) 193 — driver to blame, but no gross negligence; *Scardina* v. *LaRoche*, [1950] 2 W.W.R. 1057, [1951] 1 D.L.R. 117 (B.C.C.A) — error in judgment not gross negligence; *Lawrence* v. *Gourlay*, [1938] 1 W.W.R. 409, *Heck* v. *Braun et al.*, [1938] 2 W.W.R. 1, [1938] 2 D.L.R. 716 (Sask. C.A.) — error in judgment, not gross negligence; *Osmond* v. *McColl-Frontenac Oil Co.*, [1939] 2 W.W.R. 387, [1939] 3 D.L.R. 260 (Man. K.B.) — falling asleep or absent-mindedness — not gross negligence; *Knutson* v. *Rawn*, [1943] 2 W.W.R. 22, 51 Man. R. 18, [1943] 2 D.L.R. 582 — miscalculation in making turn not gross negligence; *McQuarrie* v. *Drysdale*, [1939] 1 W.W.R. 252 (Man. K.B.) — driving too fast at night during a snowstorm not gross negligence; *Murdock* v. *O'Sullivan*, [1943] 3 W.W.R. 162, 59 B.C.R. 249, [1943] 3 D.L.R. 773, affirmed [1944] S.C.R. 143, [1944] 1 D.L.R. 790 — carelessness found, but not gross negligence.

These are some of the gleanings of an extensive search of the authorities. Others could be mentioned but it would be useless to pretend that the mass of cases contain statements this close to the mark. In such cases it is not what the judges said which is of significance. It is what they did. What they did speaks louder than words and can only be explained by holding that the judges regarded gross negligence as referring to a lower standard of care. Again, however, it must be admitted that not all the cases are readily compatible with this view.

The "greater the risk" test

The outstanding instance of this is the rule laid down by O'Halloran J., of the British Columbia Court of Appeals, in *Girling* v. *Howden*[67] and *Ogilvie* v. *Donkin*.[68] *A failure to take care develops into gross negligence when it is clear that, when more than ordinary care is not taken, loss of life, serious injury or grave damage is almost inevitable.* To substantiate this, he cites Lord Wright in *Caswell* v. *Powell Duffryn Associated Collieries Ltd.*[69]: "The degree of want of care which constitutes negligence must vary with the circumstances . . . from man to man, from place to place, from time to time. It may vary even in the case of the same man."[70] This, he states, was adopted by Sir Lyman Duff, then Chief Justice of the Supreme Court of Canada, in *Rex* v. *Hochelaga Shipping and Towing Co., Ltd.*[71]

With respect, it must be stated that O'Halloran J.'s test is a gratuitous observation insofar as these authorities are concerned. What they refer to are amounts of care. In order to discharge his duty as a reasonable man, the driver of a motor vehicle must exercise more care and skill when driving through rain, over icy roads, over narrow and twisting mountain roads and so on, than he does on a bright and sunny day over a super highway. The standard of care does not at any time change though the skill and attention necessary to observe it varies with the circumstances.

[67] [1949] 1 W.W.R. 95 (B.C.), affirmed [1949] 3 D.L.R. 622.
[68] [1949] 1 W.W.R. 439, at p. 441 (B.C.C.A.)
[69] [1940] A.C. 152, at p. 180.
[70] The duty of the reasonable man, according to Baxter C.J., in *Campbell* v. *Perry* (1939), 14 M.P.R. 89, at p. 105 (N.B.A.D.), is to: ". . . exercise such care as a reasonable man should do under the circumstances. . . . What would be required in a crowded thoroughfare would not be applicable to a main highway running through a wooded section where there were no dwellings." By the same token, the *amount* of care, though not the *standard* of care (reasonable under the circumstances) varies with the community-recognized skill of the defendant. The care required from a surgeon is that of, to coin a phrase, the "reasonable surgeon" rather than the "reasonable man".
[71] [1940] S.C.R. 153, [1940] 1 D.L.R. 369.

This test seems to reserve gross negligence to walking in high heels on a greased tightrope over a vat of boiling oil. The test is concise enough; it is its accuracy that is in question. There is no authority for it. Under it, gross negligence could scarcely occur on a bright and sunny day, on a good, well paved, little trafficked road, unless perhaps a wheel were to come off and create a situation calling for more than ordinary care to be displayed. Yet, in *Seymour* v. *Maloney*,[72] the full Bench of Nova Scotia had no hesitation in finding gross negligence in just such circumstances. The facts of *McCulloch* v. *Murray*[73] are equally far away from the type of situation envisaged by O'Halloran J. yet the full Bench of Nova Scotia and the Supreme Court of Canada found it no problem to discern gross negligence.

Scurrah and Phipps v. *Mitsuo Kanayama*,[74] however, has very recently treated the O'Halloran rule as binding, though McInnes J., of the British Columbia Supreme Court, considered the facts of the case not to warrant invoking it.[75]

"*Very great negligence*" *test*

In *Kingston* v. *Drennan*, the Supreme Court of Canada, speaking through Sedgwick J., said: "We must, I suppose, give some meaning to this expression of the legislative will [gross negligence in a snow removal statute] and the meaning I give to it is 'very

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[72] [1955] 1 D.L.R. 824 reversed in part [1955] 4 D.L.R. 104 (N.S.). Doull J., at p. 109 said: "There is not much doubt that at the time of the accident the defendant was guilty of gross negligence. The simple fact that on a clear day, on a first class road, a good car should run off the road and into a bank and then turn upside down is itself evidence of great carelessness, even if it were not coupled with uncontradicted evidence of drinking and evidence that other people in the car asked the defendant to slow down."

[73] *Supra*, footnote 62.

[74] (1959), 15 D.L.R. (2d) 15 (B.C.).

[75] The "greater the risk" test probably has a restricted value. In *Nix* v. *Godfrey*, [1936] 2 D.L.R. 626, at p. 633, affirmed [1936] 4 D.L.R. 365, (Man. C.A.) Adamson J. says: "Certainly, if slight care is not taken to avoid obvious dangers, that shows indifference to obvious risks, and is very great negligence, criminal negligence or gross negligence." (Kerwin J., in *Kerr* v. *Cummings*, [1953] 2 D.L.R. 1, at p. 2 (S.Ct. Can.), makes it clear that gross negligence and criminal negligence are not the same). On the other hand, Charlesworth, *op. cit.*, *supra*, footnote 32, p. 24, states: "No doubt the standard of care required under various different sets of circumstances is one which is derived from a common source, namely, what was reasonable under those circumstances." And, on p. 25, "The degree of care to be taken depends on the magnitude of the risk, the greater the risk the more care should be taken." Strictly speaking, Charlesworth is undoubtedly correct, but this would not seem to preclude gross negligence occurring in the "greased tight rope" situation contemplated by O'Halloran J. and Adamson J. The extent of the failure of the party at fault to respond to the exigiencies thereby created would be the determining factor.

great negligence'".[76] The Supreme Court of Canada has repeated this with approval many times.[77] Even MacDonald J., in *Seymour* v. *Maloney*, said: ". . . the guest passenger has only a qualified right of action against his negligent driver, *viz.*, for 'very great negligence' . . . and . . . the duty owing by the driver in such cases is simply the marginal duty to refrain from very great negligence."[78] As Sir Joseph Chisholm, then Chief Justice of Nova Scotia, said in *McCulloch* v. *Murray*[79]: ". . . to say that gross negligence is very great negligence is not defining it. . . . The substitution of an equivalent or near equivalent adjective for *gross* is not explaining it for *gross* means *great* or *very great.*" *Scardina* v. *LaRoche* suggested "flagrant", "aggravated", etc., for gross.[80] Actually, the substitution should be the word "carelessness" for "negligence". Gross carelessness or very great carelessness are understandable expressions.

This test cannot be ignored. It has the weight of too much authority behind it. Despite the fact that it is not too satisfactory, if it is regarded as calling for very great carelessness to be displayed it is a least a helpful guide. The direction in which it points is, from our point of view, correct inasmuch as it precludes the standard of care displayed by the reasonable man as the one involved in gross negligence. The reasonable man need not be shown to have been guilty of very great carelessness in order to be held negligent. A much lower standard of care is obviously contemplated.

Duty to take slight care test

In an old case, *Railroad Co.* v. *Lockwood*, Bradley J. said: "If *very little care* is due from him, and he fails to bestow that little, it is called gross negligence . . . if ordinary care is due, such as a prudent man would exercise in his own affairs, failure to bestow that amount of care is called ordinary negligence."[81] And, more recently, MacDonald J. in *Seymour* v. *Maloney* stated: "Imprecise as it may be, we must take it as established that in Nova Scotia the guest-passenger has only a qualified right of action against the negligent driver . . . and since even gross negligence is a breach of duty . . . the guest can only expect a *minimum degree of care* from a . . . driver."[82] Black's Law Dictionary[83] says: "Gross negligence

[76] (1896), 27 S.C.R. 46, at p. 60.
[77] *Holland* v. *Toronto, supra,* footnote 20, *German* v. *Ottawa* (1917), 39 D.L.R. 669 (S.Ct.Can.); *Cowper* v. *Studer, supra,* footnote 29.
[78] [1955] 1 D.L.R. 824, at p. 830 (N.S.).
[79] [1941] 3 D.L.R. 42, at p. 48.
[80] *Supra,* footnote 66.
[81] (1873) 17 Wall. 357 (U.S.).
[82] [1955] 1 D.L.R. 824, at p. 830.
[83] Second edition.

. . . The want of *slight diligence*." Gross negligence, from this point of view, is a failure to observe a duty to take *slight* care. "Ordinary" negligence is the breach of a duty to take *reasonable* care. Harking back to our modified Charlesworth definition, breach of a duty to take *slight* care is the most correct from a technical point of view of all the "tests" examined in this article. Unfortunately, it is not the most helpful. What does "slight" care involve?

"Equal gravity" and "marked departure" tests

These, at last, are of considerable assistance to anyone seeking to determine whether or not an act is grossly negligent. As we have seen, the statutory test for liability to the gratuitous passenger in six of the provinces is "gross negligence or *wilful and wanton misconduct*". Have the italicized words had any effect on the meaning of gross negligence? Let us suppose that we can have conduct amounting to (1) gross negligence; (2) wilful misconduct and (3) wanton misconduct. The question arises as to whether or not these various categories of conduct differ in *kind* or *degree*.

In 1938, Martin J. in *Heck* v. *Braun and Marchuk*[84] said that gross negligence was "coloured by this association . . . [and] the phrases . . . must be given a similar interpretation." Dysart J. in the 1939 case *Osmond* v. *McColl-Frontenac Oil Co.*[85] seems to have gone much further: " The term 'gross negligence' when used as it is in conjunction with wilful and wanton misconduct . . . implies a certain *mens rea*, an intentional disregard of danger, a recklessness." It is not known what the exact reason was but it is small wonder that British Columbia in 1942 should settle for gross negligence alone or that in 1951 Saskatchewan eliminated gross negligence leaving only wilful and wanton misconduct. The need for a long phrase to do the work of a shorter one apparently did not appeal to either province.

In 1942, however, the Supreme Court of Canada in *McCulloch* v. *Murray*[86] opened the way to a less restrictive interpretation. Duff C.J. said: "*I am, myself, unable to agree with the view that you may not have a case in which the jury could properly find the defendant guilty of gross negligence while refusing to find him guilty of wilful or wanton misconduct.* All these phrases, gross negligence, wilful misconduct, wanton misconduct, imply conduct in which, if there is not concious wrongdoing, there is *a very marked de-*

[84] *Supra*, footnote 66, at p. 721 (D.L.R.).
[85] *Supra*, footnote 66, at p. 261 (D.L.R.).
[86] *Supra*, footnote 62, at p. 145 (S.C.R.).

parture from the standards by which responsible and competent people in charge of motor cars habitually govern themselves."[87]

Dysart J. did not vacate his position completely. In 1951, in *Marian* v. *Dennis and Votto*[88] he chose to emphasize the latter part of the above quotation from Duff C.J. "By so grouping the three phrases [by describing all of them as 'a very marked departure . . .'] the Chief Justice places them all on one level of conscious or unconscious fault or legal gravity. That level is set by the highest degree of fault, namely, 'wilful and wanton misconduct'. . . . In short, all three . . . are on a par in gravity." In other words, having said in the *McColl-Frontenac* case that the three did not differ in kind (that all three involved a *mens rea*) and having been contradicted in this by Duff C.J., he continued to insist that they do not differ in degree (*i.e.* a grossly negligent act may not involve *mens rea*, but in order to find an act without a "guilty mind" to be grossly negligent it is necessary that it be, for lack of a better expression, on a par with the heinousness connoted by "wilful and wanton misconduct").

This, then, is the "equal gravity" test. An act which involves such recklessness, such disregard for the safety of others, as to warrant the description "wilful and wanton" or an act which, while it is neither wilful nor wanton, is nonetheless of a nature that is on a par with the heinousness or gravity connoted by such a description, is a grossly negligent act.[89] As a practical matter, the effect of the wilful and wanton phrase is a matter for conjecture. Dysart J's attempt to *confine* gross negligence to such a *kind* of act (wilful and wanton) was put into limbo by Duff C.J. The question of *degree*, however, is a valid one and Martin and Dysart J.J. were perfectly justified in raising it. As Dysart J. points out, Duff C.J. qualified all three categories of conduct as a "marked departure". Gross negligence standing by itself can conceivably involve an act which could be termed wilful or wanton or both. It does not seem that it had to be placed in juxtaposition to the wilful and wanton phrase to permit this. Whether or not Duff C.J. would have used the words "marked departure" had he not had to contend with this phrase is problematical. It could be argued that he would, inasmuch as to the ordinary man untroubled by legal learning the test coincides with what gross negligence appears to

[87] Italics mine.

[88] [1951] 1 W.W.R. (N.S.) 513, at p. 518 (Man. C.A.).

[89] "I think that 'gross negligence' and 'wilful and wanton misconduct' connote different mental attitudes, presumably of similar gravity . . . ." *McCulloch* v. *Murray*, [1941] 1 D.L.R. 42, at p. 57, per Graham J.

mean. Dysart J., perhaps, did not have to rely on "wilful and wanton misconduct" to establish gross negligence at such a great *degree* of gravity. In any event, at least in those provinces using "gross negligence or wilful and wanton misconduct", judges can use "wilful and wanton" as a guide to the *locus* of the standard of care involved in gross negligence. In a province like British Columbia, using "gross negligence" alone, judges would seemingly not be very far astray if they followed suit.

The reasonable man has been long recognized as a standard of care, a yardstick, by which conduct is to be judged in negligence cases. Although Duff C.J. went to great pains to emphasize in *McCulloch* v. *Murray* that he had no wish to lay down a definition for gross negligence[90] he was forced, in the words of Estey J. in *Cowper* v. *Studer*[91] to ". . . recognize that learned Judges at trial must instruct juries and did go on. . ." to say that it involved "a very marked departure from the standards by which responsible and competent people in charge of motor cars habitually govern themselves." By "responsible and competent" he meant the reasonable man, the yardstick. In tying gross negligence to a "very marked departure" from the conduct of a reasonable man all he did, in effect, was to add a foot or two. This longer stick is the measuring unit, the standard of care, which determines whether or not an act or omission is grossly negligent.[92]

In conclusion, aside from Mr. Justice O'Halloran's "greater the risk" theory, the various "tests" considered above have at least one thing in common and that is that they make it clear that the reasonable man is not the standard of care involved in gross negligence cases. One test calls for the breach of a duty to take *slight* care; the "reasonable man" calls for a breach of a duty to take *reasonable* care. Another test calls for very great carelessness; another calls for conduct that is or smacks of wilful and wanton misconduct. The "reasonable man" makes no such demands. Still another calls for "a very marked departure" from the conduct of the reasonable man; the "reasonable man", of course, calls only for a departure from the conduct of the reasonable man, not anything near what is suggested by "very marked". All of these

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[90] *Ibid.*, [1942] 2 D.L.R. 179, at p. 180.

[91] *Cowper* v. *Studer*, *supra*, footnote 29, at p. 92.

[92] "The marks of an efficient legal principle are that it should give cohesion to a particular branch of the law by capably explaining the relevant cases." Paton, Jurisprudence (2nd ed., 1951), p. 176. Does the traditional insistence on the reasonable man as the only standard of care involved in negligence explain or give cohesion to what the courts have done when forced to deal with gross negligence?

tests have another thing in common and that is that they point to a *lower* standard of care than that of the reasonable man. In view of our definition of negligence, the most correct of these "tests" is that which states that gross negligence occurs where there is a breach of a duty to take slight care. The remaining tests, of very great carelessness, equal gravity, and marked departure exist as guides to our courts in the determination as to whether or not such a breach has occurred.

This is not to suggest that all these tests produce identical results. "Marked departure" and "equal gravity" are seemingly wider than "very great carelessness". A deliberate act intending injury could be classified as gross negligence under the first two while it might be more difficult to do so under the third. Despite this, with all the confusion that presently exists and the difficulties under which our courts have laboured, it is really remarkable how consistent these various judicial approaches to gross negligence are. With these aids to the judge and lawyer, the line over which a defendant driver must be found to have stepped in order to be held guilty of a breach of a duty to take slight care is at least as concise a concept as the reasonable man.