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NEGLIGENCE - THE DETERMINATION OF EXISTENCE OF GROSS NEGLIGENCE MAKING AUTOMOBILE HOST LIABLE TO NON-PAYING GUEST

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NEGLIGENCE — THE DETERMINATION OF EXISTENCE OF GROSS NEGLIGENCE MAKING AUTOMOBILE HOST LIABLE TO NON-PAYING GUEST — Under common-law principles a majority of courts require the motorist, who voluntarily undertakes to carry another gratuitously, to exercise the ordinary care of a reasonably prudent man in the management and operation of his automobile.[1] The minority rule, by analogy to the gratuitous bailment cases, requires a person who invites another to ride gratis to use only slight diligence to avoid injury to that person and holds him liable for gross negligence.[2] The minority view undoubtedly appeals to those who feel that it is unsportsmanlike to sue one's benefactor, and yet it is doubtful whether such a purely emotional foundation would have long supported the rule, or prompted the statutory modifications which have been so widespread as to constitute a trend.[3] In a great number of these cases the real defendant is an insurance company; in reading excerpts from the evidence one is struck by the indifference of the testimony given by the host; and it is quite frankly recognized by some courts that the statutes enacted in the field are meant to protect the liability company from collusive suits.

[1] 4 BLASHFIELD, CYCLOPEDIA OF AUTOMOBILE LAW AND PRACTICE, perm. ed., 92 (1935).

[2] Ibid., p. 97.

[3] Ibid., p. 100.

The limitation of liability to gross negligence has been resisted, not only on the ground that this leaves uncompensated a large class of injuries,[4] but also because the courts have been quite impatient with any recognition of degrees of negligence. A general feeling is expressed in the statement that there is "no difference between negligence and gross negligence"—it is "the same thing, with the addition of a vituperative epithet."[5] This sentiment will be shared by anyone who approaches the problem of differentiation abstractly. However, it must be recognized that the minority view is being applied in several states, and that under the recent statutes the same difficulty is presented. Courts must determine what is meant by gross negligence in this field. It has been said in another connection that "lines are pricked out by the gradual approach and contract of decisions on the opposing sides,"[6] and this indicates one approach which may be taken toward a solution of the problem of definition; that is, to consider the facts of the decided cases. Since the statutes are not uniform in their language, and it should not be assumed that the courts will be uniform in their approach, and as the cases are so numerous that they could not be adequately considered within the prescribed physical limits of this comment if we tried to cover those of all the states,[7] our inquiry will be limited to the decisions of two states: Massachusetts, whose courts apply the minority rule on a common-law basis, and Michigan, where a typical guest statute is in force.[8]

1. *Massachusetts*

The minority rule is so closely associated with the Massachusetts cases that it is sometimes referred to as the Massachusetts rule.[9] In the

[4] Allen, "Why Do Courts Coddle Insurance Companies," 61 AM. L. REV. 77 (1927); 10 UNIV. CIN. L. REV. 289 (1936).

[5] Rolfe, B., in Wilson v. Brett, 11 M. & W. 113, 152 Eng. Rep. 737 at 739 (1843).

[6] Justice Holmes in Noble State Bank v. Haskell, 219 U. S. 104 at 112, 31 S. Ct. 186 (1911).

[7] For a classification of cases in all jurisdictions on the basis of particular elements of fault, see: 4 BLASHFIELD, CYCLOPEDIA OF AUTOMOBILE LAW AND PRACTICE, perm. ed., 115 (1935); and the following annotations, 74 A. L. R. 1198 (1931); 86 A. L. R. 1145 (1933); 96 A. L. R. 1479 (1935).

[8] Mich. Comp. Laws (1929), c. 73, § 4648. ". . . *Provided, however*, That no person, transported by the owner or operator of a motor vehicle as his guest without payment for such transportation shall have a cause of action for damages against such owner or operator for injury, death or loss, in case of accident, unless such accident shall have been caused by the gross negligence or wilful and wanton misconduct of the owner or operator of such motor vehicle and unless such gross negligence or wilful and wanton misconduct contributed to the injury, death or loss for which the action is brought."

[9] The leading case is Massaletti v. Fitzroy, 228 Mass. 487, 118 N. E. 168 (1917).

case of *Altman v. Aronson*,[10] Chief Justice Rugg stated a definition of the term "gross negligence" which has been relied on and cited in most of the subsequent cases involving the automobile guest. He said,

> "Gross negligence is substantially and appreciably higher in magnitude than ordinary negligence. . . . It is very great negligence, or the absence of slight diligence, or the want of even scant care. It amounts to indifference to present legal duty and to utter forgetfulness of legal obligations so far as other persons may be affected. . . . Ordinary and gross negligence differ in degree of inattention, while both differ in kind from wilful and intentional conduct which is or ought to be known to have a tendency to injure."

Let us consider, first, the cases where the driver turned his attention from the road. This deliberate inattention has generally supported a finding of gross negligence. In *Cycz v. Dugal*[11] the defendant was driving along a street which was crossed at grade by a railroad, and a freight train stood on the tracks blocking traffic. Plaintiff saw the train while the automobile was still six hundred feet from the crossing and warned the defendant, who turned his head to look for a cigarette on the seat and finally looked back through the rear window to see if friends in another car were following. He did not look at the road ahead until too late to avoid a collision with the train. Defendant's exception to a refusal to direct a verdict in his favor was overruled. Similarly where the accident followed defendant's crouching in the seat to look up at a passing aircraft,[12] and where he turned his attention to a person in the back seat, when he knew that a truck was traveling immediately ahead, and he ran into it,[13] or when he was looking at his watch,[14] or adjusting the dashboard light and the car went off the road,[15] in each case it was held that the jury could find gross negligence.

But in *Woods v. Woods*[16] it was held that the refusal to give an instruction that "taking of one's eyes from the road is an element to be considered on the issue of gross negligence," was not prejudicial error, even if it should have been granted. There defendant was driving a

[10] 231 Mass. 588 at 591, 121 N. E. 505 (1919). This was not an automobile case, but one of gratuitous bailment by analogy to which the minority rule was formulated.

[11] 3 N. E. (2d) 1011 (1936).

[12] Crowley v. Fisher, 284 Mass. 205, 187 N. E. 608 (1933).

[13] Green v. Hoffarth, 277 Mass. 508, 178 N. E. 828 (1931).

[14] Kirby v. Keating, 271 Mass. 390, 171 N. E. 671 (1930).

[15] Dow v. Lipsitz, 283 Mass. 132, 185 N. E. 921 (1933).

[16] 3 N. E. (2d) 837 at 840 (1936).

truck, and plaintiff was standing in the rear attempting to hold furniture steady, when the truck got off the macadam, and finally clear off the shoulder, and grazed an electric light pole as they met a truck coming in the opposite direction. Defendant had testified that he looked back for two or three seconds just before the accident. The court did not indicate why it did not attach importance to this testimony, but it would seem possible to distinguish the case on the ground that part of the task of properly handling the truck called for a knowledge of how the load was riding. It does not appear that defendant turned his attention to the rear for conversational purposes or some other reason unconnected with the operation of the truck. The testimony indicates a momentary, and probably instinctive, glance to the rear, prompted by the apprehension that getting off the road might cause the load to shift.

We may consider the case of *Shriear v. Feigelson*[17] as introducing a different element of fault. While traveling at about twenty miles an hour on a straight highway, where there was no other traffic, the driver suddenly called out a warning as the car left the road. There was evidence that he was tired, had once stopped a few moments for that reason, and had been sleeping in the car before they started, but the court held there was no gross negligence shown by these facts.

In *Blood v. Adams*,[18] where the defendant felt very sleepy just before the accident and testified that he must have closed his eyes, or been blinded by a cigarette which he lit, the court said:

> "Voluntarily to drive an automobile on a public street at any time of day or night with eyes closed, or to yield to sleep while operating such kind of dangerous machine as is an automobile on a public highway, is to be guilty of a degree of negligence exceeding lack of ordinary care, and is a manifestation of recklessness which may be found by judge or jury to be gross negligence."

An exception to the refusal to direct a verdict for defendant was overruled. Possibly, in the first case, the exclamation of the driver just before the accident occurred was considered enough to overcome the inference that he had fallen asleep and the court treated the case as though there were no element of fault shown, other than loss of control unexplained, as in *Burke v. Cook*,[19] a case which is cited. There would seem to have been ample forewarning of the imminence of sleep, in each case, to meet the test which, as we shall see, is applied in the Michigan cases, and to prevent distinction on that basis.

[17] 248 Mass. 432, 143 N. E. 307 (1924).
[18] 269 Mass. 480 at 482, 169 N. E. 412 (1929).
[19] 246 Mass. 518, 141 N. E. 585 (1923).

The language of the court in *Bertera v. Cuneo*,[20] would indicate that it will not find gross negligence in the mere showing that defendant had been drinking. There defendant's exceptions were sustained after a verdict for the plaintiff, the court saying,

> "The jury could have found that defendant was drunk. But however unsafe it may be for a drunken person to operate an automobile especially upon a public highway, some act of negligence must be shown in addition to drunkenness to make out a case of gross negligence. . . . The possibility of danger is always present when a drunken person attempts to operate a motor vehicle, but if he acts as carefully as a sober man of ordinary prudence under the existing circumstances he is not negligent." [21]

In the other cases where this element is found it is difficult to determine what part it did play in the result, for in two of the cases the other facts alone would probably have warranted a finding of gross negligence,[22] and in two others it was doubtful whether drinking contributed in any way to the accident.[23] The statement of facts in *Caldbeck v. Flint*[24] simply showed that the accident happened in a peculiar unexplained manner, much as in *Shriear v. Feigelson*,[25] and that there was evidence of defendant's drinking, yet a finding of gross negligence was supported.

The cases of *Lynch v. Springfield Safe Deposit & Trust*[26] and *Cook v. Cole*[27] present squarely the simple question, whether driving at excessive speed is gross negligence. In the first, the car was going between thirty-five and fifty miles an hour when it reached the foot of a hill. At that time a truck was half way up the hill ahead of it, and going in the same direction. Defendant's intestate increased the speed and ran into the rear of the truck. The accident occurred at night In the second case, defendant's truck was going twenty-five to thirty miles an hour when it started down a curving grade, and when he disengaged the gears the speed increased to thirty-five or

[20] 273 Mass. 181, 173 N. E. 427 (1930).

[21] 273 Mass. 181 at 183. This language is capable of the interpretation that if it is shown that the driver was intoxicated he will be liable if it is also shown that he did not use ordinary care, but there is nothing else in the cases to indicate that this is the rule.

[22] Learned v. Hawthorne, 269 Mass. 554, 169 N.E. 557 (1930); Stowe v. Mason, 289 Mass. 577, 194 N. E. 671 (1935).

[23] Lynch v. Springfield Safe Deposit & Trust, (Mass. 1936) 200 N. E. 914; Marcienowski v. Sanders, 252 Mass. 65, 147 N. E. 275 (1925).

[24] 281 Mass. 360, 183 N. E. 739 (1933).

[25] 248 Mass. 432, 143 N. E. 307 (1924), supra at note 17.

[26] (Mass. 1936) 200 N. E. 914.

[27] 273 Mass. 557, 174 N. E. 271 (1931).

forty and the truck finally left the road. In each case it was held that there was no showing of gross negligence.

But in *Connors v. Boland, Admx.*[28] defendant was driving down a steep grade, with a left curve ahead, at fifty miles an hour. When the plaintiffs expressed alarm, defendant said, "What is the matter with you fellows? Are you scared? I am going to give you the fastest ride of your life." He proceeded to fulfill his promise and the car left the road at the curve, killing the driver and one of his guests. The finding of gross negligence was considered justified. In each of these last two cases the plaintiff had remonstrated with the driver about the speed, but the evidence in *Cook v. Cole* suggests that the defendant did not really appreciate the danger, and thought plaintiff was unusually timid, while in the last case his retort clearly shows that he understood the risk he was taking, and persisted in his conduct simply to frighten his passengers.

In *Bertelli v. Tronconi*[29] the defendant was driving "very fast" on a dark rainy night in a car with no windshield wiper. The plaintiff testified that she could not see through the windshield and that defendant wiped it, inside and out, with his handkerchief and put his head outside the car every now and then in order to see. The car collided with a truck at an intersection. A verdict for the defendant was affirmed. Add to the elements of this case the fact that at the intersection the traffic signal was changing to red and that defendant was trying to "beat the light" when he struck another car coming from the left with the signal, and you have substantially the facts of *Parker v. Moody*,[30] where a finding for plaintiff was affirmed.

Most of us who have travelled as guests in an automobile have at one time or another been so worried by the driver who attempts to pass another car on a grade or at a curve, where the view ahead is obstructed, that we would think that no court could deal dispassionately with such a person.[31] In *Schusterman v. Rosen*[32] the defendant undertook to pass the car ahead on a curve, where the view was obstructed, and collided with a truck traveling in the opposite direction on its side of the road. The court was of the opinion that defendant could have been found guilty of gross negligence on these facts. *Richards v. Donahue*[33] should be compared with that case. There,

[28] 282 Mass. 518, 185 N. E. 38 (1933).
[29] 264 Mass. 235, 162 N. E. 307 (1928).
[30] 274 Mass. 100, 174 N. E. 189 (1931).
[31] This is one of the situations controlled by statutory provisions under which anyone violating certain prescribed rules of the road is liable for all damages. Mass. Gen. Laws (Ter. Ed. 1932), c. 89, §§ 1-5.
[32] 280 Mass. 582, 183 N. E. 414 (1932).
[33] 285 Mass. 19, 188 N. E. 389 (1933).

also, defendant drew over to the left side of the road to pass another car on a curve, passed the car, and continued at fifty to fifty-five miles an hour around the curve on the left side of the road; having passed the curve, he saw another car approaching. To avoid a collision, defendant swerved sharply to the right and overturned his car. Expressly stating that *Schusterman v. Rosen* was distinguishable on the facts, the court overruled exceptions to the direction of a verdict for the defendant. The only point of distinction we can find here is that the danger of passing on the curve had dissipated itself. The element of fault which led to the accident was driving at an excessive speed on the wrong side of the road, where the view was obstructed, but with nothing to prevent pulling over to the right side at any time, as there would be when the car was in the act of passing another. This distinction is not very satisfying.

We can find two broad outer bounds in the consideration of this element of fault. In the case of *Burke v. Cook*[34] an attempt to pass another car, where there was a long unobstructed view ahead with no intersections, resulted in the car skidding and overturning. It was held there was no gross negligence. On the other hand, the result in *Powers v. Comerford*[35] was certainly proper. The defendant, who had been asked not to go so fast, attempted to pass a truck on a rising grade, where a curve ahead obstructed the view. Defendant was traveling fifty miles an hour and as he swung around the truck another truck appeared about two hundred feet away and coming toward them quite fast. In answer to further remonstrance defendant said that he would make it, or take a wheel off. Instead of dropping back he proceeded and collided with the oncoming truck. The court held that this was gross negligence.

Several cases have arisen from accidents which were suffered by persons on the running board of another's car. Where defendant drove at a moderate speed, knowing plaintiff was on the running board, and the latter fell off, the court held that at the most this was a showing of negligence.[36] On the other hand, turning a car at an excessive speed on a rough road, so that a small girl riding on the running board was thrown to the ground, was held to present a question for the jury.[37] And where defendant increased the speed of his car after plaintiff, who was ill and had asked to be let out, had stepped onto the running board and defendant knew this, it was considered gross negligence to continue at such speed as to throw plaintiff off and injure her.[38]

[34] 246 Mass. 518, 141 N. E. 585 (1923).
[35] 283 Mass. 589, 186 N. E. 585 (1933).
[36] Byrne v. Daley, 288 Mass. 51, 192 N. E. 201 (1934).
[37] Terlizzi v. Marsh, 258 Mass. 156, 154 N. E. 754 (1927).
[38] Swistak v. Paradis, 288 Mass. 377, 192 N. E. 920 (1934).

In another case defendant had stopped to pick the plaintiff up, and thought that the latter was securely on the running board, but did not look to make sure. He started up so quickly that plaintiff was thrown to the ground. It was held there was no gross negligence.[39]

Another type situation arises from driving a car with defective equipment, where this condition is known to the defendant. In *Logan v. Reardon*,[40] the defendant had experienced difficulty with the brakes of his car and knew that they would cause it to skid when they were applied. He was driving at about forty-five miles an hour on a wet road and the car had skidded several times so that one of the party became so frightened that he jumped out of the car into the street. Plaintiff, who was in the back seat, was not allowed to get out, though he asked several times that they stop for that purpose. As the car was turning a corner it skidded into a tree. Exceptions taken after a finding for the plaintiff was overruled. In the later case of *Gionet v. Shepardson*,[41] a finding of gross negligence was considered warranted by the evidence that the car was six years old, that the front wheels "shimmied" and that one front tire was weak, so that the car zig-zagged from side to side for some distance and defendant nevertheless continued to maintain a speed of forty-five miles an hour till the car left the road at a curve.

Before we try to draw any conclusions as to the general tests for the determination of our question, it will be well to see what change there has been in the expressions by the court. In many of the cases the court has been content to state that "the case is governed by" certain prior decisions, "and is distinguishable from" certain others, and have gone back to the very early cases for definitions of gross negligence. But in *Lynch v. Springfield Safe Deposit & Trust*,[42] the court says,

> "There is no evidence of deliberate inattention, or of voluntary incurring of obvious risk, or of impatience of reasonable restraint, or of persistence in a palpably negligent course of conduct over an appreciable period of time. These are some of the more common indicia of gross negligence."

Though there is no attempt at an exclusive definition here, we do see that the court has sifted out some rather concrete factors, which it will look for in a case of this type. Applied to the situations we have narrated the opinion indicates the facts which the court felt were controlling. Why were those particular facts considered important?

[39] Forman v. Prevoir, 266 Mass. 111, 164 N. E. 818 (1929).
[40] 274 Mass. 83, 174 N. E. 264 (1931).
[41] 277 Mass. 308, 178 N. E. 649 (1931).
[42] 200 N. E. 914 at 915 (1936).

We should keep in mind that when the court approaches one of these cases it is looking for evidence, manifested in acts, of the state of mind of the defendant. We may conceive of a gradation of tortious acts, which result in personal injury from those clearly negligent on one end to those clearly intentional on the other. The fundamental difference between them is the state of mind of the defendant when he set in motion the factors which caused the injury. Somewhere along this scale we draw a line and say that on one side all the acts are negligent, on the other they are intentional. Now the court has drawn another line dividing the negligent acts into those of ordinary negligence, and those of gross negligence, and the acts which fall on one side or the other of that line do so because of the relative amount of deliberateness with which the defendant acted.

The indicia suggested by the court in the recent opinion quoted above all look in that direction. Can it be said that "pursuing a course which is dangerous because of the probability that other factors as yet unrealized will arise is simply negligence, but where those factors have already become apparent and defendant still pursues the same course of conduct that is gross negligence"? [43]

2. *Michigan*

Although the Michigan statute describes the degree of fault which will support liability as "gross negligence or wilful and wanton misconduct" the court has held that degrees of negligence are not recognized in that state.[44] An act is either negligent, or it constitutes wilful and wanton misconduct. But on the facts of the case in which that rule was first announced the Massachusetts court would probably have found no gross negligence according to its tests,[45] and a comparison of several of the cases in the two states does not show any striking difference in the results reached. This is not surprising, for if we abandon the usual division of torts into negligent acts and intentionally wrongful acts, and introduce a division which puts a new class between these two, there cannot be much room for difference when the line setting off that new class is placed as it is by the Massachusetts court.

We find that in several cases where the defendant's car has run into a truck or car preceeding it in the same direction, though he was traveling at a speed varying between forty-five and seventy miles an hour, he was not guilty of wilful and wanton misconduct.[46] In all

[43] The cases of "deliberate inattention" do not quite harmonize with that test.

[44] Finkler v. Zimmer, 258 Mich. 336, 241 N. W. 851 (1932).

[45] See, Lamb v. Russell, (Mass. 1936) 1 N. E. (2d) 39.

[46] Van Blaircum v. Campbell, 256 Mich. 527, 239 N. W. 865 (1932); Grabowski v. Seyler, 261 Mich. 473, 246 N. W. 189 (1933); Fink v. Dasier, 273 Mich. 416, 263 N. W. 412 (1935).

of these cases, when the defendant first saw the vehicle ahead, he could do nothing to prevent the accident, for his negligence in driving too fast, or with obscured vision, had put him in a position that now made collision unavoidable. *Finkler v. Zimmer*[47] was such a case. Defendant simply maintained a speed of forty-five miles an hour on a trunk highway, expecting a car on the intersecting road to stop; it failed to do so. Though negligent, it was clear that defendant was not deliberately careless, although we could have characterized his conduct in those terms if the other car had had the right of way.

In *Manser v. Eder*,[48] defendant with two companions was making the return trip of a pleasure ride. It was after one in the morning and defendant fell asleep once, nearly running into a safety zone, so that plaintiff aroused him and asked to be let out. Defendant refused because it was so late at night and shortly afterward went to sleep again and the car collided with a post of a safety zone. A majority of the court affirmed the finding of wilful and wanton misconduct. In *Boos v. Sauer*,[49] where defendant had very little sleep the night before, and testified that he did not know what had happened, but the truck had suddenly left the road, the court assumed that he had fallen asleep. But they found that the testimony did not indicate that defendant had prior warning of the likelihood of going to sleep, so that his continued operation of the truck would have been gross negligence, and a ruling for defendant as a matter of law was affirmed. And in *Perkins v. Roberts*,[50] a judgment for plaintiff was reversed, where the facts showed that defendant, feeling drowsy, had stopped the car and then, refreshed after walking about and smoking a cigarette, continued, but fell asleep without further warning and awakened too late to avoid collision with another car. The plaintiff, who was the only other occupant of the car, had herself been asleep all this time. It seems clear that the vital issue in cases of this nature will be whether or not defendant had forewarning of the likelihood that he would go to sleep, and then, whether he ignored it, or took precautions which made it reasonably certain that such immediate danger was past.

Another fact situation which we may consider for the purpose of comparison with the results in Massachusetts is that where the guest is standing on the running board of the car. In *Schneider v. Draper*,[51] the occupants of the car were all of high school age and were on their way to the athletic field. Two boys were on the right running board and their weight caused the fender to scrape the tire whenever the

[47] 258 Mich. 336, 241 N. W. 851 (1932).
[48] 263 Mich. 107, 248 N. W. 563 (1934).
[49] 266 Mich. 230, 253 N. W. 278 (1934).
[50] 272 Mich. 545, 262 N. W. 305 (1935).
[51] 276 Mich. 259, 267 N. W. 831 (1936).

car was turned. The car was being driven down a street which at one point had a twenty-four degree angle. There was a telephone pole beyond this turn and on the right hand side, in the direction they were traveling, so that as they approached the turn, the pole was directly in front of them. About four blocks before this point defendant began zigzagging the car, from curb to curb at a speed of about forty-five miles an hour, and when they reached this angle in the street he did not start to turn till the car was within fifteen feet of the curb. The speed, the sharpness of the turn required and the weight of the boys on the running board prevented defendant from negotiating the turn and the car scraped the pole, ran partly over the curb, throwing the two boys off so that they were killed, and finally hit a second pole before it stopped. The court said:[52]

> "One may not claim freedom from a charge of wilful and wanton misconduct, as a matter of law, and on a plea of innocent intention, if he voluntarily misdrives an automobile into a place of obvious danger if others are within the range of injury from it,"

and affirmed a verdict and judgment for the plaintiff.

But in *Schlacter v. Harbin*,[53] the court held that no wilful and wanton misconduct was shown, when defendant grazed a car parked on the right side of the street knocking the plaintiff off the running board where he was riding. Although it was raining intermittently and the street was slippery so that defendant had skidded some before the accident, it did not result from skidding, but rather from defendant's failure to see the parked car.

Among the Michigan cases are two where the accident resulted from defective equipment on the car. In *Gifford v. Dice*,[54] the court held that defendant was only obliged "to provide his guest with the conveyance he provides for himself" and that driving on a tire that had worn through the tread and a large part of the fabric did not give rise to an action under the statute, although defendant knew of this condition and it resulted in an accident. In the recent case of *Wolfe v. Marks*,[55] the accident was caused by the blowout of a patched tire and the court said that it was settled by the prior case that driving with a boot in the tire was not wilful and wanton misconduct. But defendant had continued to drive the car at a speed of fifty miles an hour after a strong odor of burning rubber was apparent, and he had remarked that it was probably the boot. Plaintiff asked him to stop,

[52] 276 Mich. 259 at 265, 267 N. W. 831 (1936).

[53] 273 Mich. 465, 263 N. W. 431 (1935). Compare, Sherman v. Yarger, 272 Mich. 644, 262 N. W. 318 (1935).

[54] 269 Mich. 293, 257 N. W. 830 (1934).

[55] 277 Mich. 154, 269 N. W. 125 (1936).

and though defendant promised to look at the tire at the "next gas station," he did not. The tire blew out, throwing the car around, after which it went up into the air and upset. In the opinion of the court this series of facts did constitute wilful and wanton misconduct.

There are several cases in Michigan, more or less of the same character, in which the particular element of fault cannot be closely defined. In *Boyle v. Moseley*,[56] defendant was driving at about forty-five, "in a hurry to get to a party," when he was blinded by the lights of another car, but continued at the same speed till he got off the pavement and finally struck a mail box post and went into the ditch. The court divided evenly as to whether or not this was a case within the statute, and so the judgment of the lower court, which had been for defendant, was affirmed. Then in *McLone v. Bean*,[57] the car was on a gravel road at night behind another car which it had passed twice before and which had just passed it for the third time. Although it was so dusty that he could not see the front of his own car, defendant tried to pass the car ahead, at a speed of above seventy miles an hour, and in doing so left the road and upset. A judgment for the plaintiff was affirmed.

When defendant, driving at night at excessive speed, arrived at a curve sooner than he had expected, so that the car skidded over the curb and hit a tree when he suddenly applied the brakes, a judgment for defendant was affirmed.[58] But for comparison with that decision we have *Lucas v. Lindner*,[59] where a judgment for plaintiff was affirmed. In that case defendant was returning over a side road, which he had gone out on shortly before, and as the car neared the main road again a lantern marking a washout, to which the plaintiff had called his attention on the trip out, indicated their location in relation to that road. Plaintiff remarked to defendant, who was obviously in a bad humor, that the intersection was near and asked him to slow down. He retorted that he would not take orders from any woman, and increased his speed as they went up a hill and onto the main road. The car ran across the road and hit trees on the other side. Again the distinction rests on the defendant's actual knowledge of the danger, though the division of the court in its first decision on the last case indicates that it is squarely on the line of demarcation.

The Michigan court has attempted more often than has the Massa-

[56] 258 Mich. 347, 241 N. W. 849 (1932).

[57] 263 Mich. 113, 248 N. W. 566 (1933). See, Goss v. Overton, 266 Mich. 62, 253 N. W. 217 (1934).

[58] Elowitz v. Miller, 265 Mich. 551, 251 N. W. 548 (1933). Also see, Keilitz v. Elley, 276 Mich. 701, 268 N. W. 787 (1936), and Bobich v. Rogers, 258 Mich. 343, 241 N. W. 854 (1932).

[59] 276 Mich 704, 269 N. W. 611 (1936).

chusetts court to give verbal expression to the approach which it takes in these cases. In *Willett v. Smith*,[60] the elements constituting wilful and wanton misconduct were stated as,

> "(1) Knowledge of a situation requiring the exercise of ordinary care and diligence to avert injury to another;
> (2) ability to avoid the resulting harm by ordinary care or diligence in the use of the means at hand;
> (3) the omission to use such care and diligence to avert the threatened danger, when to the ordinary mind it must be apparent that the result is likely to prove disastrous to another."

Later the court said that "any definition or attempted dissection of the phrase is only relative, not determinative or exclusive, and slight differences in facts produce different results."[61] There is no difference in the results in the two states which would warrant any further generalization than was attempted in connection with the Massachusetts cases. The purpose of the comment has been accomplished if the cases as arranged furnish a rough test to indicate whether or not a particular fact situation presents a cause of action under these common-law and statutory limitations on liability.

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[60] 260 Mich. 101 at 104, 244 N. W. 246 (1932).
[61] Schneider v. Draper, 276 Mich. 259 at 264, 267 N. W. 831, 833 (1936).