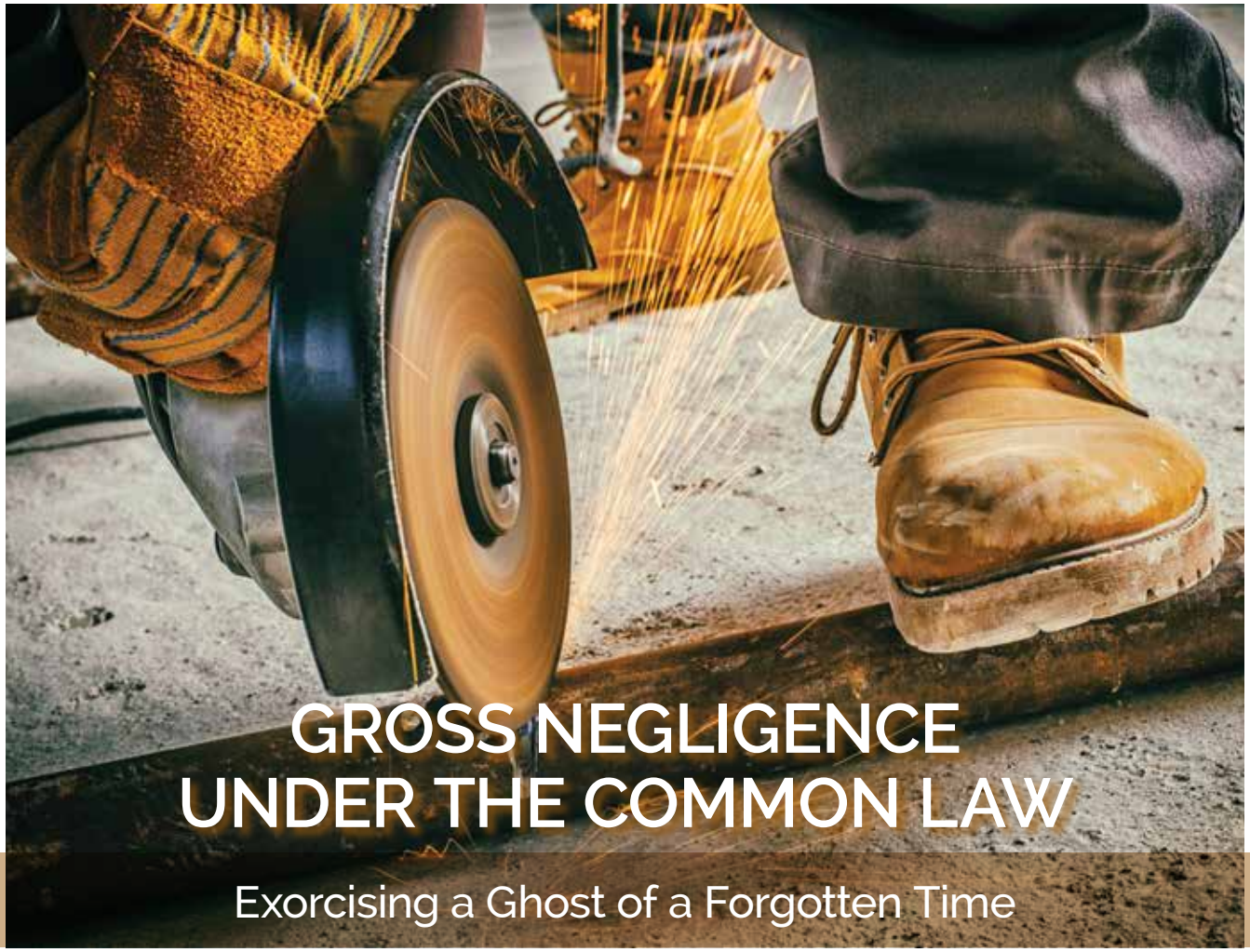

GROSS NEGLIGENCE UNDER THE COMMON LAW

Exorcising a Ghost of a Forgotten Time

By Timothy A. Diemer

> An historical basis is a poor basis for decision unless the conditions and customs of today so parallel those of the past that the reason for the rule still obtains.... The reasons for the old rule no longer obtaining, the rule falls with it.[1]

Until the Michigan Supreme Court's seminal 1979 decision in *Placek v Sterling Heights*, negligence law in Michigan was governed by the doctrine of contributory negligence, where any modicum of fault by a plaintiff categorically precluded the plaintiff's recovery of money damages altogether.[2] The contributory fault system was derided for its harshness: a measly one percent of fault on the part of the plaintiff operated as a total bar to recovery of money damages, even if the plaintiff was catastrophically injured or deceased and even if the defendant's negligence played a much larger proportional role in causing the injury.[3]

As a coping mechanism, the common law developed a series of procedural safeguards that allowed a plaintiff to recover in tort even if he or she was also found to have been negligent.[4] Even with the benefit of these common law offsets, criticisms of the doctrine of contributory negligence continued.[5] Yet this doctrine remained in place for more than 100 years until the sea change in the law delivered by the Michigan Supreme Court's opinion in *Placek* abolishing contributory negligence in favor of the modern comparative negligence framework. Since the *Placek* decision and its codification in MCL 600.2958, the fault of a plaintiff merely operates proportionally to reduce the recovery of damages as opposed to eliminating it *in toto*.[6]

With the eradication of the doctrine of contributory negligence, a number of the common law devices that were adopted solely to combat the harshness of the now-nonexistent system came under fire and were eventually abolished, including the last clear chance doctrine in 1991.[7] But for reasons that remain unclear, other doctrines that are interrelated with last clear chance (if not the same as by definition) continue to exist, including the topic of this article: gross negligence.

Common law and statutory gross negligence are very different concepts

Contrary to its definition found in MCL 691.1407(8)(a) as "conduct so reckless as to demonstrate a substantial lack of concern for whether an injury results," gross negligence under the common law was not understood as a high degree of negligence, recklessness, or egregious carelessness. Instead, it devolved out of the last clear chance doctrine or subsequent negligence, where the plaintiff's claim survived contributory negligence if the defendant's negligent act occurred after the plaintiff's—a matter of sequencing, not degree.[8]

The seminal gross negligence decision in Michigan, *Gibbard v Cursan*, adopted a three-part framework centered around the timing of the defendant's negligence to determine whether the plaintiff's contributory negligence barred the claim altogether.[9] *Gibbard* decided that gross negligence (or subsequent negligence) exists when "the defendant, who knows, or ought, by the exercise of ordinary care, to know, of the precedent negligence of the plaintiff, by his subsequent negligence does plaintiff an injury. Strictly, this is the basis of recovery in all cases of gross negligence."[10]

As will be further explained, this understanding of gross negligence proved to be unworkable under later statutory enactments that conferred immunity in certain contexts except in cases of gross negligence, where the legislature intended to strip immunity if the defendant's conduct was sufficiently callous as opposed to instances where the defendant's negligence was subsequent to the fault of the plaintiff. In one such case where the plaintiff's statutory cause of action required proof of gross negligence or willful or wanton misconduct,[11] Justice Ryan penned a separate opinion in *Burnett v City of Adrian* to highlight the ill-advised reliance on *Gibbard* to define gross negligence or willful and wanton misconduct under the Recreational Land Use Act.[12]

This tension between the formulation in *Gibbard* and modern statutory enactments came to a head in *Jennings v Southwood* where the Michigan Supreme Court was once again called on to construct a statutory elimination of immunity from tort liability except in cases of gross negligence or willful misconduct.[13] The statute at issue, the Emergency Medical Services Act, MCL 333.20901 *et seq.*, failed to define gross negligence, leaving it to the courts to supply a definition.[14] When the Court looked to the common law, the discord between the statute—which clearly focused on the degree of culpability by the defendant by linking gross negligence with willful misconduct as grounds for eliminating immunity—and the common law definition of gross negligence highlighted in *Gibbard* was readily apparent:

> Gross negligence, as defined in *Gibbard*, is not a high-degree or level of negligence. On the contrary, it is merely ordinary negligence of the defendant that follows the negligence of the plaintiff.[15]

The Court in *Jennings* declined to use the formulation of gross negligence under *Gibbard*, and instead adopted the definition from the Governmental Tort Liability Act, MCL 691.1401 *et seq.*, which provides a general cloak of immunity in favor of governmental actors unless the actor demonstrated "conduct so reckless as to demonstrate a substantial lack of concern for whether an injury results."[16] Unlike the common law, this statutory definition fulfilled the legislative intent under the Emergency Medical Services Act, which as a matter of legislative policy clearly contemplated immunity except in cases of severe recklessness or willful misconduct.[17]

At a Glance

Contrary to the current conception of gross negligence that exists under statutory authority, gross negligence under the common law was not understood as a high degree of negligence, recklessness, or egregious carelessness.

Where immunity is not an issue or the claim does not arise under a statute that puts gross negligence concepts into play, what purpose does the previous formulation of gross negligence serve?

To date, it does not appear that any published Michigan authority has directly confronted this question, but the hints are pretty strong that the day is coming when Michigan's common law will no longer recognize gross negligence as a viable cause of action.

The statutory pronouncements of "gross negligence" serve an easily identifiable purpose under the law by defining the type of conduct that is deemed to be so morally unjustifiable or egregious as to strip defendants from immunity they might otherwise enjoy on public policy grounds.

Jennings criticized but did not overrule *Gibbard*

The *Jennings* Court was dismissive of—if not outright hostile to—the *Gibbard* gross negligence standard and repeatedly criticized the antiquated common law relic that was found to have no surviving value in light of the pure comparative fault regime:

> While we recognize that *Gibbard*'s gross negligence is a seventy-year-old doctrine, we must nevertheless discard it because it has outlived its usefulness. We do not take such action lightly, but we cannot in good conscience inflict on our citizenry a doctrine that makes little sense in today's jurisprudence.[18]

The direct question of whether gross negligence should still exist under the common law was not before the Court in *Jennings*, however. Consequently, while the Court rebuked the *Gibbard* formulation it did not overrule it and chose only not to employ it under the Emergency Medical Services Act.[19] The language in *Jennings* strongly hinted that it was a matter of time before the common law conception of gross negligence would be abolished in Michigan:

> We have repudiated the traditional justification for *Gibbard*'s gross negligence. Contributory negligence no longer holds a place in Michigan jurisprudence, compelling the demise of its attendant legal theories.[20]

With the elimination of contributory fault, common law gross negligence serves no legitimate purpose

The statutory pronouncements of "gross negligence" serve an easily identifiable purpose under the law by defining the type of conduct that is deemed to be so morally unjustifiable or egregious as to strip defendants from immunity they might otherwise enjoy on public policy grounds. But in instances where immunity is not an issue or the claim does not arise under a statute that puts gross negligence concepts into play, what purpose does the previous formulation of gross negligence serve?

Certainly, proof of gross negligence does not serve the purpose of allowing the recovery of money damages despite a level of fault on the plaintiff, because contributory negligence no longer bars recovery; comparative fault proportionally reduces recovery in such an instance.[21]

Some argue that gross negligence claims ought to exist to substantiate damages claims, including exemplary or punitive damages. But Michigan has not been a punitive damages state for decades,[22] and exemplary damages are just another component of traditional compensatory damages.[23]

Another argument in favor of retaining the common law doctrine pertains to a contractual defense to avoid a pre-tort release of liability if the plaintiff can show gross negligence, but again, in this context courts do not look to the common law to delineate what constitutes gross negligence. Rather, just as in *Jennings* where the Court scoured the common law for a definition of gross negligence for a statutory cause of action, caselaw concerning a pre-accident release under a contract looks to the statutory definition of gross negligence under the Governmental Tort Liability Act:

> Thus, because the underlying purpose is the same, we adopt the statutory definition of gross negligence as defined in the [Governmental Tort Liability Act] and incorporated into the [Emergency Medical Services Act] by the *Jennings* Court.[24]

In run-of-the-mill negligence cases where statutory immunity or a pre-tort contractual release is not at issue, there is no identifiably legitimate rationale for piggybacking a gross negligence claim on ordinary negligence when compensatory damages are accorded based on the proportional share of allocable fault rather than the degree of defendant's culpability.[25]

Attorneys who pursue common law gross negligence claims when ordinary negligence would suffice are taking an unnecessary risk

In addition to the not-so-subtle warnings from the *Jennings* Court, there are other signs that gross negligence's days under the common law are numbered. Regarding the gross negligence jury instruction, M Civ JI 14.10, the Committee on Model Civil Jury Instructions raised the issue as to whether gross negligence has any role in Michigan law except in specific statutory causes of action when the committee stated that it takes "no position on the application of this instruction

in a context other than the statutes discussed in this use note and comment."

The pursuit of a gross negligence verdict under M Civ JI 14.10 is also a needless risk for the plaintiff's bar. Under long-established precedent where conflicting jury instructions are given, one of which is deemed to have been erroneously given, the appellate courts presume that the jury followed the erroneous instruction and a reversal of the trial result is compelled.[26] If gross negligence is later excised from the common law, a verdict that could have prevailed under ordinary negligence principles would needlessly be reversed.

Even a jury verdict awarding damages for both gross and ordinary negligence that could be harmonized runs the risk of interjecting error because gross negligence concepts could motivate juries to award prohibited punitive damages, which are never allowed under Michigan law.[27] Moreover, with the warnings from Michigan caselaw and the Committee on Model Civil Jury Instructions, plausible deniability of the error would not be well received as an excuse.

Conclusion

The *Jennings* Court specifically noted that gross negligence, last clear chance, and subsequent negligence were different sides of the same coin: "*Gibbard*'s formulation of gross negligence is really the doctrine of last clear chance in disguise; accordingly its usefulness is dubious at best in light of our holding in *Petrove*."[28] So while the Michigan Supreme Court abolished last clear chance as a direct result of the eradication of contributory negligence in *Petrove*,[29] there has been no similar day of reckoning for gross negligence.

To date, it does not appear that any published Michigan authority has directly confronted the existential question presented by this article. But where the entire rationale for the doctrine has been eliminated and its continued invocation presents nothing other than reversible downside risk, the hints are pretty strong that the day is coming when the state's common law will no longer recognize gross negligence as a viable cause of action—a long-awaited and welcome change to negligence law in Michigan. ■

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ENDNOTES

1. *Montgomery v Stephan*, 359 Mich 33, 46, 49; 101 NW2d 227 (1960).
2. *Placek v Sterling Heights*, 405 Mich 638, 667; 275 NW2d 511 (1979).
3. E.g., *Kirby v Larson*, 400 Mich 585, 611; 256 NW2d 400 (1977) (noting the unfairness where the plaintiff "having been adjudicated negligent, the doctrine of contributory negligence was triggered, and plaintiff thereby recovered nothing, however deserving she might otherwise have been, and however greater the negligence of defendant might have been.").
4. E.g., M Civ JI 10.08 and 10.09 (presumption of due care of the plaintiff in death or memory impairment cases because of the difficulties of proving that the deceased individual did not bring about his or her own demise in some way or where the plaintiff's mental deficits caused memory loss).
5. *Lake Shore & Mich Southern R Co v Miller*, 25 Mich 274, 277 (1872) ("Justice might seem to require that each should bear the loss in the proportion they had respectively contributed to the injury."), overruled in part by *Bricker v Green*, 313 Mich 218; 21 NW2d 105 (1946).
6. *Placek*, 405 Mich at 650, n 1.
7. *Petrove v Grand Trunk Western R Co*, 437 Mich 31, 33; 464 NW2d 711 (1991). The presumption of due care in death cases and memory impairment cases remains in full force and effect nearly four decades after the rationale for these presumptions—as offsets to avoid the harshness of contributory negligence—had been abolished.
8. *Zeni v Anderson*, 397 Mich 117, 146; 243 NW2d 270 (1976) (noting that gross negligence has been described as "discovered negligence," "subsequent negligence," or "last clear chance doctrine") and *Lacroix v Grand Trunk Western*, 379 Mich 417, 424; 152 NW2d 656 (1967) (interchangeably describing the doctrine as "gross, subsequent, or discovered negligence").
9. *Gibbard v Cursan*, 225 Mich 311, 322; 196 NW 398 (1923).
10. *Id.* at 319.
11. MCL 300.201, repealed by 58 PA 1995.
12. *Burnett v City of Adrian*, 414 Mich 448, 455; 326 NW2d 810 (1982).
13. *Jennings v Southwood*, 446 Mich 125; 521 NW2d 230 (1994).
14. *Id.* at 129, n 1.
15. *Id.* at 130.
16. MCL 691.1407.
17. *Jennings*, 446 Mich at 134.
18. *Id.* at 132.
19. Gross negligence serves many purposes in statutory causes of action because it has been adopted by the Michigan legislature as a means to avoid immunity in various contexts. E.g., MCL 257.606a (Michigan Vehicle Code); MCL 324.81131 (Natural Resources and Environmental Protection Act); MCL 500.214 (Insurance Code); MCL 600.2945 (Revised Judicature Act).
20. *Jennings*, 446 Mich at 133.
21. MCL 600.2957 and MCL 600.6304.
22. *Hicks v Ottewell*, 174 Mich App 750, 756; 436 NW2d 453 (1989).
23. *Kewin v Massachusetts Mut Life Ins Co*, 409 Mich 401, 419; 295 NW2d 50 (1980) ("In Michigan, exemplary damages are recoverable as compensation to the plaintiff, not as punishment of the defendant.") and *Eide v Kelsey-Hayes Co*, 431 Mich 26, 51; 427 NW2d 488, 498 (1988) ("Michigan has been among a minority of jurisdictions which adhere to the rule that exemplary damages may not be awarded to punish. They are available, if at all, only as an element of compensatory damages.")
24. *Xu v Gay*, 257 Mich App 263, 269; 668 NW2d 166 (2003).
25. Before *Jennings*, the Michigan Supreme Court beat back attempts to mix gross negligence concepts with ordinary negligence claims in an automobile negligence claim. *Smith v Jones*, 382 Mich 176; 169 NW2d 308 (1969).
26. E.g., *In re Bailey's Estate*, 186 Mich 677, 690; 153 NW 39 (1915); *Berwald v Kasal*, 102 Mich App 269, 272–273; 301 NW2d 499 (1980); and *Rancour v Detroit Edison Co*, 150 Mich App 276, 289 n 2; 388 NW2d 336 (1986).
27. E.g., *Gilbert v DaimlerChrysler Corp*, 470 Mich 749, 765 n 22; 685 NW2d 391 (2004).
28. *Jennings*, 446 Mich at 132. See also *Xu*, 257 Mich App at 267–268 ("Common-law gross negligence is not a higher degree of negligence, but rather ordinary negligence of the defendant that follows the negligence of the plaintiff.")
29. Petrove, 437 Mich at 33.