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GROSS, RECKLESS, WANTON, AND INDIFFERENT: GROSS NEGLIGENCE IN MARYLAND CIVIL LAW

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I. INTRODUCTION

At this time, the Maryland Annotated Code contains twenty-four statutory immunities that protect individuals from claims of negligence, but do not apply to grossly negligent acts.¹ Parties may use a contract to limit liability for their own acts of negligence but cannot

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1. See MD. CODE ANN., CTS. & JUD. PROC. § 5-406(d) (1998 & Supp. 2000) (agents of certain associations or organizations); § 5-407(c) (volunteer of charitable organization); § 5-419(b)(3) (shareholder or trustee of real estate investment trust); § 5-517(a)(2) (board of supervisors for soil conservation district); § 5-518(e) (county boards of education); § 5-522(b) (State and its personnel and units); § 5-603(a) (providers of emergency medical care); § 5-606(b)(ii) (physicians and volunteers working at charitable organizations providing health care services); § 5-607(b)(2) (volunteer sports program physicians); § 5-608 (support for emergency medical system); § 5-614 (emergency veterinary assistance); § 5-616 (scoliosis screening); § 5-617(d) (persons assisting in controlling discharge of hazardous substance); § 5-629(d) (person administering drug or vaccine); § 5-634(c) (person donating food); § 5-639(b)(2) (negligent operation of emergency vehicle); § 5-805(c)(2) (community service providers); MD. CODE ANN., EDUC. § 13-517(n)(4) (1999 & Supp. 2000) (authorized facility participating in Automated External Defibrillator Program); MD. CODE ANN., HEALTH-GEN. I § 13-708(a) (2000) (certified individuals); § 18-4A-05 (immunization of minor by health care provider); MD. CODE ANN., HEALTH-GEN. II § 21-326(b) (2000) (person applying maneuvers depicted in diagram on use of manual maneuvers to prevent asphyxiation due to choking); MD. CODE ANN., INS. § 5-201(i) (1997) (qualified actuary); MD. CODE ANN., NAT. RES. II § 8-724(e) (1990 & Supp. 2000) (person rendering assistance to vessel in distress); MD. CODE ANN., TRANSP. II § 16-205.1(c)(3) (1999 & Supp. 2000) (medical personnel performing tests for intoxication); see also *infra* notes 236-42 and accompanying text.

do so when a party has been grossly negligent.² A defendant's gross negligence may be sufficient to overcome a plaintiff's contributory negligence, thereby allowing the negligent plaintiff to recover.³ A landowner may only be held liable to a trespasser if his conduct can be defined as "willful and wanton,"⁴ a standard which, as we will see, is indistinguishable from gross negligence.⁵ In these and various other contexts, the sufficiency of the plaintiff's complaint, the plaintiff's ability to plead his or her case before the jury, and the defendant's ultimate liability depend upon the definition of gross negligence and the evidence required to plead and to prove it.⁶

Gross negligence, however, "is a nebulous term that is defined in a multitude of ways, depending on the legal context and the jurisdiction."⁷ Indeed, one of the most commonly cited definitions in Maryland cases raises a host of common-law words, such as "willful," "wanton," and "reckless," that are difficult to define and to apply:

Gross negligence is defined . . . as "an intentional failure to perform a manifest duty in reckless disregard of the consequences as affecting the life or property of another, and also implies a thoughtless disregard of the consequences without the exertion of any effort to avoid them. Stated conversely, a wrongdoer is guilty of gross negligence or acts wantonly and willfully only when he inflicts injury intentionally or is so utterly indifferent to the rights of others that he acts as if such rights did not exist."⁸

The seeming precision of such definitions is further undermined by the courts' occasional use of the term "gross negligence" as short-

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2. *Wolf v. Ford*, 335 Md. 525, 531, 644 A.2d 522, 525 (1994).
 3. See RESTATEMENT (SECOND) OF TORTS § 503(1) (1965) ("A plaintiff's contributory negligence does not bar recovery for harm caused by the defendant's reckless disregard for the plaintiff's safety.").
 4. See *Wells v. Polland*, 120 Md. App. 699, 721, 708 A.2d 34, 45 (1998) (concluding that a landowner did not engage in wilful and wanton misconduct even though the landowner was aware of the dangerous condition of a set of stairs and failed to take any action to fix them prior to the injury suffered by the trespasser when the stairs collapsed).
 5. See *infra* Part III.A.
 6. See *infra* Part III.A.
 7. 57A AM. JUR. 2D *Negligence* § 243 (1989).
 8. *Romanesk v. Rose*, 248 Md. 420, 423, 237 A.2d 12, 14 (1968) (quoting 4 BLASHFIELD'S CYCLOPEDIA OF AUTOMOBILE LAW AND PRACTICE, pt. 2, § 2771 (1946)); see also *State v. Albrecht*, 336 Md. 475, 500, 649 A.2d 336, 348 (1994) (quoting *United Life & Accident Ins. Co. v. Prostic*, 169 Md. 535, 539, 182 A. 431, 423 (1936) in holding that, to be considered grossly negligent, "the accused must have committed 'acts so heedless and incautious as necessarily to be deemed unlawful and wanton'").

hand for “very bad,” “very serious” or “obvious” negligence. For example, in 1934, the Court of Appeals of Maryland held that expert testimony would be required in medical malpractice cases to prove that a doctor had been negligent, but that “[t]here may be cases in which there is such gross negligence and unskillfulness as to dispense with professional witnesses.”⁹ In such cases, gross negligence is apparently not meant to require any form of willful, wanton, or reckless behavior, but seems to refer to a form of particularly obvious negligence.¹⁰

Such cases, however, refer to “gross negligence” only colloquially and do not provide any legal standard by which a court may measure a plaintiff’s claim that a defendant has been grossly negligent. In these cases where a defendant’s liability hinges upon a showing of gross negligence, the Maryland courts have applied the same underlying definition and have reviewed the same factors to determine whether gross negligence exists.¹¹ The variation in the cases primarily results, not from varying standards, but from the varying importance of the elements of gross negligence in the different contexts in which gross negligence is used.¹²

Some of the confusion over gross negligence is attributable to its historical origins and its migration over time from a less strict form of ordinary negligence to its current position in Maryland law as a type of conduct only slightly less culpable than malice. Part II.A of this Article traces the migration of gross negligence in Maryland law, beginning with its origins as one level on a three-tiered system of varying degrees of care that were imposed upon defendants in varying circumstances.¹³ At the same time that the court of appeals began to abandon this concept of “degrees of negligence,” it was using the term “gross negligence” in cases where contributory negligence was found as a matter of law.¹⁴ The use of this term, while not describing a specific legal duty or threshold for liability, began to incorporate the concept of recklessness, or the knowing creation and acceptance of a

9. *Fink v. Steele*, 166 Md. 354, 361, 171 A. 49, 52 (1934); *see also Crockett v. Crothers*, 264 Md. 222, 224-25, 285 A.2d 612, 614 (1972).

10. *See Pa. R.R. v. Cook*, 180 Md. 633, 637-638, 26 A.2d 384, 387 (1942) (stating that an engineer would be “grossly negligent” if he neglected “faithfully to obey every signal employed in the operation of railroad trains”); *Catalano v. Bopst*, 166 Md. 91, 105, 170 A. 562, 568 (1934) (stating that if defendants’ evidence were true, plaintiff “was grossly negligent” for failing to properly perform duties under a contract).

11. *See infra* note 322-27 and accompanying text.

12. *See infra* notes 328-34 and accompanying text.

13. *See infra* Part II.A.1.

14. *See infra* Part II.A.2.

risk.¹⁵ Part II.A concludes by discussing the roots of the modern standard in three cases. The court in *Bannon v. Baltimore & Ohio Railroad*¹⁶ applied a definition of gross negligence similar to the modern one,¹⁷ but it was not relied upon in any meaningful sense for more than 120 years. The two guest statute cases, *White v. King*¹⁸ and *Romanesk v. Rose*,¹⁹ applied Michigan and Virginia law, respectively, but are widely cited formulations of Maryland's civil gross negligence standard.²⁰

Part II.B of this Article discusses modern cases utilizing the gross negligence standard or its alternative formulation of "willful and wanton" conduct, and seeks to illustrate the different elements that the courts have relied upon in applying this standard in different types of cases.²¹ Between 1972 and 1992, the Maryland courts used a gross negligence standard to determine whether to award punitive damages, although with mixed and sometimes inconsistent results.²² These cases focused on the level and scope of the defendant's knowledge that the conduct engaged in created a risk of harm for another.²³ Currently, gross negligence is frequently litigated in the area of immunity law. In this context, courts give more deference to defendants because, unlike cases involving punitive damages, the very existence of an immunity statute demonstrates that the category of conduct in which a defendant is engaged is socially desirable.²⁴ Courts have applied the same gross negligence standard without such overtones of social utility in cases involving contractual exculpatory clauses and have been particularly deferential to landowners in cases where they are sued by a trespasser under the "willful and wanton" standard.²⁵

Part III seeks to develop a common-sense formulation of a single underlying standard that does not require dependence upon common-law terms such as reckless, willful, wanton, or gross.²⁶ The definition developed here demonstrates that gross negligence may be broken into four separate elements, three of which relate to the de-

15. See *infra* Part II.A.2.

16. 24 Md. 108 (1866).

17. See *id.* at 124.

18. 244 Md. 348, 223 A.2d 763 (1966).

19. 248 Md. 420, 237 A.2d 12 (1968).

20. See *infra* Part II.A.5.

21. See *infra* Part II.B.

22. See *infra* Part II.B.

23. See *infra* Part II.B.

24. See *infra* Part II.B.2.

25. See *infra* Part II.B.3-4.

26. See *infra* Part III.

fendant's state of mind, and one of which is an objective analysis of the nature of the defendant's actions.²⁷ First, the defendant's intentional action or its intentional failure to perform a duty must have caused the plaintiff's injury. Only the defendant's *act* must be intentional; however, there need not be any intent to cause harm to anyone.²⁸ Second, the defendant must be aware that the conduct engaged in created a risk of harm, although the defendant does not need to appreciate the severity of the risk.²⁹ Third, the defendant must have knowledge of the facts from which a reasonable person *should have* appreciated the nature and extent of the risk.³⁰

While these first three tests are subjective, the fourth test is not. Under the fourth test, the defendant's conduct must be an extreme departure from the conduct of an ordinary, reasonable person, such that the conduct creates an unjustified risk of sufficiently probable harm with sufficiently serious possible consequences. While three of the key elements in this standard are "justification," "severity," and "probability," the courts frequently do not engage in such a rigorous analysis.³¹ Many cases review the defendant's knowledge at the time of the intentional act or omission to determine whether a reasonable person could have acted as the defendant acted—an approach that seems to combine the third and fourth elements of the gross negligence test detailed in this Article.³² While this fourth element is objective, it cannot be quantified with any precision and heavily depends upon the facts of specific cases.³³

Part IV briefly addresses the difficulties in separating the legal standard in gross negligence cases from the factual issues of pleading and proof.³⁴ The practical application of this standard depends upon a fine-grained analysis by the courts of what facts may be sufficient either to infer that the defendant had the requisite state of mind or to determine whether there is any factual question as to whether the risk created by the defendant was sufficiently serious, probable, or unjustified. Part IV seeks to illustrate the types of evidence relied upon by the courts in making such determinations.³⁵

In Maryland at least, where a defendant's liability hinges upon a showing of gross negligence, the term is not "nebulous," even if it may

27. See *infra* Part III.A.

28. See *infra* Part III.B.1.

29. See *infra* Part III.B.2.

30. See *infra* Part III.B.3.

31. See *infra* Part III.C.1.

32. See *infra* Part III.C.3.

33. See *infra* Part III.C.3.

34. See *infra* Part IV.

35. See *infra* Part IV.

be difficult to apply in some cases.³⁶ Nor is gross negligence simply a particularly serious variant of ordinary negligence.³⁷ Rather, to survive a motion to dismiss or a motion for summary judgment, or to provide evidence to allow a jury to rule in his or her favor, the plaintiff must demonstrate each of the three subjective factors and the objective factor.³⁸

II. THE DEVELOPMENT OF GROSS NEGLIGENCE IN TORT LAW

A. *Early Definitions of and Uses for Gross Negligence*

As discussed in the Introduction, gross negligence migrated over time from one of three “degrees of negligence,” to a standard of conduct that not only incorporates the older notion of a gross departure from a reasonable person’s conduct, but also adds subjective elements that require an intentional act with knowledge that the act would create a risk of harm to another.³⁹ This section traces that migration, and the incorporation of those subjective elements into Maryland’s gross negligence standard.

1. Gross Negligence as an Enhanced Form of Negligence

The first reported use of the term “gross negligence” by the court of appeals appears in the 1810 decision of *Turner v. Bouchell’s Executors*,⁴⁰ a case involving the execution of an estate. It was not until 1853, in *Baltimore & Susquehanna Railroad v. Woodruff*,⁴¹ that the term was discussed as the applicable standard of care in a tort case. For the next several decades, the court of appeals wrestled with the concept of gross negligence as one level on a sliding scale of legal duties.⁴² As the court stated in *Woodruff*:

[T]his word *negligence* has very different meanings in relation to different causes of action known to the law. In some cases it means a very slight absence of care and prudence, in

36. See *infra* Part V.

37. See *infra* Part V.

38. See *infra* Part V. The subjective factors are: (1) intentional conduct; (2) awareness of the creation of risk; and (3) knowledge of facts from which the risk should be appreciated. See *supra* notes 28-30 and accompanying text; see also *infra* Part III.B. The objective factor is an unjustified creation of a severe and probable risk of harm to another person or class of persons. See *supra* notes 31-33 and accompanying text; see also *infra* Part III.C.

39. See *infra* Part III.

40. 3 H. & J. 99, 103 (Md. 1810).

41. 4 Md. 242 (1853).

42. See *infra* Part II.A.2.

others the absence of reasonable care or caution, and again, such a want of care as makes gross negligence.⁴³

This sliding scale of negligence provided no hard-and-fast line to separate gross negligence from an ordinary lack of care. As the court of appeals stated in 1868, “[w]hat may be gross negligence in one case, may not be so in the light of the particular facts of another; and ordinary care in one state of case may be very gross negligence in another and different case.”⁴⁴ In such cases, the term “gross negligence” did not imply a standard with any *legal* distinction from the duty of ordinary care, and the significance of referring to “gross” negligence, rather than “ordinary” or “slight” negligence lay primarily in the instructions that would be propounded to the jury.⁴⁵

In *Baltimore & Ohio Railroad v. Smith*,⁴⁶ for example, the court rejected the defendant’s contention that the plaintiff could not recover unless “the defendant or its agents were so *grossly careless* as that the exercise of proper caution on the part of the [decedent] would not have protected her from injury,” and that “[p]roof of *negligence* or want of *ordinary care* on the part of the defendant or its agents was sufficient.”⁴⁷ Nothing in that opinion, however, indicates that the plaintiff needed to provide any additional evidence if gross negligence was required. Instead, the entire dispute related to the proper wording of a jury instruction.⁴⁸

43. *Woodruff*, 4 Md. at 256.

44. *Northern Cent. Ry. v. Price*, 29 Md. 420, 438 (1868); *see also* *Baltimore Chesapeake & Atlantic Ry. v. Turner*, 152 Md. 216, 228, 136 A. 609, 614 (1927) (“Acts or omissions which might amount to gross negligence on the part of the driver of an automobile might not be negligent at all on the part of a passenger therein.”).

45. *See Price*, 29 Md. at 437-42 (1868).

46. 29 Md. 460 (1868).

47. *Id.* at 464.

48. Similarly, in *Woodruff*, the plaintiff argued that the defendant railroad was required to use the “utmost care and caution” and be free from the “least degree of negligence.” *Woodruff*, 4 Md. at 256. The court noted that the railroad was required to use the “utmost care and caution” to protect the safety of its passengers, with whom it had a contract, but that “this word *negligence* has very different meanings in relation to different causes of action known to the law.” *Id.* The plaintiff, however, had no contract with the railroad. Rather, he filed suit because one of his buildings burned down allegedly as a result of sparks thrown off by a locomotive, and the court ruled that the jury should have been instructed that only “reasonable care or caution” was required. *Id.* at 244-46, 253. Nothing indicates, however, that any different standard of proof would have been required to try the case before the jury under either level of care.

Perhaps for this reason, the court of appeals treated the distinction between "gross," "ordinary," and "slight" negligence as a distinction without a difference. In *Bankard v. Baltimore & Ohio Railroad*,⁴⁹ for example, an exculpatory contract clause exempted the defendant railroad from any claims for damage "except such as may arise from the gross negligence or default of the agents or officers" of the railroad.⁵⁰ After concluding that this exculpatory clause was effective, the court proceeded to use the terms "negligence" and "gross negligence" at different points throughout the opinion without any distinction between them.⁵¹

The court of appeals also began to question the utility of oscillating between varying standards of "gross," "ordinary," or "slight" negligence in varying types of tort cases.⁵² As the court complained in *Baltimore & Ohio Railroad v. Breinig*:⁵³

[T]he courts have often attempted, by some general definition, to fix the standard or degree of diligence imposed by the law in particular cases . . . and the attempt to prescribe such a standard has often produced difficulty and confusion instead of tending to establish plain and intelligible rules so as to aid the jury in their investigations, and restrain them within just and proper limits.⁵⁴

Indeed, to the extent that the terms "gross" or "slight" were merely descriptive terms with no legal distinction, they could have no role in restraining a jury "within just and proper limits."⁵⁵ Juries faced "difficulty and confusion" in the absence of a separate legal standard.⁵⁶

49. 34 Md. 197 (1871).

50. *Id.* at 202.

51. *See id.* at 203-04. The court ultimately concluded that evidence "that cars became detached or brook [sic] loose from a train" and "collided with the train below," that "on one occasion a wheel broke, causing damage," that, on another occasion, "the train ran off the track in turning around a curve," or that "a collision occurred" was not "of itself proof of gross negligence." *Id.* The key to this striking conclusion, however, lay in the fact that these events all took place during the Civil War, at a time when the Confederate Army was attacking the railways. *Id.* at 204.

52. *See, e.g., Baltimore & Ohio R.R. v. Schumacher*, 29 Md. 168, 177-78 (1868) (rejecting a claim that plaintiff was required to bear a "higher degree of proof" and dismissively referring to "the metaphysical shades of distinction between very slight and fraudulently gross neglect").

53. 25 Md. 378 (1866).

54. *Id.* at 386.

55. *Id.* at 386-87.

56. *Id.* at 386.

The court's 1880 decision in *Schermer v. Neurath*⁵⁷ reflects the demise of gross negligence as a species of negligence. In that case, the defendant held bonds belonging to the plaintiff when a third party stole them, and the plaintiff claimed that the defendant was negligent in failing to keep the bonds safe.⁵⁸ The court of appeals noted "a well recognized distinction in regard to the care and diligence required of a *bailee for hire*, and one who undertakes to keep property *without reward*."⁵⁹ A bailee for hire "is obliged to exercise that care and diligence which is ordinarily exercised by persons in regard to the business or thing committed to his care" or "ordinary diligence."⁶⁰ A bailee without reward is "liable only for wrongful conduct, or according to the expression used in many cases, gross negligence."⁶¹

Without expressly rejecting this "well recognized distinction," the court declined to apply it, after noting that:

The terms "*gross and slight negligence*" have . . . been the subject of some criticism of late, on the ground of not being legal terms, and not importing a precise and definite idea of actionable negligence And in *Wilson v. Brett*, 11 [*Meeson & Welsby*], 115, Baron Rolfe said, he "could see no difference between *negligence* and *gross negligence*, that it was the same thing with the addition of a vituperative epithet."⁶²

The court concluded that the defendant, even though an unpaid bailee, "is bound to observe such care in the custody of property committed to his keeping, as persons of *ordinary prudence* in his *situation and business*, usually bestow in the custody and keeping of like property belonging to themselves," and that "want of ordinary diligence is . . . a question for the jury."⁶³

57. 54 Md. 491 (1880).

58. *Id.* at 495.

59. *Id.* at 496 (emphasis added).

60. *Id.*

61. *Id.*

62. *Breinig*, 54 Md. at 497.

63. *Id.* (emphasis added). This standard was first set out in *Maury v. Coyle*, where the court stated that an unpaid bailee was "bound to use ordinary diligence" and upheld the trial court's definition of ordinary diligence as "such care in the custody and keeping of such bonds, as persons of common prudence in their situation and business, usually bestow in the custody and keeping of similar property belonging to themselves." *Maury v. Coyle*, 34 Md. 235, 247, (1871) (emphasis omitted). Nothing in *Maury* itself addresses the issue of gross negligence. The annotations to *Maury*, however, state that "[i]t has been most strenuously maintained that a gratuitous bailee is responsible only for loss or injuries resulting from his *gross negli-*

The court's decision in *Schermer* was consistent with, but did not cite, its earlier 1874 ruling in *McHenry v. Marr*.⁶⁴ *McHenry* provides the court's strongest statement rejecting gross negligence as a separate standard of care from ordinary negligence.⁶⁵ In what would be a negligent breach of contract case today, the plaintiff claimed that the defendants failed to use proper care when they constructed a wall, which subsequently fell down.⁶⁶ The defendants sought a jury instruction that there could be no recovery unless they were guilty of "gross negligence," and the trial court adopted a standard of "such ordinary care in the [creating] of said wall, as prudent men usually exercise in regard to their own property."⁶⁷ The court of appeals held that there was no difference between these two standards: "[g]ross negligence and ordinary care are correlative terms. Want of ordinary care is gross negligence, and *vice versa*."⁶⁸

2. Contributory Negligence as a Matter of Law

A large number of early cases refer to conduct by a plaintiff as grossly negligent where the legal question before the court was whether the plaintiff engaged in contributory negligence as a matter of law.⁶⁹ Generally, negligence, whether the defendant's negligence or the plaintiff's contributory negligence, "is not so much a question of law as it is a question of fact, depending for its determination upon a consideration of all the attending facts and circumstances," and such consideration is left to the jury.⁷⁰ In some cases, however, "the acts of the injured party are so glaringly careless and negligent, that the court will declare them to constitute negligence in law."⁷¹ Such cases "always present some prominent and decisive act, in regard to the effect and character of which no room is left for ordinary minds to differ."⁷²

gence. But there is no such legal term as *gross negligence*, as distinguished from fraud or bad faith." *Id.* at 241-42.

64. 39 Md. 510 (1874).

65. *See id.* at 528.

66. *Id.*

67. *Id.* at 528-29.

68. *Id.* at 529; *see also* State v. Western Md. R.R., 63 Md. 433, 444 (1885) (citing English cases for the proposition that "[t]here are degrees of negligence in the sense that some acts evidence a greater degree of carelessness and recklessness than do other acts which may still be classed as negligent[, but] the difference between gross and ordinary negligence is more a question of fact than of law").

69. *See infra* notes 70-73 and accompanying text.

70. Baltimore & Ohio R.R. v. State, 36 Md. 366, 377 (1872).

71. *Id.* at 376.

72. Baltimore & Ohio R.R. v. Fitzpatrick, 35 Md. 32, 46 (1872).

The court of appeals frequently referred to such contributory negligence as gross negligence.⁷³

Unlike the “legal duty cases” described in the preceding section,⁷⁴ however, these cases did not purport to define gross negligence as a separate level of tort duty, and they did not expressly articulate any distinction between gross negligence and some other form of conduct.⁷⁵ Rather, in those cases where the court of appeals found that a plaintiff’s conduct was so clearly negligent that there was no issue for a jury to decide, the court tended to refer to such conduct as grossly negligent, even though the term itself made no difference in the case.⁷⁶

At the same time, the grossly negligent conduct to which the court referred in these cases contained the same basic elements of recklessness, risk-taking, and indifference to harm that may be found in modern gross negligence decisions. For example, in *Baltimore & Ohio Railroad v. State*,⁷⁷ according to unrebutted testimony, the plaintiff’s decedent was struck by a train after he attempted to cross the tracks, (1) when the train was in sight and heading toward the crossing, and (2) either with the knowledge that the train was coming down the street or after passing through the warning gates that had already come down and under circumstances where “if he had stopped, looked and listened . . . he would have seen [the train], and not risked his life.”⁷⁸ In other words, the plaintiff’s decedent knew that the train was coming or that the gates were down, but chose to run the risk of crossing the tracks. The court found that this was a case “of inexcusable recklessness and grossly contributory negligence,” thus barring plaintiff from any recovery as a matter of law.⁷⁹

73. See *United Rys. & Elec. Co. v. Sherwood Bros.*, 161 Md. 304, 310, 157 A. 280, 282 (1931) (stating that in a case where a truck driver filed suit after a collision with a train, the driver was barred by contributory negligence, as a matter of law because “[h]is negligence was so gross as to preclude the right of plaintiff to recover”); *Consolidated Gas Co. v. Crocker*, 82 Md. 113, 120, 33 A. 423, 425 (1895) (stating that where large quantities of explosive gas have escaped into a building “it is obviously in law a grossly negligent act to enter with a lighted candle or lamp, or to strike a match after entering”).

74. See *supra* Part II.A.1.

75. See *generally supra* notes 70-73 and accompanying text.

76. The modern opinions on contributory negligence apply essentially the same legal standard, but do not make such references to gross negligence. See, e.g., *Saponari v. CSX Transp.*, 126 Md. App. 25, 727 A.2d 396 (1999).

77. 75 Md. 526, 24 A. 14 (1892).

78. *Id.* at 537, 24 A. at 18.

79. *Id.*

In these contributory negligence cases, the court of appeals repeatedly described plaintiffs as grossly negligent or reckless where they consciously exposed themselves to the risk of death or injury:

When the facts show . . . that the injury had resulted from a deliberate but unsuccessful effort to cross the track in the face of evident danger, or, when the disaster had been due to a miscalculation as to the chances of the individual being able to clear the track before the car would reach the point where the collision coincidentally occurred, a recovery has been denied upon the obvious ground that such a reckless attempt was gross negligence on the part of the person injured.⁸⁰

The court applied similar reasoning to cases in which plaintiffs either consciously disregarded a known legal duty or knowingly violated a safety rule or regulation.⁸¹

*Bacon v. Baltimore & Potomac Railroad*⁸² provides an excellent illustration of the nature of "grossly negligent" or "reckless" conduct that the court held to be contributory negligence as a matter of law. There, George Bacon walked several miles down a railroad track, go-

80. *United Rys. & Elec. Co. v. Watkins*, 102 Md. 264, 268, 62 A. 234, 235 (1905); *see also State v. United Rys. & Elec. Co.*, 97 Md. 73, 76, 54 A. 612, 614 (1903) (finding driver to be contributorily negligent where "with his eyes open, after seeing [a street car] approaching, he attempted to cross . . . in a slow trot, without in the least hastening his speed"); *Reidel v. Philadelphia, Wilmington & Baltimore R.R.*, 87 Md. 153, 159, 39 A. 507, 509 (1898) (finding decedent who had been run over by a train to be contributorily negligent as a matter of law where "[i]t seems to us the conduct of the plaintiff was reckless" and "[i]f the deceased did see or hear the approaching train in time and failed to get out of the way, he was certainly guilty of the grossest negligence"); *Baltimore & Ohio R.R. v. State*, 69 Md. 551, 556, 16 A. 212, 213 (1888) (stating that decedent was guilty of contributory negligence as a matter of law where he was run over by a train and "[a]ll other persons at or about the scene of the accident heard and saw the approach of the train, and paid heed to it" and "[a] more daring experiment, or grosser act of negligence, on the part of the deceased, could scarcely be imagined").

81. In *Baltimore City Passenger Railway v. Wilkinson*, for example, a passenger was injured after getting on a train at the wrong end, despite the fact that he was aware of railway regulations that forbade any person from getting on or off a train at the front end of a car. *See Baltimore City Passenger Ry. v. Wilkinson*, 30 Md. 224, 225 (1869). The court held that "if the plaintiff knowingly violated said regulation, it was conclusive evidence of negligence on his part, and if he were injured in consequence thereof he was not entitled to recover." *Id.* at 232.

82. 58 Md. 482 (1882).

ing from his house to a store.⁸³ During the time he was in the store, a regularly scheduled express train was due to pass, but was late.⁸⁴ Upon leaving the store, Bacon took out his watch and told his companion that a “very swift running train” came along at that time, but that it “ought to have passed.”⁸⁵ Bacon nonetheless decided to walk back home on the tracks, rather than by way of a slightly longer road running in the same direction.⁸⁶ As the court of appeals stated, Bacon “assumed the risk of walking up the railroad track for a distance of over a mile and a half, knowing that it was about the time for the passage of an express train, and without knowing whether or not such train had in fact passed.”⁸⁷ Thus, the plaintiff could not recover for Bacon’s death after he was struck by the train because Bacon was guilty of contributory negligence as a matter of law.⁸⁸

Other cases involved plaintiffs who failed to take even the smallest precaution for their safety, such as slowing down and looking before crossing a street.⁸⁹ The court distinguished between such reckless conduct and simple negligence in *Cooke v. Baltimore Traction Co.*⁹⁰ There, the court compared a negligent failure to see an oncoming

83. *Id.* at 486.

84. *Id.* at 487.

85. *Id.*

86. *Id.*

87. *Id.* at 488.

88. *Id.* at 488-89.

89. *See* *Washington, Baltimore & Annapolis R.R. v. State*, 140 Md. 115, 118, 116 A. 911, 912 (1922). Here, decedent had been killed at a train crossing. The court stated that:

[T]here could not be room for a difference of opinion among reasonable men that decedent was guilty of negligence of the grossest kind If he used his eyes he must have seen the approaching train in time to avoid danger, and if he listened he must have heard it. If he knew of the approach of the train, and stood near enough to the track to be hit, he was equally guilty of contributory negligence.

Id.; *Brehm v. Philadelphia, Baltimore & Washington R.R.*, 114 Md. 302, 310, 79 A. 592, 595 (1911) (finding that there was contributory negligence as a matter of law in a case arising from a collision with a train where “there is abundant evidence to show that the accident was caused by [plaintiff’s] recklessness in rapidly driving towards the crossing”); *Hatcher v. McDermot*, 103 Md. 78, 84, 63 A. 214, 216 (1906) (finding the plaintiff’s claim to be barred by contributory negligence as a matter of law where the court found it “difficult to understand” how the plaintiff could have failed to observe an oncoming streetcar’s headlights before the plaintiff attempted to cross the street “unless he was guilty of gross negligence, amounting to recklessness”).

90. 80 Md. 551, 31 A. 327 (1895).

streetcar, after properly looking both ways, with a reckless failure to look even before entering an intersection:

In the latter instance his failure to see [the oncoming streetcar] would have resulted from his omission to do that which it was his plain duty to do, viz., to look To say that his failure to see the car when he did look is, as an indication of negligence, equivalent to a failure to see it when he did not look, is to ignore the self-evident difference between an affirmative attempt to avoid an injury and a reckless indifference to the happening of one.⁹¹

As with the modern definition of gross negligence, the conduct at issue in these cases was not merely negligent but reckless, and usually involved some decision that exposed the plaintiff to a risk of serious harm, or circumstances under which such a decision could be inferred.⁹²

3. Gross Negligence Supporting an Inference of Bad Faith

A distinct line of cases dating from 1839 to 1922 held that where a contract designates a third party to make estimates that will be binding on the parties to the contract, gross negligence by the third party may be evidence that the estimate was made in bad faith.⁹³ In *Wilson*

91. *Id.* at 557-58, 31 A. at 329. The court referred to a defendant's "indifference" as gross negligence in *Northern Central Railway v. Price*. N. Cent. Ry. v. Price, 29 Md. 420, 439 (1868). There, Robert Price was struck by a train while crossing the train tracks. *Id.* at 422. After the collision, Price was assumed to be dead by the railway employees, "though showing no external wound to justify the conclusion that life was in fact extinct." *Id.* at 439. Without providing any notice to Price's family or sending for a physician, the employees locked Price in a railway warehouse, despite the fact that "it was remarked at the time, that the man ought to be examined, and that the place was unfit for him to be placed in." *Id.* The next morning, Price was found dead, but still warm, in a stooping posture several feet from where the employees had left him. *Id.* The court concluded that these actions were "strongly indicative of the grossest negligence, and an entire indifference of the most ordinary feelings of humanity." *Id.*

92. *See* *Pennsylvania R.R. v. State*, 61 Md. 108, 121 (1883) (finding contributory negligence as a matter of law where "[u]nless a man were intent on self-murder it is difficult to account for an act exhibiting such an utter disregard of ordinary care and caution, and such extreme recklessness"); *Commissioners of Anne Arundel County v. State*, 107 Md. 210, 218-19, 68 A. 602, 605-06 (1908) (stating that the plaintiff's claim was barred by contributory negligence as a matter of law where "it clearly appears [from the evidence] that the plaintiff was grossly negligent" and he "plunged recklessly" into an open drawbridge).

93. *See infra* notes 94-100 and accompanying text.

v. York & Maryland Line Railroad,⁹⁴ a contract between the plaintiff and defendant required the estimation of water expenses, and the court ruled that this estimate was binding upon the parties unless it could be shown that the estimate was made in bad faith.⁹⁵ The court also held that gross negligence in making the estimate could not demonstrate bad faith as a matter of law, but that it was evidence “to be left to the jury, from which they might infer fraud, or the want of *bona fides* in the making of said estimate.”⁹⁶

Nearly fifty years later, in *Lynn v. Baltimore & Ohio Railroad*,⁹⁷ the court applied the same rule to a contract calling for the delivery of ice. Again, the court refused to allow a showing of gross negligence to supplant the required finding of bad faith, but allowed a jury to consider evidence of gross negligence as evidence of bad faith.⁹⁸

The court of appeals most recently applied the rule that gross negligence may be evidence of bad faith in *Anderson v. Watson*,⁹⁹ decided in 1922. The court held that:

[T]he facts to which we have adverted compel one of two conclusions, either that the company, in failing to discover over so long a period so striking an inaccuracy in its scales was guilty of negligence so gross that fraud may be inferred from it . . . or that the company actually knew and intended the scales to be inaccurate.¹⁰⁰

While recent decisions cite this line of cases for the proposition that estimates made in good faith are binding upon the parties to a contract, none of those decisions indicate whether allowing a jury to infer

94. 11 G. & J. 58 (Md. 1839).

95. *Id.*

96. *Id.* at 79; *see also* *Baltimore & Ohio R.R. v. Resley*, 14 Md. 424, 441 (1859).

97. 60 Md. 404 (1883).

98. *Id.* at 415. The court stated that, “[i]t was not enough that the jury might believe from the evidence that [the third party] unreasonably rejected the ice, or that he was grossly wrong in his judgment . . . ; they must go further, and actually infer and find fraud or bad faith.” *Id.*

99. 141 Md. 217, 228, 118 A. 569, 573 (1922); *see also* *Mayor of Baltimore v. Clark*, 128 Md. 291, 313, 97 A. 911, 919 (1916). In this case, there was:

[E]vidence . . . from which the jury might have found that the decision of the Water Engineer . . . was affected by bad faith. Not bad faith in the sense that he purposely or intentionally wronged the appellee, or knowingly disregarded his rights but in the sense that his decision was based upon a classification characterized by gross negligence or incapacity on the part of the resident engineer.

Id.

100. *Anderson*, 141 Md. at 228, 118 A.2d at 573.

bad faith from gross negligence in the making of such an estimate remains valid law.¹⁰¹

4. *Bannon v. Baltimore & Ohio Railroad*

The clearest definition of gross negligence in the nineteenth and early twentieth century cases comes from *Bannon v. Baltimore & Ohio Railroad*.¹⁰² There, the minor plaintiff alleged that the defendant railroad should be held liable for punitive damages.¹⁰³ The court of appeals rejected this claim, holding that "there was no evidence of gross negligence" upon which a jury "might allow punitive or exemplary damages."¹⁰⁴ In reaching this conclusion, the court stated that "[g]ross negligence is a technical term; it is the omission of that care 'which even inattentive and thoughtless men never fail to take of their own property,' it is a violation of good faith It implies malice and evil intention."¹⁰⁵

The court also rejected the contention that gross negligence was necessarily a jury issue, even though there was evidence of ordinary negligence.¹⁰⁶ Despite acknowledging that "'[w]hat is, and what is not gross negligence, is often a mixed question of law and fact,'"¹⁰⁷ the court stated that "[w]hether malice or gross negligence existed, is a question for the jury; but what facts are sufficient to prove malice or gross negligence, is in such cases the province of the court to determine."¹⁰⁸ These statements, however, are little more than dicta. Since the plaintiff failed to allege facts to support claims beyond ordinary negligence, he was not entitled to punitive damages under any of the possible standards.¹⁰⁹

In comparison with the "legal duty" and contributory negligence cases, *Bannon's* analysis, which connects gross negligence to implied malice or a violation of good faith, bears the most similarity to the modern definitions of gross negligence.¹¹⁰ At the time, however, *Bannon* stood alone. No Maryland case was cited in *Bannon* to support this definition.¹¹¹ More importantly, while other cases repeatedly cite

101. See *Laurel Race Course, Inc. v. Regal Constr. Co.*, 274 Md. 142, 149-50, 333 A.2d 319, 325 (1975).

102. 24 Md. 108 (1866).

103. *Id.*

104. *Id.* at 124.

105. *Id.* (citation omitted).

106. *Id.*

107. *Id.* (citation omitted).

108. *Id.*

109. *Id.*

110. See *id.*

111. See *id.*

Bannon for its holdings with respect to liability to minors and the calculation of pecuniary damages,¹¹² only one early decision cites *Bannon's* gross negligence formulation.¹¹³ In that decision, it is not clear that gross negligence, as opposed to ordinary negligence, was at issue.¹¹⁴ With this lone exception, no case cites *Bannon's* formulation of gross negligence for nearly 120 years.¹¹⁵

5. The Guest Statute Cases - *Romanesk v. Rose* and *White v. King*

Putting the dicta in *Bannon* aside, the first two Maryland cases to apply the term gross negligence with any accompanying legal analysis actually did not involve Maryland law at all. In the mid-1960s, the court decided *White v. King*¹¹⁶ and *Romanesk v. Rose*.¹¹⁷ Both of these cases involved plaintiffs who were riding in the defendants' automobiles and were injured in an out-of-state collision.¹¹⁸ In both cases, the collision occurred in a state with a guest statute that required any guest in an automobile to prove that the driver was grossly negligent.¹¹⁹ In each case, the court concluded that there was sufficient evidence for the jury to decide whether the defendant had been

112. See, e.g., *Rhone v. Fisher*, 224 Md. 223, 225, 167 A.2d 773, 775 (1961); *McMahon v. Northern Cent. Ry. Co.*, 39 Md. 438, 443 (1874); *Baltimore & Ohio R.R. v. Shipley*, 31 Md. 368, 374 (1869).

113. In *Darby Candy Co. v. Hoffberger*, the court of appeals held that there was insufficient evidence to support the plaintiff's claim of "gross carelessness and negligence" on the part of the defendant, who had rented two horses from the plaintiff. *Darby Candy Co. v. Hoffberger*, 111 Md. 84, 87, 73 A. 565, 566 (1909).

114. Throughout its opinion in *Darby*, the court used the term "gross carelessness and negligence," as pled in the plaintiff's complaint, and the court cited *Bannon's* standard of gross negligence as implying "malice and evil intention" and "the omission of that care which even inattentive and thoughtless men never fail to take of their own property." *Id.* at 90, 73 A. at 567. The holding, however, would have been the same under an ordinary negligence standard; there was no evidence of any sort of negligence on the part of the defendant. See *id.* at 88, 73 A. at 566-67.

115. After *Darby*, *Bannon's* gross negligence standard is next cited in *Liscombe v. Potomac Edison Co.*, 303 Md. 619, 634-35, 495 A.2d 838, 845-46 (1985). *Davis v. Gordon*, cites *Bannon* in a discussion of punitive damages, but only for the purpose of distinguishing it on its facts. See *Davis v. Gordon*, 183 Md. 129, 134, 36 A.2d 699, 701 (1944).

116. 244 Md. 348, 223 A.2d 763 (1966).

117. 248 Md. 420, 237 A.2d 12 (1968).

118. See *White*, 244 Md. at 351, 223 A.2d at 765; *Romanesk*, 248 Md. at 421-22, 237 A.2d at 13.

119. See *White*, 244 Md. at 351, 223 A.2d at 765; *Romanesk*, 248 Md. at 422-23, 237 A.2d at 14.

grossly negligent and compared the standard used in the foreign civil law with Maryland's standard for criminal gross negligence.¹²⁰

In *White*, the passengers were injured during a trip from College Park, Maryland to Grand Rapids, Michigan, when their car ran off the side of a Michigan highway after the driver fell asleep.¹²¹ Plaintiffs presented evidence that the driver drove for all but two and one-half hours of the 500-mile trip; the passengers repeatedly asked to drive because they felt the driver was too tired; he drove off the road one other time before the accident occurred; and he was once required to come to a complete stop to avoid running into a highway overpass.¹²² The court of appeals held that this was sufficient evidence of a "wanton neglect" of the passengers' safety to allow the jury to determine whether the driver was grossly negligent under Michigan law.¹²³ The court also stated that these facts would raise a triable issue of gross negligence under Maryland law.¹²⁴ The standard applied by the court, however, was not taken from the earlier civil cases, but from Maryland's cases dealing with manslaughter by automobile, which required the conduct of the defendant "to amount to 'a wanton or reckless disregard of human life or for the rights of others.'"¹²⁵

Romanesk involved two couples who left Maryland to attend a party in Virginia.¹²⁶ On the way back from the party, while still in Virginia, the driver accelerated to "'sixty or seventy miles an hour' [while] in a thirty-five mile zone" where both sides of the road were under construction and "torch-topped barrels" were spaced along the edges of the roadway.¹²⁷ The driver then "reduced his speed to 'fifty or fifty-five miles an hour'" in an attempt to turn, and ran off the road into a concrete abutment.¹²⁸ The driver testified that he attempted to turn, but was misled by the construction barrels as to the location of the turn.¹²⁹ The court of appeals found sufficient evidence to support the jury's verdict of gross negligence under Virginia law.¹³⁰

120. See *White*, 244 Md. at 361-62, 223 A.2d at 771; *Romanesk*, 248 Md. at 423, 237 A.2d at 14.

121. *White*, 244 Md. at 358-60, 223 A.2d at 769-70.

122. *Id.* at 361, 223 A.2d at 770-71.

123. *Id.* at 361-62, 223 A.2d at 771.

124. *Id.*

125. *Id.* at 361 n.2, 223 A.2d at 771 n.2 (quoting *Johnson v. State*, 213 Md. 527, 531, 132 A.2d 853, 855 (1957)).

126. *Romanesk*, 248 Md. at 421, 237 A.2d at 13.

127. *Id.* at 421-22, 237 A.2d at 13.

128. *Id.* at 422, 237 A.2d at 13.

129. *Id.*

130. *Id.* at 423-24, 237 A.2d at 14.

The court defined gross negligence as “an intentional failure to perform a manifest duty in reckless disregard of the consequences as affecting the life or property of another, and . . . a thoughtless disregard of the consequences without the exertion of any effort to avoid them.”¹³¹ In the court’s view, the jury’s verdict was proper because it could have found that: (1) the driver “should have been aware of the obviously dangerous conditions” resulting from the construction because he was on the same roadway earlier that day; (2) “the four alcoholic drinks he had consumed [and] the lateness of the night . . . impaired his ability to remain alert;” (3) “he failed to look effectively before he attempted to make a right turn into what he thought was a roadway;” and (4) “he drove his automobile on an unlighted roadway under reconstruction at an excessive rate of speed in utter disregard of prudence.”¹³² As in *White*, the court affirmed that these facts would also support a finding of gross negligence under Maryland law, stating that “[t]he law in Maryland as to what is and is not gross negligence in criminal cases involving manslaughter by automobile is in line with the Virginia decisions under the motor vehicle guest statute.”¹³³

White v. King and *Romanesh v. Rose* were decided in 1966 and 1968, respectively.¹³⁴ As shown in Part II.A, the court of appeals frequently used the term gross negligence throughout the preceding one hundred and fifty years, but no case found a claim of gross negligence to be legally sufficient based upon a specific standard of law.¹³⁵ *Bannon* was the first case to give the term any specific legal significance, but *Bannon* involved no reckless or wanton conduct, and *Bannon* was not followed by any subsequent decisions applying or elucidating this standard.¹³⁶ As of 1967, the court had simply not been called upon to define gross negligence as a separate legal standard under Maryland civil law.

B. *The Development of the Modern Definition.*

The modern definition of gross negligence has been applied in four major contexts. Between 1972 and 1992, the Maryland courts used a gross negligence standard to determine whether to award punitive damages,¹³⁷ until the court of appeals in *Owens-Illinois, Inc. v. Ze-*

131. *Id.* at 423, 237 A.2d at 14 (citing 4 BLASHFIELD’S CYCLOPEDIA OF AUTOMOBILE LAW AND PRACTICE, pt. 2, § 2771 (1946)).

132. *Romanesh*, 248 Md. at 424, 237 A.2d at 14-15.

133. *Id.* at 425, 237 A.2d at 15.

134. See *White*, 244 Md. at 348, 223 A.2d at 763; *Romanesh*, 248 Md. at 420, 237 A.2d at 12.

135. See *supra* Part II.A.

136. See *supra* Part II.A.4.

137. See *infra* Part II.B.1.a-c.

*nobia*¹³⁸ held that an "actual malice" standard would be required in the future.¹³⁹ However, gross negligence or "willful and wanton" conduct is still litigated in cases involving a statutory immunity, cases involving exculpatory contract clauses, and cases addressing a landowner's liability to trespassers.¹⁴⁰ In each type of case, the courts have emphasized different factors in their analyses but have applied the same underlying standard for gross negligence, reckless indifference, or willful and wanton conduct.¹⁴¹

1. Punitive Damages Under the "Implied Malice" Standard

a. Automobile Tort Cases

In 1972, the court of appeals held, in *Smith v. Gray Concrete Pipe Co.*,¹⁴² that a showing of gross negligence was sufficient evidence of implied malice to support a claim for punitive damages in a tort case.¹⁴³ The court applied the same definition of gross negligence that it had set forth in *Romanesk* and had applied in Maryland's criminal manslaughter cases.¹⁴⁴ Thus, with respect to a tort claim arising from an automobile accident, a plaintiff could recover punitive damages if the defendant acted with a "'wanton or reckless disregard for human life' in the operation of a motor vehicle, with the known dangers and risks attendant to such conduct."¹⁴⁵ The plaintiffs in *Smith* filed suit after their son was killed in an automobile accident caused by a truck driven by the defendant's underage and unlicensed employee.¹⁴⁶ Plaintiffs alleged that: (1) the defendant knew that it "was obligated by law to insure that its drivers were over 21 years of age, possessed current medical certificates and chauffeurs' licenses, and that they were adequately informed of safety regulations and procedures before allowing them to drive company trucks;" and (2) defendant knew that the hood of the truck was only held down by two strands of baling wire, which were "inadequate to prevent the hood from flying up and obscuring the driver's vision, as it had [done] in the past."¹⁴⁷ The plaintiffs further alleged that the defendant "knew or should have known that the truck was completely uncontrollable at

138. 325 Md. 420, 601 A.2d 633 (1992).

139. See *infra* note 231.

140. See *infra* Part II.B.2-4.

141. See *infra* Part II.B.2-4.

142. 267 Md. 149, 297 A.2d 721 (1972).

143. *Id.* at 167-68, 297 A.2d at 731-32.

144. *Id.* at 167, 297 A.2d at 731.

145. *Id.* at 168, 297 A.2d at 731-32.

146. *Id.* at 152, 297 A.2d at 723.

147. *Id.* at 169, 297 A.2d at 732.

any speed in excess of 50 m.p.h.," was being operated on a highway where it would be required to go at a greater speed, was "loaded illegally overwidth, but possessed no overwidth permit, although the company knew that such permits were required, and was loaded in such a fashion that the rearview mirrors were obstructed."¹⁴⁸ In total, the vehicle was found to be in violation of fifteen various safety regulations, in addition to the driver's lack of qualifications.¹⁴⁹ While traveling on the highway, the baling wire broke, the truck's hood flew up, and the unqualified driver pulled over into the middle lane of the highway, instead of the right shoulder which he was legally required to use.¹⁵⁰ The automobile in which the plaintiff's son was traveling then collided with the back of the truck.¹⁵¹

The court held that these allegations were sufficient to state a claim for punitive damages against the employer, but not the driver.¹⁵² According to the court, the driver's conduct was not willful or wanton because plaintiffs alleged nothing more than:

[A] breach of duty by [the driver] in operating a truck without being assured of its condition, and a failure to respond correctly to the emergency confronting him when the hood flew up. The failure to respond properly under exigent circumstances underscores the very distinction we make between a situation reflecting 'mere' negligence . . . and that which we say may entitle an injured party to exemplary damages.¹⁵³

In contrast, the employer's conduct "did not occur under the pressures of a highway crisis," but "reflect[ed] a premeditated decision, deliberately arrived at, by an indifferent employer in possession of facts which should have indicated almost certain harm to others."¹⁵⁴

In another automobile tort case, *Nast v. Lockett*,¹⁵⁵ the court of appeals held that one driver, who was intoxicated at the time of an accident, could be held liable for punitive damages, while another driver, who was driving under the influence of alcohol, could not.¹⁵⁶ In reaching this conclusion, the court distinguished mere negligent or even reckless conduct from the sort of outrageously reckless conduct

148. *Id.* at 170, 297 A.2d at 732-33.

149. *Id.* at 170, 297 A.2d at 733.

150. *Id.*

151. *Id.* at 151, 297 A.2d at 723.

152. *Id.* at 171, 297 A.2d at 733.

153. *Id.*

154. *Id.* at 172, 297 A.2d at 734.

155. 312 Md. 343, 539 A.2d 1113 (1988).

156. *Id.* at 366-67, 539 A.2d at 1124-25.

needed to support a claim of "reckless indifference."¹⁵⁷ It stated that "[o]nly conduct that is of an extraordinary or outrageous character will be sufficient to imply th[e] state of mind" needed to support a gross negligence claim.¹⁵⁸ Thus, not only is simple negligence insufficient to support a gross negligence claim, "reckless driving may not be enough. It is not reckless driving that allows punitive damages; it is the reckless disregard for human life. Reckless driving may be a strong indicator, but unless it is of an extraordinary or outrageous character, it will ordinarily not be sufficient."¹⁵⁹

The plaintiff in *Nast* was injured in a three-car accident caused by the two defendants, Lockett and Houck.¹⁶⁰ In holding that Houck, the intoxicated driver, could be held liable for punitive damages, while Lockett could not, the court espoused a test that holistically considered the degree of a driver's impairment along with any other wrongful acts that he or she may have committed. The court articulated the test as follows:

[I]n civil automobile accident cases involving a drinking driver, [the question] whether the driver had a wanton or reckless disregard for human life, in the operation of an automobile, is to be tested by a sliding scale. As the degree of impairment by the voluntary consumption of alcohol increases, the need for other aggravating circumstances lessens, and vice versa. In other words, a high degree of impairment calls for other aggravating circumstances, if any at all, of a less serious nature. The less the degree of impairment, the more the other conduct of the drinking driver needs to be extraordinary and outrageous.¹⁶¹

The court posited two circumstances under which the "state of mind" for gross negligence might be inferred by a jury: "[f]irst one may infer the driver's state of mind from the manner of operation of

157. *Id.* at 352, 539 A.2d at 1117.

158. *Id.* at 351-52, 539 A.2d at 1117.

159. *Id.* at 352, 539 A.2d at 1117.

160. *Id.* at 347-48, 539 A.2d at 1115. The accident happened when Lockett tried to make a U-turn across two lanes of oncoming traffic, but could not complete the turn and had to back up into oncoming traffic to complete it. *Id.* at 347, 539 A.2d at 1115. Houck's vehicle collided with Lockett's, crossed into the oncoming traffic on the other side of the street, and struck the plaintiff's car. *Id.* at 348, 539 A.2d at 1115. There was conflicting evidence as to whether Houck had sufficient time and distance to stop his car before striking Lockett's vehicle. *Id.* at 347, 539 A.2d at 1115. There was sufficient evidence for a jury to conclude that Houck was legally intoxicated at the time of the accident, and that Lockett was driving under the influence of alcohol, but not intoxicated. *Id.* at 356, 359, 539 A.2d at 1120-21.

161. *Id.* at 362, 539 A.2d at 1122.

the motor vehicle,” because “[o]utrageously dangerous driving permits an inference that the driver does not care whether he kills or severely injures someone else.”¹⁶² “Second, one may infer a reckless or wanton disregard for human life from the combined acts of voluntarily drinking until intoxicated and then operating such a potentially dangerous instrumentality as an automobile.”¹⁶³ Under the circumstances of this case, “a finding by the jury that [Houck] was driving while intoxicated, would be sufficient for the jury to conclude that he had a wanton or reckless disregard for human life.”¹⁶⁴ However, the court stated that:

[O]ther conduct on Lockett’s part of a more extraordinary and outrageous nature than the traffic laws which she may be found to have violated would have to be coupled with the fact that she was driving while under the influence of alcohol in order to elevate her negligence to gross negligence.¹⁶⁵

In *Thorne v. Contee*,¹⁶⁶ the court of special appeals relied upon *Nast* in addressing the circumstances under which a driver’s knowledge of his incapacity could be considered recklessly indifferent to human life.¹⁶⁷ In that case, the plaintiff was injured when the defendant truck driver had a seizure and lost control of his tractor-trailer, which crossed the highway median and struck the plaintiff’s car.¹⁶⁸

There was evidence that, at the time of the accident, the driver was aware that the truck had a steering defect that “caused the tractor to pull hard to the left,” and he had “a history of at least a dozen reported seizures in the preceding nine years,”¹⁶⁹ but had not reported

162. *Id.* at 362, 539 A.2d at 1123.

163. *Id.* at 362-63, 539 A.2d at 1123. The court cautioned, however, that the ultimate question must focus, not on the summation of various factors, but on the holistic question of whether “the evidence considered as a whole [permits] a rational inference that the driver had a reckless indifference for human life.” *Id.* “In many cases, it is the drinking that produces the negligent driving. The cause may not simply be added to the effect.” *Id.* at 363-64, 539 A.2d at 1123. In essence, if “the jury may find that consideration of the extent to which the driver had been drinking gives additional insight into the driver’s probable state of mind, . . . it is appropriate to add the fact of drinking to the mix of facts being considered.” *Id.* at 363, 539 A.2d at 1123.

164. *Id.* at 366, 539 A.2d at 1124.

165. *Id.* at 367, 539 A.2d at 1125.

166. 80 Md. App. 481, 565 A.2d 102 (1990).

167. *Id.* at 489, 492-93, 565 A.2d at 106-07.

168. *Id.* at 485-86, 565 A.2d at 103-04.

169. *Id.* at 486, 565 A.2d at 104.

this problem on his employment application.¹⁷⁰ The court concluded that there was sufficient evidence upon which to base an award of punitive damages against the driver:

The jury could have concluded that Contee knew of his susceptibility to have seizures while driving and yet, after withholding that information from his employment application, obtained a job driving heavy tractor-trailers on public highways [T]he jury could find Contee's conduct was made even more outrageous by continuing to drive a tractor, with poor steering, that required all his faculties to be operating at an optimum level.¹⁷¹

In two other automobile tort cases, *Murphy v. Edmonds*,¹⁷² and *Baublitz v. Henz*,¹⁷³ the Maryland appellate courts rejected claims for punitive damages where the plaintiffs could not properly connect the cause of their injury and the alleged risk to which the defendants had supposedly been recklessly indifferent.¹⁷⁴ *Murphy* arose from a collision between a truck and an automobile after one of the truck's tires blew out.¹⁷⁵ There was evidence that the tire had been improperly repaired, and the jury could have properly inferred that the improper repair was known to the driver and his supervisor when they observed a hole in the tire's surface as a result of the repair.¹⁷⁶ The blowout, however, had not directly resulted from the improper repair, but from

170. *Id.* at 494, 565 A.2d at 108.

171. *Id.* at 494-95, 565 A.2d at 108. The court noted that Contee's behavior was even more outrageous than the behavior of the intoxicated driver in *Nast*. *Id.* at 492, 565 A.2d at 107 (stating that "where a person has reason to know that he suffers from an illness that can cause a seizure to occur without [warning], and then undertakes to operate a motor vehicle, it involves even more aggravated indifference to life than existed in *Nast*"). Here, the driver made a "deliberate, clear-headed decision to drive, knowing that he could, as in the past, pass out at any time without warning." *Id.* at 493, 565 A.2d at 107. The court, however, emphasized that punitive damages would not be awarded in all cases involving a driver who was susceptible to seizures. *Id.* at 495, 565 A.2d at 109. Rather, the court emphasized that in this case, the plaintiff was aware of repeated seizures for which he had been treated in at least six hospitals and for which he had been taking medication, but had stopped. *Id.* at 493, 565 A.2d at 108.

172. 325 Md. 342, 601 A.2d 102 (1992).

173. 73 Md. App. 538, 535 A.2d 497 (1988).

174. *Murphy*, 325 Md. at 377, 601 A.2d at 119; *Baublitz*, 73 Md. App. at 546-47, 535 A.2d at 500-01.

175. *See Murphy*, 325 Md. at 347, 601 A.2d at 104.

176. *Id.* at 376, 601 A.2d at 118-19.

rusting of the tire's steel belts, which had been caused by the improper repair but "was not visible upon external inspection."¹⁷⁷

Baublitz also arose from a collision between a delivery truck and the plaintiff's automobile.¹⁷⁸ On the day of the accident, the driver and his supervisor were aware that the truck was "acting up" and wasn't in "the greatest shape," but the supervisor decided to drive the truck anyway because "we're only making two stops."¹⁷⁹ Twice during the delivery, the driver informed the supervisor that the truck "was not operating properly."¹⁸⁰ At one point, the truck came over a hill, and the driver discovered that its brakes had gone out.¹⁸¹ The truck struck the plaintiff's car, and the plaintiff sought compensatory and punitive damages.¹⁸² In holding that the plaintiff was not entitled to punitive damages as a matter of law, the court of special appeals focused on the employer's knowledge of the specific problem with the truck's brakes.¹⁸³ As the court noted, "there was no evidence . . . that the brakes on the truck had failed" at any time other than the time of the collision, and there was no evidence that the other alleged mechanical problems of which the employer was aware "were in any way contributing causes to the collision."¹⁸⁴

b. Products Liability Cases

The decision in *Smith v. Gray Concrete Pipe Co.* was a narrowly focused one, and could easily have been interpreted as applying only to punitive damage claims in automobile tort cases.¹⁸⁵ The court of special appeals, however, rejected this view, and adapted the implied malice

177. *Id.* at 376, 601 A.2d at 119.

178. *Baublitz*, 73 Md. App. at 540-41, 535 A.2d at 498.

179. *Id.* at 542, 535 A.2d at 498.

180. *Id.*

181. *Id.*

182. *Id.* at 541-42, 535 A.2d at 498.

183. *Id.* at 547, 535 A.2d at 501. According to the court, the question was "what evidence . . . would demonstrate prior knowledge of [the employer] as to the condition of the truck, such as would make [the employer] guilty of wanton or reckless disregard for human life in sending that truck out on the highway." *Id.* at 546, 535 A.2d at 500-01.

184. *Id.* at 546-47, 535 A.2d at 501. The only relevant testimony was a claim that another employee had told the driver on the morning of the accident that "the brakes were 'worn,'" and that the truck was a large heavy vehicle. *Id.* at 547, 535 A.2d at 501. These facts were not "sufficient to show such extraordinary and outrageous conduct as to amount to a wanton or reckless disregard for human life." *Id.*

185. *See Smith v. Gray Concrete Pipe Co.*, 267 Md. 149, 297 A.2d 721 (1972).

standard in a variety of contexts, with mixed results.¹⁸⁶ *American Laundry Machine Industries, Inc. v. Horan*,¹⁸⁷ was the first post-*Smith* case to address punitive damages in the context of a products liability lawsuit. The claim in *Horan* was based upon the explosion of a commercial laundry dryer that did not include a patented safety device that might have prevented the explosion.¹⁸⁸ In evaluating the plaintiff's punitive damage claim under the "gross negligence" or "wanton or reckless disregard for others" standard, the court of special appeals held that the plaintiff must demonstrate "direct evidence of substantial knowledge on the part of the manufacturer that the product is, or is likely to become, dangerous, and a gross indifference to the danger."¹⁸⁹ The evidence, however, showed no knowledge of the alleged defect on the part of the manufacturer; the plaintiff had used the dryer for eighteen years,¹⁹⁰ and there was no evidence that any of the similar types of dryers "had ever before disintegrated in this fashion, or had come close to it."¹⁹¹ There was also no evidence of indifference: "[t]here is nothing in this record to show *why* the patented [safety] device was not used on this particular machine – whether appellant had some reason not to use it, or simply never considered its use."¹⁹² Thus, the plaintiff's punitive damage claim was insufficient as a matter of law and should not have been submitted to the jury.¹⁹³

The court of special appeals then applied the rule stated in *Horan* in three nearly identical asbestos cases against the same defendant, but with contrary results.¹⁹⁴ In the first of these cases, *Eagle-Picher Industries, Inc. v. Balbos*,¹⁹⁵ the plaintiffs were employees of two asbestos

186. *See id.*

187. 45 Md. App. 97, 412 A.2d 407 (1980).

188. *Id.* at 117, 412 A.2d at 420.

189. *Id.*

190. *Id.*

191. *Id.* There was also no evidence of prior complaints or other knowledge of the defect. *Id.*

192. *Id.* at 118, 412 A.2d at 420.

193. *Id.*

194. The court of special appeals also applied the *Horan* standard in *Harley-Davidson Motor Co. v. Wisniewski*, where the court rejected the plaintiff's claim for punitive damages because there was "no evidence that Harley-Davidson was aware [that the part was defective]." *See Harley-Davidson Motor Co. v. Wisniewski*, 50 Md. App. 339, 346, 437 A.2d 700, 704 (1981). Nor does the evidence reveal the existence of a design defect which would inherently present the probability of recurrence of the danger to the consumer." *Id.* There was "no evidence to establish the manufacturer's substantial knowledge of the . . . danger to the plaintiff." *Id.*

195. 84 Md. App. 10, 578 A.2d 228 (1990), *aff'd in part, rev'd in part*, 326 Md. 179, 604 A.2d 445 (1991).

manufacturers who did not work directly with or in proximity to asbestos, but claimed that they contracted mesothelioma as a result of asbestos exposure under an adrift theory.¹⁹⁶ Noting that “[w]anton and reckless conduct . . . requires far more than mere negligence, or what may be causally inferred from it,”¹⁹⁷ the court stated that:

[I]t requires *direct evidence* of substantial knowledge on the part of the manufacturer that the product is, or is likely to become, dangerous, and a gross indifference to that danger Under this standard, the plaintiff must prove that the defendant conducted himself in an extraordinary manner characterized by a wanton or reckless disregard for the rights of others.¹⁹⁸

The plaintiffs were unable to meet this test. With respect to the first manufacturer, Owens-Illinois, Inc., there was evidence that the company hired an independent laboratory to examine the health risks of its asbestos product, Kaylo, and that the laboratory reported “that inhaling Kaylo dust could produce asbestosis in animals,” but that Owens-Illinois did not place any warnings on its product.¹⁹⁹ With respect to the second manufacturer, Eagle-Picher Industries, Inc., there was evidence that the state of the art in the industry at the relevant time period documented the hazards of asbestos, but the company’s literature did not suggest any danger from exposure to either company’s finished product.²⁰⁰ In holding that these facts were insufficient to support a claim for punitive damages, the court of special appeals cited cases from other jurisdictions where punitive damages had been awarded, in which “defendants were not just aware of potential hazards of long-term exposure to asbestos but rather there was direct evidence that they possessed substantial knowledge that the product at issue was dangerous and exhibited a gross indifference to that danger.”²⁰¹ In those cases:

[S]uch “substantial knowledge” and “gross indifference” was demonstrated by conduct such as the withholding of relevant information from employees and the public . . . ; knowledge that the product had already caused disease in other employees . . . ; availability of asbestos free products . . . ; and

196. *Id.* at 19-39, 578 A.2d 232-42.

197. *Id.* at 72-73, 578 A.2d at 259 (citing *American Laundry Mach. Indus., Inc. v. Horan*, 45 Md. App. 97, 117, 412 A.2d 407, 420 (1980)).

198. *Id.* at 73, 578 A.2d at 259 (citing *Exxon Corp. v. Yarema*, 69 Md. App. 124, 516 A.2d 990 (1986)); *see also* RICHARD GILBERT & PAUL T. GILBERT, MARYLAND TORT LAW HANDBOOK § 25.3.1 (1986).

199. *Balbos*, 84 Md. App. at 76, 578 A.2d at 260.

200. *Id.* at 77, 578 A.2d at 261.

201. *Id.* at 79, 578 A.2d at 262.

rejection of the advice of experts, due to profit concerns, to place warning label on the product There are no such instances of outrageous conduct in the case *sub judice*.²⁰²

In *MCIC, Inc. v. Zenobia*,²⁰³ however, the court reached the opposite conclusion and held that the presentation of sufficient evidence justified an award of punitive damages against Owens-Illinois, based on essentially the same evidence.²⁰⁴ This time, however, the court concluded that "Owens-Illinois was advised in 1956 that its asbestos-containing Kaylo product posed a hazard beyond its own employees and to those who used or might otherwise be exposed to the product and that, contrary to expert advice, it failed to place warnings on its product."²⁰⁵

In the third case, *Owens-Illinois, Inc. v. Armstrong*,²⁰⁶ the court of special appeals once again upheld an award of punitive damages against Owens-Illinois, this time in an action brought on behalf of asbestos

202. *Id.* In light of its decision to eliminate the implied malice standard for punitive damages and to impose a clear and convincing standard of proof in *Zenobia*, the court of appeals, on appeal, vacated the court of special appeals' ruling on punitive damages and remanded for a new trial under the new actual malice standard. See *Eagle-Picher Indus., Inc. v. Balbos*, 326 Md. 179, 233-34, 604 A.2d 445, 471-72 (1991). Given that the punitive damage claims had been *rejected* in *Balbos*, however, the application of a new, more stringent standard would not have warranted a retrial, except for the court's apparent concern that the court of special appeals' various punitive damage rulings against Owens-Illinois had been inconsistent. See *Owens-Illinois, Inc. v. Zenobia*, 325 Md. 420, 459, 601 A.2d 633, 652 (1992).
203. 86 Md. App. 456, 587 A.2d 531 (1991), *vacated*, *Owens-Illinois, Inc. v. Zenobia*, 325 Md. 420, 601 A.2d 633 (1992).
204. *Zenobia*, 86 Md. App. at 466-68, 578 A.2d at 536-37. The court stated that the plaintiffs in this case provided additional evidence that was not presented in *Balbos*. *Id.* at 468 n.1, 587 A.2d at 537 n.1. This new evidence appears to have consisted of the single fact that, after the independent laboratory hired by Owens-Illinois issued its report showing that asbestos-related diseases had developed in animals, the laboratory also informed Owens-Illinois that the Kaylo "product should be labeled to reflect the hazard posed by the product." *Id.* at 466-67, 587 A.2d at 536.
205. *Id.* at 468, 587 A.2d at 537. With respect to a second defendant, the supplier Porter Hayden, the sole evidence of "knowledge" was a single worker's compensation claim in which the plaintiff alleged that asbestos had caused his disease. *Id.* The court held that this knowledge could not support a claim for damages against Porter Hayden. *Id.* at 469, 587 A.2d at 537. The court of appeals vacated the court of special appeals' ruling in *Zenobia*, and remanded for a new trial under the new actual malice standard. *Id.* at 462-63, 472-75, 601 A.2d at 653-54, 659-60.
206. 87 Md. App. 699, 591 A.2d 544 (1991), *aff'd in part, rev'd in part*, 326 Md. 107, 607 A.2d 47 (1992).

installers. Based upon essentially the same evidentiary record as in *Balbos* and *Zenobia*, the court found a gross indifference to the risk of harm to the installers.²⁰⁷ The evidence showed that the installers had exposure to levels of asbestos in the air that far exceeded the known safety standard, and the manufacturer introduced a safety program for its workers in its warehouse and shipping departments, but failed to begin any safety program for the installers or place any warnings on its labels.²⁰⁸ There was also evidence that the company "took steps to limit the publication of the dangers of Kaylo products."²⁰⁹

Of these three cases, *Balbos* and *Armstrong* appear to apply the same standards as the other gross negligence cases cited throughout this article, in terms of requiring a conscious indifference to the consequences of the manufacturer's actions.²¹⁰ For example, the evidence in *Armstrong* that the manufacturer knew of the dangers of asbestos and took steps to conceal them from the installers, indicates the manufacturer's indifference to the possible health consequences that the installers may suffer.²¹¹ In *Zenobia*, the court of special appeals appears to apply a far looser standard, and even *Balbos* and *Armstrong* reach opposite conclusions on basically the same factual record.²¹² On appeal, the court of appeals chose *Zenobia* as the case in which it would alter the law of punitive damages on the grounds that "[t]he implied malice test adopted in *Smith v. Gray Concrete Pipe Co.* has been overbroad in its application and has resulted in inconsistent jury verdicts involving similar facts."²¹³

207. *Id.* at 719, 735, 591 A.2d at 554, 561.

208. *Id.* at 722, 591 A.2d at 554-55.

209. *Id.* at 722, 591 A.2d at 555. The court of special appeals contrasted its holding here with that in *Balbos* because the employees in *Balbos* did not work directly with Kaylo products and, as a result, were not exposed to asbestos in excess of the safety levels that were known at the time. *Id.* at 723, 591 A.2d at 555. On appeal to the court of appeals, that court reversed the punitive damages award for a new trial under the new actual malice standard. *Armstrong*, 326 Md. at 128-29, 604 A.2d at 57.

210. See *supra* notes 199, 206-09 and accompanying text.

211. See *supra* notes 206-09 and accompanying text; *Armstrong*, 87 Md. App. at 719-22, 591 A.2d at 553-55; *Balbos*, 84 Md. App. at 55, 73, 78-79, 578 A.2d at 250, 258, 261-62.

212. Compare *Armstrong*, 87 Md. App. at 708, 719-23, 591 A.2d at 548, 553-55 (affirming the trial court's decision to award punitive damages to the plaintiffs), with *Balbos*, 84 Md. App. at 19-20, 73-79, 578 A.2d at 232-33, 259-67 (reversing the trial court's decision to award punitive damages to the plaintiff).

213. *Owens-Illinois*, 325 Md. at 459, 601 A.2d at 652.

c. Other Tort Cases

During the "implied malice" period, the courts applied the same "gross negligence," "wanton," or "reckless disregard" standard when awarding punitive damages in various other contexts. In *Wedeman v. City Chevrolet Co.*,²¹⁴ for example, the court upheld an award of punitive damages in a case of fraud in the sale of an automobile, finding that such damages could be awarded upon a showing that defendant engaged in "conduct of an extraordinary nature characterized by a wanton or reckless disregard for the rights of others."²¹⁵ The evidence in that fraud case demonstrated that the defendant not only knowingly committed the fraud, but sought to coerce the plaintiff into admitting that the fraud never occurred.²¹⁶ The court of special appeals' decision in *Thomassen Lincoln-Mercury v. Goldbaum*²¹⁷ is similar.²¹⁸

214. 278 Md. 524, 366 A.2d 7 (1976).

215. *Id.* at 532, 366 A.2d at 13.

216. *See id.* at 526, 366 A.2d at 9. In *Wedeman*, an automobile had been previously damaged in an accident, but was sold as new. *Id.* at 525-26, 366 A.2d at 9. When the automobile was further damaged, as a result of the original damage, the purchaser asked the dealer to repair all of the damage at its expense. *Id.* at 526, 366 A.2d at 9. The dealer:

[T]ook the position that it would make the repairs only if [the purchaser] withdrew her statement [that the car had been previously damaged] or paid for the damage. [The dealer's] stance was manifestly unreasonable since the statement was true. Nevertheless, [the purchaser] finally offered to pay for the repairs, but they were never made and the car was repossessed. This conduct, coming on the heels of the fraudulent misrepresentation itself, was sufficient to support the recovery of punitive damages.

Id. at 533, 366 A.2d at 13.

217. 45 Md. App. 297, 443 A.2d 218 (1980).

218. In *Thomassen*, the court affirmed the jury's award of punitive damages arising from the sale of a new automobile that had actually been previously used and damaged in a fire, because defendant's "agents knew full well the history of this car, and yet they not only passively concealed it from [plaintiff] but deliberately lied to him about it" *Id.* at 309, 443 A.2d at 225. The court stated:

[W]hen an automobile dealer knowingly and deliberately engages in the type of conduct apparent in this case — patently lies to the customer in response to pointed and material questions about the condition of the car — the dividing line between ordinary fraud and outrageous, wanton, or reckless conduct has been approached sufficiently to permit the issue of punitive damages to be submitted to the trier of fact.

Id.

In another case, *Medina v. Meilhammer*,²¹⁹ the court of special appeals concluded that the plaintiff had failed to allege gross negligence as a matter of law against the operators of an apartment complex, despite alleging a lengthy series of negligent acts.²²⁰ Two repairmen, employed by the apartment complex, dug a three-foot-wide hole on the complex grounds in order to repair a hot water line.²²¹ After they left to obtain material to cover the hole, which they had seen fill with scalding water, a small child fell into it and received severe burns.²²² The court ruled that “[t]he quantity of the negligence in this case does not change the quality of that negligence so that it becomes different from ordinary lack of care.”²²³

219. 62 Md. App. 239, 489 A.2d 35 (1985).

220. *Id.* at 251-52, 489 A.2d at 41.

221. *Id.* at 243-44, 489 A.2d at 37.

222. *Id.* Before departing the scene, the repairman placed a board over the hole, which covered approximately two-thirds of the hole. *Id.*

223. *Id.* at 251, 489 A.2d at 41. Viewing the evidence in the light most favorable to the plaintiffs, the court found that the defendants had sent two young and inexperienced workers to dig a hole where 180 degree water was leaking and that management was aware that, even though the hot water flow had been turned off, water would remain in the system. *Id.* Moreover, the defendants possessed the knowledge that:

[T]he truck [that the manager] had attempted to repair to transport the material to secure the hole was not available and, therefore, the employees would have to walk to the supply depot to obtain the materials; that the hole which had filled with scalding water would be left unguarded; that in the area there were children who were not only attracted to the water, but had in fact played in it when it was cooler; and that the hole had only been partially secured. Also, there was evidence regarding the availability of safety procedures which [defendants] had neither adopted nor implemented.

Id. In *Cambridge Iron & Metal Co. v. Hartman*, 65 Md. App. 629, 501 A.2d 871 (1985), the court of special appeals also rejected a claim for punitive damages where the defendant's omission was nothing more than simple negligence. *Id.* at 637, 501 A.2d at 881. Here, some firefighters received injuries while fighting a fire on defendant's property when a metal box containing magnesium plates exploded. *Id.* at 631, 501 A.2d at 878. The defendant had warned the firefighters that the fire on its property was a magnesium fire, but he did not warn them of the magnesium in the metal box. *Id.* The court stated that firefighters and policemen are “licensees” such “that a landowner has a duty to make a licensee aware of hidden dangers of which the owner has knowledge, provided the owner has an opportunity to give the warning,” but that the defendant's conduct was only actionable if it was willful or wanton. *Id.* at 632, 501 A.2d at 878. Plaintiffs failed to state a claim for punitive damages because the landowner's conduct “amounts to no more than mistake, thoughtlessness or inadvertence

In *Exxon Corp. v. Yarema*,²²⁴ the court of special appeals upheld a jury's award of punitive damages because it found the "positive element of conscious wrong doing" that was lacking in *Medina*.²²⁵ In *Yarema*, the plaintiffs owned property near an Exxon gasoline station and claimed that they had been damaged as a result of leaks in the station's gasoline tanks.²²⁶ The court held that there was sufficient evidence for a jury to award punitive damages because "Exxon had knowledge of readily perceptible risks, which it disregarded."²²⁷ Exxon also may have taken steps to conceal the leaking gasoline from the property owners and government officials, and the jury could have inferred that Exxon delayed in the hope that no damage would manifest itself.²²⁸

d. The Era of Implied Malice Is Over - Perhaps

The award of punitive damages based upon gross negligence came to an end with *Owens-Illinois, Inc. v. Zenobia*.²²⁹ Complaining that the implied malice test "has been overbroad in its application and has resulted in inconsistent jury verdicts involving similar facts," the court of appeals ruled that, henceforth, "[i]n a non-intentional tort action, the trier of facts may not award punitive damages unless the plaintiff has established that the defendant's conduct was characterized by evil mo-

occasioned by the excitement and confusion of the moment." *Id.* at 637, 501 A.2d at 881.

224. 69 Md. App. 124, 516 A.2d 990 (1986).

225. *Id.* at 156, 516 A.2d at 1007.

226. *Id.* at 132-33, 516 A.2d at 994-95.

227. *Id.* at 160, 516 A.2d at 1009. According to the court, "after Exxon became aware of the leaks, it not only delayed the removal of gasoline from its tanks but kept filling them with gasoline." *Id.* Exxon also waited for two years before drilling observation wells to test groundwater samples. *Id.* at 161, 516 A.2d at 1009. "Nowhere in the testimony does Exxon explain its delay in testing ground water samples. This silence suggests [that Exxon] was hoping that no significant ground water contamination would manifest itself." *Id.*

228. "Even though it knew that gasoline and its components are toxic and pose serious risks to humans if ingested, Exxon failed to file reports with [the] county, state, and federal authorities and failed to disclose the existence of the problem to surrounding property owners." *Id.* at 162, 516 A.2d at 1009-10. In addition, Exxon's employees made representations both to property owners and to government officials that "could appear to have been calculated to mislead." *Id.* The court also stated that "[s]uch behavior suggests that Exxon's corporate disposition was to disregard the health and safety of the community." *Id.*

229. 325 Md. 420, 601 A.2d 633 (1992).

tive, intent to injure, ill will, or fraud, *i.e.*, ‘actual malice.’”²³⁰ At the same time, however, the implied malice vampire may not be entirely dead. While the court in *Zenobia* opined that “actual malice” would henceforth be required, it also held that “in products liability cases the equivalent of the ‘evil motive,’ ‘intent to defraud,’ or ‘intent to injure,’ which generally characterizes ‘actual malice,’ is actual knowledge of the defect and deliberate disregard of the consequences.”²³¹ Thus, in a products liability case, under the new standard, “the plaintiff must prove: (1) actual knowledge of the defect on the part of the defendant; and (2) the defendant’s conscious or deliberate disregard of the foreseeable harm resulting from the defect.”²³² The now-discredited decision in *Smith v. Gray Concrete Pipe Co.*, by way of comparison, required a “‘wanton or reckless disregard for human life’ in the operation of a motor vehicle with the known dangers and risks attendant to such [defendant’s] conduct,”²³³ and the employer in *Smith* was held liable for punitive damages because its actions “reflect[ed] a premeditated decision, deliberately arrived at, by an indifferent employer in possession of facts which should have indicated almost certain harm to others.”²³⁴ Despite the high tone of the court’s decision in *Zenobia*, these standards are not as far apart as one might expect.

2. Gross Negligence in Immunity Law

As stated in the Introduction, there are twenty-four separate statutory immunities in the Maryland Annotated Code that protect individuals for their negligent acts, but which do not apply to grossly negligent acts.²³⁵ These immunities protect state officers and employees acting within the scope of their employment,²³⁶ certain other individuals who are officials or employees of government bodies,²³⁷ persons rendering emergency assistance in various contexts,²³⁸ per-

230. *Id.* at 460, 601 A.2d at 652; *see also* *Scott v. Jenkins*, 345 Md. 21, 31-32, 690 A.2d 1000, 1005 (1997); *Montgomery Ward v. Wilson*, 339 Md. 701, 733, 644 A.2d 916, 932 (1995).

231. *Owen-Illinois*, 325 Md. at 462, 601 A.2d at 653.

232. *Id.*

233. *Smith v. Gray Concrete Pipe Co.*, 267 Md. 149, 168, 297 A.2d 721, 731 (1972).

234. *Id.* at 172, 297 A.2d at 734.

235. *See supra* note 1.

236. MD. CODE ANN., CTS. & JUD. PROC. § 5-522(b) (1998 & Supp. 2000).

237. *Id.* § 5-517(a) (excluding from liability members or employees of boards of supervisors for soil conservation district); § 5-518(e) (excluding employees of county boards of education).

238. *Id.* § 5-603(a) (exempting certain individuals providing emergency medical care); § 5-608 (excluding from liability certain individuals providing sup-

sons engaged in charitable work or socially beneficial activities for which they are not compensated,²³⁹ persons performing various statutorily required activities such as certain medical tests or vaccinations,²⁴⁰ and shareholders or trustees of real estate investment trusts.²⁴¹ While it is logical to assume that the term “gross negligence” is intended to have the same meaning in each of these statutes, most of these immunities have not yet been addressed in a published decision. The cases addressing gross negligence under an immunity statute have generally arisen in lawsuits against government officials or employees.²⁴²

port to the emergency medical system); § 5-614 (exempting veterinarians providing emergency assistance for no fee or compensation); § 5-617(b) (excluding persons assisting in controlling discharge of hazardous substance); § 5-639(b)(2) (exempting from liability persons operating emergency vehicles); MD. CODE ANN., EDUC. § 13-517(n) (1999 & Supp. 2000) (excluding from liability facilities and persons authorized to operate external defibrillators); MD. CODE ANN., HEALTH-GEN. I § 13-708(a) (2000) (exempting authorized persons rendering treatment to individuals suffering an adverse reaction to an insect sting); MD. CODE ANN., HEALTH-GEN. II § 21-326(b) (2000) (excluding persons employing the Heimlich maneuver in accordance with a posted chart); MD. CODE ANN., NAT. RES. II § 8-724(e) (1990 & Supp. 2000) (exempting from liability persons rendering assistance in boating accidents).

239. MD. CODE ANN., CTS. & JUD. PROC. § 5-406(d) (1998 & Supp. 2000) (exempting agents of athletic associations, charitable organizations, civil leagues, and homeowners' associations); § 5-407(c) (excluding from liability volunteers of charitable organizations); § 5-606(b)(1)(ii) (exempting from liability physicians and volunteers working at charitable organizations providing health care services); § 5-607(b)(2) (excluding volunteer sports program physicians); § 5-634(c) (exempting persons donating food to non-profit organizations); § 5-805(c)(2) (excluding from liability participants engaged in community service work).

240. *Id.* § 5-616 (exempting persons performing scoliosis screening); § 5-629(d) (excluding persons administering drugs or vaccines); MD. CODE ANN., HEALTH-GEN. I § 18-4A-05 (2000) (providing immunity from damages arising from vaccination of a minor); MD. CODE ANN., INS. § 5-201(i) (1997) (exempting from liability actuaries providing an opinion on life insurance reserves); MD. CODE ANN., TRANSP. II § 16-205.1(c)(3) (1999 & Supp. 2000) (excluding from liability medical personnel performing drug or alcohol tests).

241. MD. CODE ANN., CTS. & JUD. PROC. § 5-419(b)(3) (1998 & Supp. 2000).

242. *See generally* Mayor & City Council of Baltimore v. Chase, 360 Md. 121, 123, 756 A.2d 987, 988 (2000) (addressing a lawsuit against a paramedic employed by a municipal fire department); Shoemaker v. Smith, 353 Md. 143, 146-47, 725 A.2d 549, 551 (2000) (deciding a lawsuit filed against law enforcement officers); Wells v. State, 100 Md. App. 693, 694-96, 642 A.2d 879,

These decisions highlight one important difference between cases involving an immunity statute and the punitive damages cases cited in the preceding section.²⁴³ The immunity statutes, as a whole, were enacted to protect individuals engaged in activities that are considered to be socially beneficial, even though harm may sometimes result.²⁴⁴ This is particularly true in cases such as those involving police officers, rescue personnel, or other persons rendering emergency assistance, where, as a society, we *expect* those individuals to consciously and knowingly make instantaneous decisions that may result in harm to others.²⁴⁵

In such cases, while the legal standard for gross negligence is the same, the courts have not been as willing to infer gross negligence from the facts as they might have been in the punitive damages cases cited above. In *Lovelace v. Anderson*,²⁴⁶ for example, an off-duty police officer was accused of injuring a bystander during a shoot out in the lobby of a hotel during a hold-up attempt. The plaintiff argued that the officer had several alternative choices of conduct, but recklessly chose to engage in gunplay, thereby endangering the lives of everyone present.²⁴⁷ The court of special appeals rejected this claim, however, and held that there was no legally sufficient evidence of “gross negligence,” because “[t]here are no reasonable inferences that would allow a fact finder to conclude that [defendant] did not act as a reasonable police officer would at the time the events were occur-

879-80 (1994) (hearing a case against the Department of Social Services for failure to prevent repeated abuse); *Burns v. Mayor & City of Rockville*, 71 Md. App. 293, 296, 525 A.2d 255, 256 (1987) (deciding a lawsuit filed against the City for failure to warn of dangerous conditions in a public building).

243. See *supra* notes 142-228 and accompanying text.

244. See *Williams v. Mayor & City Council of Baltimore*, 359 Md. 101, 138, 753 A.2d 41, 61 (2000) (discussing public official immunity and stating that “[t]he rationale underlying this grant of immunity ‘is that a public purpose is served by protecting officials when they act in an exercise of their discretion’”) (citations omitted).

245. See *Williams v. Prince George’s County*, 112 Md. App. 526, 543, 685 A.2d 884, 893 (1996). The court stated that:

[T]he rationale in insulating officers against all but flagrant abuses . . . [is necessary] to permit police officers . . . to make the appropriate decisions in an atmosphere of great uncertainty. The theory is that holding police officers liable in hindsight for every injurious consequence of their actions would paralyze the functions of law enforcement.

Id.

246. 126 Md. App. 667, 730 A.2d 774 (1999).

247. *Id.* at 696-97, 730 A.2d at 789-90.

ring."²⁴⁸ This decision was based upon the facts that the officer was required "'to make a split-second determination in the heat of the moment that deadly force was necessary . . .'"²⁴⁹ and that he "acted to protect two civilians and himself from not only serious injury, but fatal injury."²⁵⁰

In the same vein, two immunity decisions have rejected gross negligence claims arising from accidents involving emergency vehicles.²⁵¹ In *Boyer v. State*,²⁵² the plaintiffs' parents were killed when their car was struck by a vehicle driven by an intoxicated driver who was fleeing from a Maryland State police officer during a high speed chase.²⁵³ The officer was entitled both to the immunity accorded to operators of emergency equipment,²⁵⁴ and the immunity accorded to Maryland State employees under the version of the Tort Claims Act in effect at the time of the accident.²⁵⁵ Under either immunity, the plaintiffs were required to show that the officer was grossly negligent.²⁵⁶ The plaintiffs claimed that the officer was grossly negligent when he pursued:

[A] suspected drunk driver[] at an excessively high rate of speed through a heavy traffic area; in continuing to recklessly pursue [the driver] at extremely high and dangerous rates of speed; in failing to activate immediately all of the emergency equipment on his police car so as to warn other motorists of the foreseeable dangers to their health and safety created by [the officer's] negligent and reckless pursuit; and in otherwise failing to adhere to the acceptable police procedures and policies in attempting to apprehend [the driver].²⁵⁷

Citing *Nast v. Lockett*²⁵⁸ and the automobile manslaughter case of *Hughes v. State*,²⁵⁹ the court of appeals determined that "the plaintiffs

248. *Id.* at 703, 730 A.2d at 794.

249. *Id.* at 704, 730 A.2d at 794 (quoting *Ridgeway v. City of Woolwich Township*, 924 F. Supp. 658 (D. N.J. 1996)).

250. *Id.*

251. See generally *Boyer v. State*, 323 Md. 558, 594 A.2d 121 (1991). See also *infra* notes 262-70 and accompanying text for a discussion of *Khawaja v. Mayor & City Council of Rockville*.

252. 323 Md. 558, 594 A.2d 121 (1991).

253. *Id.* at 562-63, 594 A.2d at 123-24.

254. See MD. CODE ANN., TRANSP. II § 19-103 (1987).

255. See MD. CODE ANN., CTS. & JUD. PROC., § 5-404 (1984) (subsequently recodified at MD. CODE ANN., STATE GOV'T., § 12-104 (1999)).

256. *Boyer*, 323 Md. at 578, 594 A.2d at 131.

257. *Id.* at 579-80, 594 A.2d at 132.

258. 312 Md. 343, 539 A.2d 1113 (1988).

259. 198 Md. 424, 84 A.2d 419 (1951).

must have pled *facts* showing that Trooper Titus acted with a wanton and reckless disregard for others in pursuing [the intoxicated driver].”²⁶⁰ These facts were not sufficient, as a matter of law.²⁶¹

The court of special appeals reached a similar conclusion in *Khawaja v. Mayor & City Council of Rockville*,²⁶² where the plaintiffs were injured in a collision with a police car who was responding to an emergency call, and filed suit against the officer who had been driving.²⁶³ The officer was entitled to the immunity provided “for any damages resulting from a negligent act or omission while operating [an] emergency vehicle,”²⁶⁴ which did not apply to “a malicious act or omission or for gross negligence of the operator.”²⁶⁵

The plaintiffs claimed that the officer had activated her emergency lights, but not her siren, and had approached the intersection where the accident took place “with the intention of running the red light,” and at a speed in excess of 50 miles per hour in a 25 miles per hour speed zone.²⁶⁶ The plaintiffs further alleged that the officer “had intentionally not activated the siren of her motor vehicle; that she saw that she had a red light . . . when she had adequate time and distance to stop . . . [and] made a conscious decision to go through the red light and enter the intersection at a high rate of speed,” notwithstanding the fact that the “plaintiff’s vehicle was in view . . . as she approached the intersection.”²⁶⁷ The court noted that gross negligence required a “‘wanton or reckless disregard for human life’ in the operation of a motor vehicle with the known dangers and risks attendant to such conduct”²⁶⁸ and that “only conduct that is of an extraordinary or outrageous character will be sufficient to supply the requisite state of mind. Reckless driving is not enough; there must be reckless disregard for human life.”²⁶⁹ The court held that these allegations were insufficient to state a claim for gross negligence.²⁷⁰

260. *Boyer*, 323 Md. at 579, 594 A.2d at 132.

261. *See id.* at 580-81, 594 A.2d at 132 (stating that “because Trooper Titus did not act with wanton or reckless disregard for the safety of others . . . he was entitled to summary judgment”).

262. 89 Md. App. 314, 598 A.2d 489 (1991).

263. *Id.* at 316-17, 598 A.2d at 490.

264. MD. CODE ANN., TRANSP. II § 19-103(b)(1) (1987).

265. *Id.* § 19-103(b)(2); *see also Khawaja*, 89 Md. App. at 318, 598 A.2d at 491.

266. *Khawaja*, 89 Md. App. at 317, 598 A.2d at 490.

267. *Id.*

268. *Id.* at 319, 539 A.2d at 491 (quoting *Smith v. Gray Concrete Pipe Co.*, 267 Md. 149, 168, 297 A.2d 721, 731 (1972)).

269. *Id.* at 319, 598 A.2d at 491 (citing *Nast v. Lockett*, 312 Md. 343, 352, 539 A.2d 1113, 1117 (1988)).

270. *Id.* at 318, 598 A.2d at 491.

Other immunity decisions illustrate the difference between gross negligence, which focuses on the state of mind of the defendant, and negligence, which focuses only on the unreasonable nature of the defendant's conduct. In *Tatum v. Gigliotti*,²⁷¹ two emergency medical technicians ("EMTs") were accused of improperly treating an individual who died during a severe asthma attack.²⁷² As both appellate courts concluded, the EMTs were entitled to the immunity granted by Maryland's "Good Samaritan Statute," under which they could not be held liable "for any civil damages as the result of any professional act or omission . . . not amounting to gross negligence."²⁷³ As claimed by the plaintiff, the EMTs "attempted to place a paper bag over [the patient's] face as treatment for hyperventilation, although that act was in contravention of the prescribed treatment"²⁷⁴ They made the patient walk down twelve flights of stairs to reach the ambulance and "did not carry him on a stretcher, even though he was having great difficulty breathing."²⁷⁵ Once in the ambulance, the EMTs failed to put an oxygen mask on the patient, and allowed the patient to fall off of the "ambulance bench onto the floor of the vehicle," where he was found lying face down when the ambulance reached the hospital.²⁷⁶ Finally, they may have falsified the ambulance report, which indicated that the patient arrived at the hospital in stable condition and directly contradicted the testimony of the emergency room personnel "who testified that [the patient] had been in complete respiratory and cardiac arrest upon his arrival."²⁷⁷ Despite this enormous *quantity* of negligence, the court of special appeals upheld the trial court's conclusion that these facts were insufficient to overcome the good samaritan immunity.²⁷⁸

271. 80 Md. App. 559, 565 A.2d 354 (1989), *aff'd*, 321 Md. 623, 583 A.2d 1062 (1991).

272. *Id.* at 625-26, 583 A.2d at 1063.

273. MD. ANN. CODE art. 43, § 132(a) (1980).

274. *Tatum*, 321 Md. at 625-26, 583 A.2d at 1063.

275. *Id.*

276. *Id.*

277. *Id.* The court of appeals affirmed the court of special appeals' decision, but only addressed the applicability of the Good Samaritan Law without considering the sufficiency of plaintiff's gross negligence claim. *See id.* at 630, 583 A.2d at 1065.

278. *See Tatum*, 80 Md. App. at 569, 565 A.2d 358-59 ("[A]lthough the actions of Gigliotti may have amounted to negligence, they do not satisfy the threshold of gross negligence."). The plaintiffs encountered the same problem in *Foor v. Juvenile Services Administration*, which arose after the plaintiffs' son was killed by a foster child sent to them by the Juvenile Services Administration (JSA). *See Foor v. Juvenile Servs. Admin.*, 78 Md. App. 151, 155, 552 A.2d 947, 949 (1989). The plaintiffs filed suit against JSA employees and

The plaintiffs in *Wells v. State*²⁷⁹ similarly presented allegations of negligence at a level that could be considered appalling, and with tragic consequences, but which did not constitute gross negligence as a matter of law.²⁸⁰ *Wells* involved a tort suit filed on behalf of an abused child against employees of the Maryland Department of Human Resources and the Baltimore City Department of Social Services.²⁸¹ The allegations showed a repeated failure by the social service agencies and their supervisory personnel to recognize and take action on the severe child abuse inflicted upon the plaintiff and his sister, who ultimately died from the abuse.²⁸² The claim against the supervisory defendants alleged that they knew the Department of Social Services “was understaffed, underfunded, and not well managed,” that they knew “the protective services system within DSS was in disarray, that, as a result, children were not being protected, and that they failed to ‘take reasonable steps to establish an effective program for dealing with child abuse in Baltimore City.’”²⁸³ These allegations, however, “failed, completely, to allege the kind of wanton, wilful, or reckless conduct on the part of these supervisory defendants toward [plaintiff] necessary to sustain an action for gross negligence.”²⁸⁴

employees of the Baltimore County Board of Education, claiming, in essence, that they were responsible for allowing the dangerous foster child to remain in the plaintiffs’ home without warning the plaintiffs of the danger. *Id.* The plaintiffs, however, alleged no “reckless” acts, *i.e.*, acts showing a conscious decision by the defendants to allow the plaintiffs to run a risk. *Id.* at 156-57, 552 A.2d at 950. The court found that the defendants were entitled to the immunity accorded to state employees for non-malicious, non-grossly negligent acts or omissions, which was then codified at section 12-105(a) of the State Government Article and is now codified at section 5-522 of the Courts and Judicial Proceedings Article, and that the plaintiffs had wholly failed to plead any specific facts relating to their gross negligence claim against the JSA employees. *Id.* at 169-70, 552 A.2d at 956. The plaintiffs also claimed that the Baltimore County School Board employees had been grossly negligent because they failed to warn the plaintiffs of the foster child’s drug problems and failed to exercise reasonable care in their dealings with the plaintiffs and the foster child. *Id.* at 171-72, 552 A.2d at 957. According to the court, these allegations were “so deficient as not to require discussion.” *Id.* at 172, 552 A.2d at 957.

279. 100 Md. App. 693, 642 A.2d 879 (1994).

280. *Id.* at 704, 642 A.2d at 884.

281. *Id.* at 694, 642 A.2d at 879.

282. *Id.* at 697-98, 642 A.2d at 881.

283. *Id.* at 703-04, 642 A.2d at 884.

284. *Id.* at 704, 642 A.2d at 884. As the court stated:

These allegations . . . suggest individual negligence and bureaucratic mismanagement and incompetence; they suggest a critically important governmental unit not properly doing its job because of

While the plaintiffs in *Tatum* and *Wells* had wholly failed to present any evidence relating to the defendants' state of mind, such evidence was present in *Catterton v. Coale*,²⁸⁵ where the plaintiff's allegations were sufficient to survive a motion to dismiss based upon the immunity granted to state personnel.²⁸⁶ There, the defendant social worker was accused of negligence and malicious prosecution arising from a child sexual abuse investigation, and the defendant sought to dismiss the plaintiff's claims pursuant to the immunity granted under the Tort Claims Act.²⁸⁷ The plaintiff claimed, among other things, that the social worker had fabricated a report stating that the plaintiff had failed a polygraph examination.²⁸⁸ According to the court, this allegation of bad faith was "sufficient to show malice or gross negligence" at the stage of a motion to dismiss, although the court opined that "[p]erhaps additional discovery will reveal the source of the report and whether [defendant] acted in 'good faith.'"²⁸⁹

3. Exculpatory Contract Clauses

The third major category of civil cases involving gross negligence contains those cases where an exculpatory clause limits a party's liability. "In the absence of legislation to the contrary, exculpatory clauses are generally valid, and the public policy of freedom of contract is best served by enforcing the provisions of the clause."²⁹⁰ On the other hand, "a party will not be permitted to excuse its liability for inten-

underfunding, understaffing, lack of effective leadership and supervision, lack of training, and lack of clear procedures and protocols. They do not indicate, however, malice, evil intention, or wanton, wilful, or reckless disregard for human life or the rights of others. In short, they do not allege gross negligence on the part of any of the defendants.

Id. at 705-06, 642 A.2d at 885. Thus, as a matter of law, the individual defendants were entitled to the immunity given to state personnel that is currently codified at section 5-522 of the Courts and Judicial Proceedings Article. *Id.* at 706, 642 A.2d at 885. At the time that *Wells* was decided, this immunity was codified at section 5-399.2 of the Courts and Judicial Proceedings Article, but contained the same provisions giving state employees immunity for conduct within the scope of their employment and "committed without malice or gross negligence." *Id.*

285. 84 Md. App. 337, 579 A.2d 781 (1990).

286. *Id.* at 343-44, 579 A.2d at 784.

287. *Id.* at 341, 579 A.2d at 783. Immunity under the Tort Claims Act is now codified at § 5-522 of the Courts and Judicial Proceedings Article. MD. CODE ANN., CTS. & JUD. PROC. section 5-522 (1998 & Supp. 2000).

288. *Catterton*, 84 Md. App. at 343, 579 A.2d at 783.

289. *Id.* at 343-44, 579 A.2d at 783-84.

290. *Wolf v. Ford*, 335 Md. 525, 531, 644 A.2d 522, 525 (1994).

tional harms or for the more extreme forms of negligence, i.e., reckless, wanton, or gross.”²⁹¹ Thus, where an exculpatory clause has barred a claim for negligence in the performance of a contract, plaintiffs have attempted to state their claim in terms of grossly negligent or malicious misconduct.

In addressing whether gross negligence has been pled in order to avoid an exculpatory clause, the courts look to the same factors of intentional conduct and exposure of another to an unwarranted risk. In *Boucher v. Riner*,²⁹² for example, a parachuting student was injured when he landed amongst uninsulated electric lines after the jumpmaster instructed him to turn so that his back was to the lines, and he could not see them, and where the jumpmaster failed to warn the student about the lines, even though the jumpmaster himself realized the danger.²⁹³ The plaintiff was barred from bringing a simple negligence claim against the instructor or school because of the exculpatory clause in his contract.²⁹⁴ The court of special appeals held that the plaintiff had failed to prove gross negligence as a matter of law, stating that:

[T]he conduct alleged here reflects, at worst, poor judgment on the part of [defendant] that, while perhaps amounting to ordinary negligence, does not rise to the level of gross negligence. We see no evidence of a premeditated decision, deliberately arrived at, by an indifferent jumpmaster that should have indicated almost certain harm to others.²⁹⁵

The decisions addressing gross negligence in the context of exculpatory contract clauses also distinguish between conduct that is simply unreasonable or fails to meet the applicable standard of care and the sort of intentionally reckless conduct required to plead or prove gross negligence. *Marriott Corp. v. Chesapeake & Potomac Telephone Co.*²⁹⁶ involved a suit filed against a telephone company for damages that plaintiff sustained from an outage of its telephone service. The outage occurred after a telephone company employee misinformed some construction workers of the location of underground telephone lines, and the construction workers cut through the lines while they were excavating.²⁹⁷ The telephone company’s tariff, which is treated as a contract between the telephone company and its customers, limited

291. *Id.*

292. 68 Md. App. 539, 514 A.2d 485 (1986).

293. *Id.* at 542, 514 A.2d at 487.

294. *Id.* at 548-49, 514 A.2d at 490-91.

295. *Id.* at 548, 514 A.2d at 490.

296. 124 Md. App. 463, 723 A.2d 454 (1998), *cert. denied*, 354 Md. 113, 729 A.2d 405 (1999).

297. *Id.* at 467, 723 A.2d at 456-57.

its liability for negligence, and the plaintiff alleged that the telephone company employee had been grossly negligent when he failed to use the best method for locating the underground cables.²⁹⁸ The court of special appeals held that:

[A]lthough the evidence might support a negligence finding, it could not support a finding of gross negligence [N]othing suggests that [the employee's] failure to [use the "newer practice"] amounted to "[a]n intentional failure to perform a manifest duty in reckless disregard of the consequences as affecting the life or property of another."²⁹⁹

Rather, "uncontroverted evidence indicated that [the employee] did exert some effort to avoid a severance of the cable."³⁰⁰

In *Jacob v. Davis*,³⁰¹ the plaintiffs managed to successfully plead gross negligence as to one of two claims.³⁰² There, the sole remainderman of two trusts sued the trustees for breach of fiduciary duty.³⁰³ The trustees were accused of failing to provide any accounting to the beneficiaries and of allowing plaintiff's stepmother, who had a life estate in the trusts, to make decisions relating to the trust, despite the will's clear intention that she should have no such control over the trust funds.³⁰⁴ The trust agreement contained a provision stating that the trustees would only be liable for "fraud, willful misconduct, or gross negligence,"³⁰⁵ and the court of special appeals held that there was sufficient evidence to allow the trier of fact, in this case the trial court, to conclude that the trustees were grossly negligent when they

298. *Id.* at 467-68, 723 A.2d at 457.

299. *Id.* at 480, 723 A.2d at 463 (quoting *Romanesk v. Rose*, 248 Md. 420, 423, 237 A.2d 12, 14 (1967)).

300. *Id.* at 480-81, 723 A.2d at 463. *Baker v. Roy Haas Associates*, similarly involved an unsuccessful attempt to transform a claim of simple negligence into one involving gross negligence, but without any evidence of the defendant's state of mind. *See Baker v. Roy Haas Assocs.*, 97 Md. App. 371, 378-79, 629 A.2d 1317, 1321 (1993). There, the defendant was sued for conducting a faulty home inspection, and the home inspection contract limited any damage claims to the amount paid for the inspection. *Id.* at 374-75, 629 A.2d at 1318-19. The defendant's inspection report stated "that the roof was in satisfactory condition," when in fact it "was in substantial need of repair" and was "defective." *Id.* The court of special appeals concluded that the inadequate inspection was "a classic example of ordinary negligence" as a matter of law and "could not be characterized as indicating a wanton or reckless disregard for [plaintiff's] rights." *Id.* at 378, 629 A.2d at 1321.

301. 128 Md. App. 433, 738 A.2d 904 (1999).

302. *Id.* at 464-65, 738 A.2d at 920.

303. *Id.* at 438, 738 A.2d at 906.

304. *Jacob*, 128 Md. App. at 438-39, 738 A.2d at 906.

305. *Id.* at 464, 738 A.2d at 920.

improperly delegated their duties under the agreement to the plaintiff's stepmother.³⁰⁶ "With clear instructions in the will, it would appear that appellees either did not read the will, or read the provisions in the will, but intentionally deviated from them. With respect to the latter, at least, a determination of gross negligence would be for the trier of fact."³⁰⁷ On the other hand, the trustees' failure to give an accounting could not be grossly negligent as a matter of law, because "[t]here was no evidence to suggest that appellees recognized an obligation to account, during [the stepmother's] lifetime or after her death, and intentionally disregarded it."³⁰⁸

4. Willful or Wanton Injury to Trespassers

While not explicitly referring to gross negligence, those cases addressing a landowner's duties to trespassers have applied the same standards used in the gross negligence decisions to determine whether a landowner's conduct is wanton.³⁰⁹ A landowner has no duty to make his or her property safe for trespassers; the landowner's only duty is "not to injure or entrap [trespassers] willfully or wantonly."³¹⁰ In *Wells v. Polland*,³¹¹ the court of special appeals conducted an extensive review of Maryland case law, and found that "liability for injury to trespassers is imposed only in those cases in which the landowner has engaged in conduct calculated to or reasonably expected to lead to injury of the trespasser."³¹² Further:

In each of these cases . . . , trespassers had access to the defendants' property, and it was foreseeable that a trespasser would be injured by a condition located on the property. In many of the cases, there was actual knowledge that trespassers were on the property or routinely used the property. With [one exception], each of the cases involved a danger that was affirmatively created by the land owner. Moreover, it appears that in each case danger could have been averted without much effort or expense. Yet in none of the cases did

306. *Id.* at 465, 738 A.2d at 920.

307. *Id.*

308. *Id.* at 464-65, 738 A.2d at 920.

309. *See, e.g.*, *Potomac Elec. Power Co. v. Smith*, 79 Md. App. 591, 609, 558 A.2d 768, 777 (1989), *overruled by* *United States v. Streidel*, 329 Md. 533, 620 A.2d 905 (1993) (applying the same willful and wanton standard to punitive damages claim as has been applied in cases involving injuries to trespassers).

310. *Wells v. Polland*, 120 Md. App. 699, 721, 708 A.2d 34, 45 (1998).

311. 120 Md. App. 699, 708 A.2d 34 (1998).

312. *Id.* at 721, 708 A.2d at 45.

the land owner's conduct meet the wanton or willful standard.³¹³

In *Murphy v. Baltimore Gas & Electric Co.*,³¹⁴ for example, the owner of an abandoned quarry was not willful or wanton in the drowning death of a child, even though the owner knew that trespassers swam in the water in the quarry and that two children had drowned in the previous decade, and despite the fact that the owner's failure to maintain the fence around the quarry was a violation of the Baltimore County code.³¹⁵

In *Bramble v. Thompson*,³¹⁶ the court of appeals contrasted the quintessential willful and wanton act of placing a "spring gun" on one's property with the case at bar, where a trespasser was attacked by a dog belonging to the land owner and known by its owners to be vicious.³¹⁷ The court concluded that the key factors in the decision were the probability and severity of the risk to which the trespasser would be exposed, and the landowner's intent in creating the hazardous condition.³¹⁸ According to the court, the act of placing a spring gun on one's property "is more than likely to take human life," and "is placed, not for the purpose of warning others off, but with the design to do them great injury"³¹⁹ In contrast, courts have ruled that owners are not liable where trespassers are bitten by dogs maintained on the property, even though the owners are aware of the dog's vicious nature,³²⁰ or that the erection of a nearly invisible chain without warning signs or reflectors across a right of way is not actionable, even though the owner was aware that trespassers were likely to ride motorcycles across the property and had done so in the past.³²¹

313. *Id.* at 724, 708 A.2d at 47.

314. 290 Md. 186, 428 A.2d 459 (1981), *overruled by* Baltimore Gas & Elec. Co. v. Flippo, 348 Md. 680, 705 A.2d 1144 (1998).

315. *Id.* at 189, 428 A.2d at 462.

316. 264 Md. 518, 287 A.2d 265 (1972).

317. *Id.* at 526, 287 A.2d at 269-70.

318. *Id.*

319. *Id.* at 526, 287 A.2d at 270 (quoting *Woodbridge v. Marks*, 45 N.Y.S. 156, 160 (1897)).

320. *See id.* ("[T]he use of a vicious watchdog to protect its owners' property does not constitute [wanton or willful entrapment or misconduct]."); *see also* *Mech v. Hearst Corp.*, 64 Md. App. 422, 429, 496 A.2d 1099, 1102 (1985).

321. *See* *Doehring v. Wagner*, 80 Md. App. 237, 248-49, 562 A.2d 762, 768 (1989); *Carter v. Baltimore Gas & Elec. Co.*, 25 Md. App. 717, 718-19, 727, 336 A.2d 790, 790-91, 795 (1975). In contrast, the court of special appeals in *Potomac Electric Power Co. v. Smith*, relied upon the probability that a trespasser would be injured and the severity of the likely injury, along with the

5. Gross Negligence in Other Contexts

Claims of gross negligence or wanton conduct have arisen in other Maryland cases and have been decided under the same basic principles as the cases discussed above involving punitive damages, immunities, exculpatory clauses, and trespassers. In *Liscombe v. Potomac Edison Co.*,³²² for example, the plaintiff attempted to state a claim of gross negligence, and contended that his own contributory negligence would not bar such a claim. The court did not address whether the doctrine of contributory negligence applied to a claim of gross negligence, but held that the plaintiff's gross negligence claim was insufficient as a matter of law under the same definition of gross negligence used in *Romanesk v. Rose*, *Smith v. Gray Concrete Pipe Co.*, and some Maryland manslaughter cases.³²³

landowner's knowledge of the risk, to find that a landowner's conduct could be considered willful or wanton despite the lack of evidence of any intent by the landowner to harm a trespasser. See *Potomac Elec. Power Co. v. Smith*, 79 Md. App. 591, 608, 558 A.2d 768, 777 (1989). The court relied upon decisions holding "that a utility company is guilty of willful and wanton conduct when it knowingly fails to install, maintain, or repair its facilities properly," and found that there was evidence that the cross-arm on which the line was suspended and its continued use, over twenty-four years, violated the National Electric Safety Code. *Id.* at 611, 618, 558 A.2d at 778, 782. After the cross-arm broke and the line fell to the ground, the defendant had received at least three complaints over a one month period about a downed power line in the plaintiff's neighborhood, and the company was "aware the people in the neighborhood, including children, often used the path located on its right-of-way easement. See *id.* at 618, 558 A.2d at 782. "Yet [defendant] permitted this dangerous condition to continue uncorrected." *Id.* at 609, 558 A.2d at 777. In this decision, however, the court repeatedly emphasized the duties and sophisticated knowledge of a utility company. *Id.*

322. 303 Md. 619, 495 A.2d 838 (1985).

323. *Id.* at 634-37, 495 A.2d at 845-47; see also *Smith v. Gray Concrete Pipe Co.*, 267 Md. 149, 168, 297 A.2d 721, 731-32 (1972); *Romanesk v. Rose*, 248 Md. 420, 423, 237 A.2d 12, 14 (1968). The plaintiff in *Liscombe v. Potomac Edison*, had been driving a dump truck at a ready mix concrete plant where the dumping area lay underneath high voltage electric lines. *Liscombe*, 303 Md. at 622, 495 A.2d at 839. On previous occasions, the plaintiff had made deliveries to the plant, and had been warned that, while dumping materials, the bed of the dump truck would rise to the height of these overhead power lines, and orange flags had been placed on the lines. *Id.* One time, however, the plaintiff allowed the bed of the truck to contact the wires, and he received an electric shock. *Id.* at 622-25, 495 A.2d at 839-41. In his lawsuit, the plaintiff claimed that the operator of the concrete plant and the power company had been grossly negligent in allowing the dangerous lines to remain above the dumping area. *Id.* at 620, 495 A.2d at 838. The court

As another example, the court of appeals found an employee's conduct to be "wantonly offensive" under the applicable personnel statute in *Maryland State Department of Personnel v. Sealing*,³²⁴ where a correctional officer was terminated after he brought a flyer describing "Big Game Season" on African-Americans into a prison and passed it around amongst the other correctional officers.³²⁵ The court applied the "traditional Maryland definition" of "wanton," defined under these circumstances to be "conduct by an employee that is characterized by extreme recklessness and utter disregard for the rights of fellow employees, wards of the State or the public."³²⁶ The court found that, at the time the officer brought the racist material to work, he "was then aware of his obligation to be extremely careful to avoid any conduct on his part that might proliferate existing problems," but "intentionally brought a letter into the institution" that contained racially inflammatory material and "not only displayed this letter to staff members, but also negligently permitted it to be reproduced and negligently allowed copies to be left on a desk accessible to both inmates and correctional officers."³²⁷

III. DEFINING GROSS NEGLIGENCE

A. A Single, Common Standard

The court of appeals' commonly cited formulation of gross negligence in *Romanesh v. Rose*³²⁸ defines the term as "an intentional failure to perform a manifest duty in reckless disregard of the consequences as affecting the life or property of another, and also implies a thoughtless disregard of the consequences without the exertion of any effort to avoid them."³²⁹ The same basic definition has been applied to willful and wanton conduct; according to one commonly cited formulation, "[t]he word 'wanton' means characterized by extreme

held that there was no legally sufficient evidence of gross negligence because the employer and the power company had placed flags on the lines, began proceedings to move the lines, and distributed warnings of the lines to all drivers. *Id.* at 634, 637, 495 A.2d at 845, 847. The court found that the defendants "acted reasonably and with reasonable dispatch to guard against further harm to others," and there was "no indication to either that almost certain harm to others would result from their action or their failure to act." *Id.* at 637, 495 A.2d at 847.

324. 298 Md. 524, 471 A.2d 693 (1984).

325. *Id.* at 528-36, 471 A.2d at 695-99.

326. *Id.* at 537-38, 471 A.2d at 699-700.

327. *Id.* at 538, 471 A.2d at 700.

328. 248 Md. 420, 237 A.2d 12 (1968).

329. *Id.* at 423, 237 A.2d at 14.

recklessness and utter disregard for the rights of others.”³³⁰ The court of special appeals has also stated that “[t]he words ‘wanton’ and ‘reckless’ have been used in conjunction with ‘wilful’ [*sic*] to such an extent that distinctions among them have been consistently ignored.”³³¹ Thus, while “most courts consider that ‘gross negligence’ falls short of a reckless disregard of the consequences, and differs from ordinary negligence only in degree, and not in kind,”³³² Maryland has eliminated this distinction and treats gross negligence as a form of wanton or reckless conduct falling just short of actual malice.³³³

Whether in the context of punitive damages, immunities, exculpatory clauses, trespassers, or other uses of gross negligence, reckless indifference, or willful or wanton conduct, the Maryland courts have applied the same basic definition, have focused on the same elements of risk and knowledge, and have made no legal distinction between the varying contexts in which the terms are used.³³⁴ For example, in *Foor v. Juvenile Services Administration*,³³⁵ which addressed the sufficiency of a gross negligence claim in the context of a statutory immu-

330. *Dennis v. Baltimore Transit Co.*, 189 Md. 610, 617, 56 A.2d 813, 817 (1948). The courts have discerned a difference between willful and wanton conduct, but this distinction has made no practical difference in the cases discussed here. “Willful misconduct is performed with the actor’s actual knowledge or with what the law deems the equivalent of actual knowledge of the peril to be apprehended, coupled with a conscious failure to avert injury. A wanton act, by contrast is performed with reckless indifference to its potentially injurious consequences.” *Doehring v. Wagner*, 80 Md. App. 237, 246, 562 A.2d 762, 767 (1989). As a practical matter, since wanton conduct is defined in the same terms as gross negligence, and provides the lesser standard, none of the cases hinge upon any difference between willful and wanton, and many decisions simply cite “willful or wanton” as a single standard. See, e.g., *Mech v. Hearst Corp.*, 64 Md. App. 422, 429, 496 A.2d 1099, 1103 (1985) (“‘Willful or wanton’ generally denotes conduct that is extreme and outrageous, in reckless disregard for the rights of others.”).

331. *Medina v. Meilhammer*, 62 Md. App. 239, 249, 489 A.2d 35, 40 (1985).

332. W. PAGE KEETON ET AL., *PROSSER AND KEETON ON THE LAW OF TORTS* § 34, at 212 (5th ed. 1984) [hereinafter *PROSSER & KEETON*].

333. *Medina*, 62 Md. App. at 249, 489 A.2d at 40.

334. Cf. *PROSSER & KEETON*, *supra* note 332, § 34, at 214 (stating that “‘willful,’ ‘wanton,’ or ‘reckless’ conduct tends to take on the aspect of highly unreasonable conduct, involving an extreme departure from ordinary care, in a situation where a high degree of danger is apparent,” and “there is often no clear distinction at all between such conduct and ‘gross’ negligence, and the two have tended to merge and take on the same meaning . . .”); *Medina*, 62 Md. App. at 249-51, 489 A.2d at 40-41.

335. 78 Md. App. 151, 552 A.2d 947 (1989).

nity, the court of special appeals quoted the standard of gross negligence from *Bannon v. Baltimore & Ohio Railroad* as "the omission of that care 'which even inattentive and thoughtless men never fail to take of their own property,'" and as "impl[ying] malice and evil intention," and noted that this "standard has remained more or less intact."³³⁶ The court then relied upon *White v. King* for the proposition that gross negligence is equivalent to "'wilful and wanton misconduct' [and] 'a wanton or reckless disregard for human life or the rights of others.'"³³⁷ The court also relied upon *Romanesk v. Rose* for the proposition that "'a wrongdoer is guilty of gross negligence or acts wantonly and willfully only when he inflicts injury intentionally or is so utterly indifferent to the rights of others that he acts as if such rights did not exist.'"³³⁸

The essence of these definitions is that gross negligence is not really negligence at all. Plaintiffs have repeatedly tried to argue that their claims of gross negligence should succeed because the alleged negligent acts were prolonged, numerous, or severe.³³⁹ As the court of special appeals stated in *Medina v. Meilhamer*,³⁴⁰ "[t]he quantity of the

336. *Id.* at 170, 552 A.2d at 956 (quoting *Bannon v. Baltimore & Ohio R.R.*, 24 Md. 108, 124 (1866)).

337. *Id.* (quoting *White v. King*, 244 Md. 348, 360, 362 n.2, 223 A.2d 763, 770, 771 n.2 (1966)).

338. *Id.* (quoting *Romanesk v. Rose*, 248 Md. 420, 423, 237 A.2d 12, 14 (1968)); see also *Nast v. Lockett*, 312 Md. 343, 351, 539 A.2d 1113, 1117 (1988) (test of gross negligence "in a civil automobile accident action . . . is the same as the test in a criminal prosecution of manslaughter by automobile"); *Smith v. Gray Concrete Pipe Co.*, 267 Md. 149, 167-68, 297 A.2d 721, 732 (1972) (applying the standard of gross negligence from automobile manslaughter cases to a punitive damage claim); *Boucher v. Riner*, 68 Md. App. 539, 544-45, 514 A.2d 485, 488 (1986) (citing, in a case arising from an exculpatory contract clause, cases involving "the circumstances under which gross negligence can support an award of exemplary damages, civil liability for injuries to trespassers, and criminal liability for manslaughter by automobile," as well as "an automobile guest statute, contributory negligence and . . . a pre-injury release").

339. See, e.g., *Tatum v. Gigliotti*, 321 Md. 623, 625-26, 583 A.2d 1062, 1063 (1991) (alleging numerous negligent acts); *Foor*, 78 Md. App. at 165-67, 552 A.2d at 954-55 (alleging repeated negligent acts with severe consequences); *Cambridge Iron & Metal Co. v. Hartman*, 65 Md. App. 629, 637, 501 A.2d 871, 881 (1985) (alleging a negligent act with severe consequences); *Medina*, 62 Md. App. at 251, 489 A.2d at 41 (alleging numerous negligent acts leading to foreseeable death of a child).

340. 62 Md. App. 239, 489 A.2d 35 (1985).

negligence . . . does not change the quality of that negligence so that it becomes different from ordinary lack of care."³⁴¹

In any gross negligence case, the central question is whether the defendant engaged in a course of conduct that created an unreasonable risk of harm to another person or class of persons, and did so in a manner that could be labeled "reckless indifference" to that risk. Gross negligence is an attempt to hold an individual responsible for risks that he has knowingly created for someone else in the same sense that the doctrine of "assumption of the risk" holds an individual responsible for a risk of harm that he has caused to himself.³⁴² "The Maryland courts have identified three elements to be established before a risk will be deemed legally assumed. The defendant must show that the plaintiff (1) had knowledge of the risk of danger, (2) appreciated that risk and (3) voluntarily exposed himself to it."³⁴³ In addressing grossly negligent, willful and wanton, or recklessly indifferent conduct, the courts have looked to these same basic elements.³⁴⁴ By way of analogy, a simplistic formulation of gross negligence may be when a defendant has knowingly created a risk, he has then legally assumed the risk.³⁴⁵

B. The Defendant's Subjective Mental State

1. Intentional Conduct Requirement

As stated above, gross negligence requires "an intentional failure to perform a manifest duty in reckless disregard of the consequences as affecting the life or property of another."³⁴⁶ The most basic requirement of gross negligence or reckless indifference is that the harm suffered by the plaintiff must have resulted from some intentional act or

341. *Id.* at 251-52, 489 A.2d at 41.

342. See *Liscome v. Potomac Edison Co.*, 303 Md. 619, 630, 495 A.2d 838, 843 (1985) for a discussion on the assumption of risk standard, and see *infra* Part III.B-C for a discussion on the similarities between assumption of risk tests and the test for gross negligence.

343. *Liscombe*, 303 Md. at 630, 495 A.2d at 843 (quoting *Stancill v. Potomac Elec. Power Co.*, 744 F.2d 861, 866 (D.C. Cir. 1984)).

344. See *infra* Part III.B-C.

345. See *supra* notes 332-48 and accompanying test; see also *infra* Part III.B-C.

346. *Romanesk v. Rose*, 248 Md. 420, 423, 237 A.2d 12, 14 (1968) (quoting 4 BLASHFIELD'S CYCLOPEDIA OF AUTOMOBILE LAW AND PRACTICE, pt. 2, § 2771 (1946)); see also *State v. Albrecht*, 336 Md. 475, 500, 649 A.2d 336, 348 (1994) (quoting *United Life & Accident Ins. Co. v. Prostic*, 169 Md. 535, 539, 182 A.2d 421, 423 (1936) (holding that, to be considered grossly negligent, "the accused must have committed 'acts so heedless and incautious as necessarily to be deemed unlawful and wanton'")).

omission.³⁴⁷ As stated in the *Restatement (Second) of Torts*, “[c]onduct cannot be in reckless disregard of the safety of others unless the act or omission is itself intended.”³⁴⁸ In *The Law of Torts*, the authors explicitly differentiate cases involving intentional acts or omissions, which might support a claim of aggravated or gross negligence, from cases that involve alleged “thoughtlessness,” “inadvertence,” or “simple inattention.”³⁴⁹

The Maryland cases similarly require that a claim of gross negligence or reckless indifference must be based upon a defendant’s intentional act or omission. In *Maryland State Department of Personnel v. Sealing*,³⁵⁰ the court upheld the finding that a correctional officer acted wantonly because he “intentionally brought a letter into the institution” that contained racially inflammatory material.³⁵¹ In *Marriott Corp. v. Chesapeake & Potomac Telephone Co.*,³⁵² by contrast, the plaintiff’s claim of gross negligence was insufficient as a matter of law, where “nothing suggests that [the employee’s] failure to [use the ‘newer practice’] amounted to ‘an intentional failure to perform a manifest duty in reckless disregard of the consequences as affecting the life or property of another’”³⁵³ This element of gross negligence is most likely to become an issue where the defendant is accused of an omission. In such cases, the plaintiff cannot simply argue that the defendant failed to perform some act that a reasonable person would have performed; he must show that the defendant intentionally decided not to do it.³⁵⁴

347. See *Medina*, 62 Md. App. at 249-50, 489 A.3d at 40 (“The usual meaning assigned to ‘willful,’ ‘wanton,’ or ‘reckless,’ . . . is that the actor has intentionally done an act of an unreasonable character” (quoting PROSSER & KEETON, *supra* note 332, at 213)).

348. RESTATEMENT (SECOND) OF TORTS § 500 cmt. b (1965); *id.* § 500 (defining the phrase “reckless disregard of safety” in terms of “do[ing] an act or intentionally fail[ing] to do an act which it is his duty to the other to do”).

349. See PROSSER & KEETON, *supra* note 332, at 214, quoted in *Earl v. Gunnell*, 78 Md. App. 648, 663-64, 554 A.2d 1256, 1263-64 (1989).

350. 298 Md. 524, 471 A.2d 693 (1984).

351. *Id.* at 538, 471 A.2d at 700.

352. 124 Md. App. 463, 723 A.2d 454, (1998), *cert. denied*, 354 Md. 113, 729 A.2d 405 (1999).

353. *Id.* at 480, 723 A.2d at 463 (internal quotation omitted); see also *Jacob v. Davis*, 128 Md. App. 433, 464-65, 738 A.2d 904, 920 (1999) (holding that trustee’s failure to give an accounting could not be grossly negligent as a matter of law, because “[t]here was no evidence to suggest that appellees recognized an obligation to account, during [the stepmother’s] lifetime or after her death, and intentionally disregarded it”).

354. *Exxon Corp. v. Yarema*, 69 Md. App. 124, 156, 516 A.2d 990, 1006-07 (1986), provides an illustration of a case where there was sufficient evidence of an

2. Defendant's Knowledge that His Conduct Will Create a Risk of Harm

The Maryland courts have not engaged in any extended discussion of the extent to which a defendant must be aware that his or her conduct has created a risk of harm to another person or class of persons, although they have extensively discussed the defendant's knowledge or inferred knowledge under the facts of each case.³⁵⁵ One standard, proposed in a comment in the *Restatement (Second) of Torts*, suggests that:

In order that the actor's conduct may be reckless, it is not necessary that he himself recognize it as being extremely dangerous It is enough that he knows or has reason to know of circumstances which would bring home to the realization of the ordinary, reasonable man the highly dangerous character of his conduct.³⁵⁶

Prosser and Keeton suggest an even more relaxed standard, and state that when determining whether a defendant's conduct is willful and wanton, "an objective standard must of necessity in practice be applied" which asks whether "the defendant, whatever his state of mind, has proceeded in disregard of a high and excessive degree of danger, either known to him or apparent to a reasonable person in his position."³⁵⁷

The court of appeals addressed the issue of a defendant's subjective knowledge in the criminal law context in *Minor v. State*,³⁵⁸ and concluded that "whether the accused's conduct . . . was reckless . . . is a matter for objective determination, to be made by the trier of fact

intentional omission to allow a jury to decide whether the defendant was grossly negligent. The defendant in that case was aware, through inventory discrepancies, that its gas tank was leaking, and it had a duty under state law requiring it to correct such a leak, but it delayed for two years and failed to file required reports with various government agencies. *Id.* at 160, 516 A.2d at 1008. The court of special appeals held that a jury could infer that Exxon's delay was deliberate: "Nowhere in the testimony does Exxon explain its delay in testing ground water samples. This silence suggests it was hoping that no significant ground water contamination would manifest itself." *Id.* at 161, 516 A.2d at 1009.

355. See *supra* Part II.B; see also *Brown v. Dermer*, 357 Md. 344, 362, 744 A.2d 47, 57 (2000); *Pearson v. State*, 126 Md. App. 530, 542, 730 A.2d 700, 706 (1999); *Greenway v. State*, 8 Md. App. 194, 196-98, 259 A.2d 89, 91-92 (1969).

356. RESTATEMENT (SECOND) OF TORTS § 500 cmt. c (1965).

357. PROSSER & KEETON, *supra* note 332, at 213-14.

358. 326 Md. 436, 605 A.2d 138 (1992).

from all the evidentiary circumstances in the case."³⁵⁹ In *Minor*, the defendant handed a "loaded shotgun to his brother with the safety off and ready to fire," despite his knowledge that he and his brother had "consumed three or four fifths of wine" and used cocaine and heroin, that his brother had "indicated an intention to put the gun to his head and pull the trigger," and that defendant dared him to do so "in order to 'call his bluff.'"³⁶⁰ The parties stipulated, however, that the defendant subjectively thought there was *no* chance his brother might shoot himself.³⁶¹ The court affirmed the defendant's conviction for reckless endangerment, stating that "[t]he test is whether the appellant's misconduct, viewed objectively, was so reckless as to constitute a gross departure from the standard of conduct that a law-abiding person would observe, and thereby create the substantial risk that the statute was designed to punish."³⁶²

Minor could be interpreted as applying the same objective definition quoted above from *The Law of Torts*, thereby eliminating any requirement that the defendant must be aware that his conduct created a risk of harm.³⁶³ Under such a definition of gross negligence, the only requirement would be some intentional act or omission by the defendant and a resulting risk of harm to another that is sufficiently severe, probable, and unjustified, even if it never entered the defendant's mind that his or her conduct might be at all risky. Such a definition could be seen as consistent with the language in some Maryland civil opinions, which refer to facts that the defendant "should have known."³⁶⁴

Such an interpretation, however, would ignore the important distinction between the bare knowledge that a risk exists and the more extensive *appreciation* of its extent, *i.e.*, its probability or the severity of the resulting harm. As the court of appeals held in *Minor*, a person

359. *Id.* at 443, 605 A.2d at 141.

360. *Id.*

361. *Id.* at 441, 605 A.2d at 140.

362. *Id.* at 443, 605 A.2d at 141.

363. PROSSER & KEETON, *supra* note 332, at 213-14; *see also Minor*, 326 Md. at 443, 605 A.2d at 141.

364. *See Smith v. Gray Concrete Pipe Co.*, 267 Md. 149, 170-72, 297 A.2d 721, 733-34 (1972) (holding defendant liable for punitive damages because its conduct reflected "a premeditated decision, deliberately arrived at, by an indifferent employer in possession of facts which should have indicated almost certain harm to others"); *Boucher v. Riner*, 68 Md. App. 539, 548, 514 A.2d 485, 490 (1986) (concluding there was no evidence of gross negligence because there was no evidence "of a premeditated decision, deliberately arrived at, by an indifferent jumpmaster that should have indicated almost certain harm to others").

may be guilty of the offense of reckless endangerment without appreciating the extent to which his or her conduct is risky.³⁶⁵ This does not mean, however, that a person can be guilty of the offense even though he or she does not even know that a risk of harm exists.

In applying *Minor*, the court of special appeals has concluded that a defendant must have some awareness of the risk of harm that he or she has created in order to support a charge of reckless endangerment in a criminal case.³⁶⁶ In *Williams v. State*,³⁶⁷ the court observed that *Minor's* holding was limited to the question of whether the risk created by the defendant was, in fact, sufficiently substantial.³⁶⁸ The court concluded that, even under *Minor*, the defendant must perceive that his or her conduct creates *some* risk, even if he or she need not perceive the *amount* of the risk:

One is not guilty [of reckless endangerment] if he is oblivious to the fact that there is a risk and oblivious to the fact that he is disregarding a risk It is required that the defendant on trial be aware of a risk and then consciously disregard it. That much is indisputably subjective.³⁶⁹

According to the court of special appeals in *Williams*, the holding in *Minor* focused upon whether the risk itself was sufficiently substantial to be reckless, and it is the question of the actual *extent* of the risk that must be "objectively measured, not only quantitatively substantial but also qualitatively unjustified."³⁷⁰

The court of special appeals' view in *Williams* is consistent with the way the Maryland courts have addressed the defendant's knowledge in civil law contexts. In *Medina v. Meilhammer*,³⁷¹ *Tatum v. Gigliotti*,³⁷² and

365. See *Minor*, 326 Md. at 442-43, 605 A.2d at 141.

366. *Williams v. State*, 100 Md. App. 468, 508-10, 641 A.2d 990, 1010 (1994).

367. 100 Md. App. 468, 641 A.2d 990 (1994).

368. *Id.* at 507, 641 A.2d at 1009.

369. *Williams*, 100 Md. App. at 503, 641 A.2d at 1007; see also *Wieland v. State*, 101 Md. App. 1, 28, 643 A.2d 446, 459 (1994) ("At the mens rea level, the evidence was sufficient to permit the jury to find that the appellant was aware that his firing, or his brandishing, of the weapon created some risk of harm and that he then consciously disregarded such risk.") (emphasis omitted).

370. *Williams*, 100 Md. App. at 504, 641 A.2d at 1007. The plaintiff in *Minor* may have thought that his brother would never pull the trigger, but, as the court of special appeals noted, he was aware that, as a general proposition, there was some risk in handing a loaded shotgun to someone who had been drinking and using drugs and then daring that person to use it. See *Minor*, 85 Md. App. at 319, 583 A.2d at 1108-09.

371. 62 Md. App. 239, 243-44, 248-52, 489 A.2d 35, 37, 39-41 (1985).

Wells v. State,³⁷³ for example, the defendants undeniably engaged in conduct that resulted in an unreasonable and substantial risk of death or injury to another person. None of these cases, however, involved anything more than simple negligence.³⁷⁴ As the court of special appeals stated in the context of a products liability case, “[i]n order to find ‘recklessness’ . . . there must be a readily perceptible danger and a conscious choice by the manufacturer to market the product despite the risk.”³⁷⁵ It is the defendant’s awareness of the risk that changes the “quality” of the defendant’s act from negligent into reckless conduct.³⁷⁶ Such lack of knowledge was the basis for the rejection of one of the plaintiff’s gross negligence claims in *Jacob v. Davis*.³⁷⁷ In *Jacob*, the sole remainderman of two testamentary trusts sued the trustee alleging that the trustee violated his fiduciary duties as trustee.³⁷⁸ Thus, while a defendant may not avoid liability for gross negligence solely

372. 80 Md. App. 559, 571, 565 A.2d 354, 359 (1989), *aff’d*, 321 Md. 623, 626 n.1, 583 A.2d 1062, 1063 n.1 (1991).

373. 100 Md. App. 693, 705-06, 642 A.2d 879, 885 (1994).

374. *See id.* at 694, 642 A.2d at 879 (involving reports of child abuse and whether employees of the state Department of Human Resources and the Baltimore City Department of Social Services failed to prevent the repeated child abuse); *see also Tatum*, 80 Md. App. at 562-65, 565 A.2d at 355-56 (involving the death of a patient due to an asthma attack and whether the emergency medical technicians properly treated the patient); *Medina*, 62 Md. App. at 243-45, 489 A.2d at 37-38 (involving the partial immersion of a two year old in an excavated hole of scalding water and whether the employees of the apartment complex were negligent in excavating the hole in order to repair a ruptured hot water line).

375. *Harley-Davidson Motor Co. v. Wisniewski*, 50 Md. App. 339, 346-47, 437 A.2d 700, 704-05 (1981) (finding no gross negligence because there was “no evidence that Harley-Davidson was aware of the [defective part]”).

376. *See Medina*, 62 Md. App. at 251, 489 A.2d at 41 (stating that “[t]he quantity of the negligence in this case does not change the quality of that negligence so that it becomes different from ordinary lack of care”).

377. 128 Md. App. 433, 738 A.2d 904 (1999).

378. *Id.* at 438, 738 A.2d at 906. The court stated, “[t]here was no evidence to suggest that appellees recognized an obligation to account, during [the stepmother’s] lifetime or after her death, and intentionally disregarded it.” *Id.* at 464-65, 738 A.2d at 920; *see also Maryland State Dep’t of Pers. v. Sealing*, 298 Md. 524, 538, 471 A.2d 693, 700 (1984) (finding that an officer’s conduct was wanton where he brought racist material to work, even though he “was then aware of his obligation to be extremely careful to avoid any conduct on his part that might proliferate existing problems”); *Potomac Elec. Power Co. v. Smith*, 79 Md. App. 591, 609-11, 558 A.2d 768, 777-78 (1989) (finding defendant power company to have been wanton where it “was aware that people in the neighborhood . . . often used the path located on its right-of-way easement” in the area of a downed power line).

because he or she subjectively mis-evaluated the riskiness of his or her conduct, there must be evidence to allow a trier of fact to infer that the defendant was aware that *some* risk existed, and that the defendant intentionally acted or failed to act despite this risk.³⁷⁹

3. Requirement that the Defendant Know the Facts Such that He or She *Should* Have Appreciated the Extent of the Risk

Gross negligence also contains a third state-of-mind element, which requires a subjective inquiry into the facts known to the defendant and an objective evaluation of what a reasonable person would have known or appreciated based upon those facts. Simple awareness of “some” amount of risk, however seemingly remote, is not grossly negligent even though the person intentionally disregards the risk.³⁸⁰ In *Murphy v. Edmonds*,³⁸¹ for example, the court of appeals rejected the plaintiff’s punitive damage claim because, although the defendants had observed a hole in the tire that blew out and caused the accident on the morning before the accident occurred, the defendants had not been aware of the specific facts that caused the plaintiff’s harm: the steel belts in the tire had rusted, but were not observable upon visual inspection.³⁸² While there is surely *some* level of risk that a tire with a hole in it is more likely to blowout than a tire without such a hole, the court found that the defendants could have reasonably concluded that “it was not serious enough to require immediate attention since the tire was not losing air,” and that such a conclusion would not support any claim of gross negligence.³⁸³

379. See *Jacob*, 128 Md. App. at 465, 738 A.2d at 920-21; *Williams*, 100 Md. App. at 492, 641 A.2d at 1002.

380. *Murphy v. Edmonds*, 325 Md. 342, 376-77, 601 A.2d 102, 118-19 (1992).

381. 325 Md. 342, 601 A.2d 102 (1992).

382. *Id.* at 376-77, 601 A.2d at 118-19. Similarly, the defendants were not recklessly indifferent, as a matter of law, in *Baublitz v. Henz*, despite the defendants’ knowledge of mechanical problems of the truck in that case, there was no evidence that the alleged mechanical problems of which the employer was aware “were in any way contributing causes to the collision.” *Baublitz v. Henz*, 73 Md. App. 538, 546-47, 535 A.2d 497, 500-01 (1988); see also *Eagle-Picher Indus., Inc. v. Balbos*, 84 Md. App. 10, 79, 578 A.2d 228, 262 (1990) (finding no gross negligence where the manufacturer was not aware of a specific risk from the finished product, as opposed to materials used to make the product); *American Laundry Mach. Indus. v. Horan*, 45 Md. App. 97, 118, 412 A.2d 407, 420 (finding the defendant was not grossly negligent where there was nothing “to show that [defendant] ever really expected the machine to be used as it was in this case, even though, for purposes of establishing negligence, such a use was within a general class of use that was ‘foreseeable’”).

383. *Murphy*, 325 Md. at 377, 601 A.2d at 119.

Under this third state-of-mind element, Maryland incorporates the *Restatement's* view that the actor must "know[] or ha[ve] reason to know of circumstances which would bring home to the realization of the ordinary, reasonable man the highly dangerous character of his conduct."³⁸⁴ As stated in *Smith v. Gray Concrete Pipe Co.*, the question is whether the defendant is "in possession of facts which should have indicated almost certain harm to others."³⁸⁵

In putting all three state-of-mind elements together, it is useful to examine the distinctions between "reckless" conduct, "willful" conduct, and "malicious" conduct. A defendant who acts maliciously *wants* to cause harm to another.³⁸⁶ In other words, a malicious defendant should not only foresee a risk of harm to someone, but also intend for the harm to happen.³⁸⁷ A reckless or willful defendant, however, does not necessarily want to cause anyone harm, but either (1) does not care whether he or she causes harm, or (2) proceeds in the hope that the possible harm would not come true.³⁸⁸

384. RESTATEMENT (SECOND) OF TORTS § 500 cmt. c (1965).

385. *Smith v. Gray Concrete Pipe Co.*, 267 Md. 149, 172, 297 A.2d 721, 734 (1972); *see also* *Boucher v. Riner*, 68 Md. App. 539, 548, 514 A.2d 485, 490 (1986) (rejecting a claim of gross negligence where there was "no evidence of a premeditated decision, deliberately arrived at, by an indifferent [parachute] jumpmaster that should have indicated almost certain harm to others").

386. *See* *Owens-Illinois, Inc. v. Zenobia*, 325 Md. 420, 460, 601 A.2d 633, 652 (1992) (characterizing "actual malice" as "evil motive, intent to injure, ill will, or fraud").

387. *See id.*; *see also* *Montgomery Ward v. Wilson*, 339 Md. 701, 729 n.5, 664 A.2d 916, 930 n.5 (1995) (defining actual malice "to refer to conduct characterized by evil or wrongful motive, intent to injure, knowing and deliberate wrongdoing, [and] ill will or fraud").

388. The inclusion of individuals who improperly elect to take chances, even though hoping that no harm results, in the definition of the term "reckless" is apparent in the early contributory negligence cases. *See, e.g.*, *United Rys. & Elec. Co. v. Watkins*, 102 Md. 264, 268, 62 A. 234, 235 (1905). The court stated that:

[W]hen the disaster had been due to a miscalculation as to the chances of the individual being able to clear the track before the car would reach the point where the collision coincidentally occurred, a recovery has been denied upon the obvious ground that such a reckless attempt was gross negligence on the part of the person injured.

Id.; *State v. United Rys. & Elec. Co.*, 97 Md. 73, 76, 54 A. 612, 613-14 (1903) (finding the driver to be contributorily negligent where "with his eyes open, after seeing [a street] car approaching he attempted to cross . . . in a slow trot, without in the least hastening his speed").

The distinction between “willful” and “reckless” arises, not in terms of intention, but in terms of subjective awareness of the risk. A “willful” defendant intentionally proceeds even though he or she is aware of the extent to which his conduct may cause harm to another.³⁸⁹ A “reckless” defendant, as discussed above, is aware that there is *some* risk of harm and *should* appreciate its extent, but does not because of indifference or miscalculation.³⁹⁰ It is this failure to heed and to calculate appropriately a known risk to which the law of gross negligence is directed, the idea that a defendant will be held responsible when he or she knows that his or her conduct may be dangerous to some other person or class of persons in the abstract, but ignores the risk or thinks that his or her position or knowledge of the risk is special.³⁹¹ Where a defendant makes such a calculation, the law imposes upon him the legal responsibility for the consequence, in the same sense that a plaintiff has assumed the risk of his own conduct where he foresees a danger, but elects to proceed in the hope that it will not harm him.³⁹²

C. *Requirement that the Defendant’s Conduct Be Objectively Extraordinary or Outrageous*

1. The Nature of the Risk of Harm

As discussed in the previous section, the court of appeals’ decision in *Minor* held that “whether the accused’s conduct . . . was reckless . . . is a matter for objective determination,”³⁹³ and “[t]he test is whether the appellant’s misconduct, viewed objectively, was so reckless as to constitute a gross departure from the standard of conduct that a law-

389. See *Doehring v. Wagner*, 80 Md. App. 237, 246, 562 A.2d 762, 767 (1989) (“Willful misconduct is performed with the actor’s actual knowledge or with what the law deems the equivalent of actual knowledge of the peril to be apprehended, coupled with a conscious failure to avert injury.”).

390. See *supra* notes 355-69 and accompanying text.

391. See generally *Minor v. State*, 326 Md. 436, 441-43, 605 A.2d 138, 140 (1992). The court found the defendant guilty of reckless endangerment when the defendant “actually was aware of a substantial risk that his brother would [shoot himself] . . . [but] perceived no risk because he believed that his brother would simply return the gun to him.” *Id.*

392. In *Exxon Corp. v. Yarema*, for example, the court of special appeals found sufficient evidence to support a claim of punitive damages where Exxon knew of leaks in its gasoline tanks. *Exxon Corp. v. Yarema*, 69 Md. App. 124, 169, 516 A.2d 990, 1013 (1986). “Nowhere in the testimony does Exxon explain its delay in testing ground water samples. This silence suggests it was hoping that no significant ground water contamination would manifest itself.” *Id.*

393. *Minor*, 326 Md. at 443, 605 A.2d at 141.

abiding person would observe, and thereby create the substantial risk that the statute was designed to punish."³⁹⁴ This objective element is similar to ordinary negligence, but varies as a matter of degree, and thus descends from the old concept of gross negligence as a lower duty of care.

The main problem lies in determining how to quantify this part of the gross negligence test in order to apply it consistently. Negligent acts are also objectively measured, with an exclusive focus on whether the defendant's conduct is reasonable.³⁹⁵ In determining whether a defendant is liable for simple negligence, courts and juries weigh the probability of harm, the risk of the harm, and any social utility of the defendant's conduct.³⁹⁶ Gross negligence, however, requires more; it requires an element of outrageous conduct or actions undertaken in an "extraordinary manner."³⁹⁷

The Maryland courts have wrestled with this element with varying verbal formulations. In *Bannon v. Baltimore & Ohio Railroad*,³⁹⁸ the court attempted to define an underlying standard of care as "the omission of that care which even inattentive and thoughtless men never fail to take of their own property."³⁹⁹ Other cases have focused on the probability of harm to another, such as in *Liscombe v. Potomac Edison Co.*,⁴⁰⁰ where defendants were not grossly negligent because there was "no indication to [defendants] that almost certain harm to others would result from their action or their failure to act,"⁴⁰¹ or as in *Minor v. State*, which required a "substantial risk of death or serious injury to

394. *Id.* at 443, 605 A.2d at 141.

395. *See, e.g., Eastern Shore Pub. Serv. Co. v. Corbett*, 227 Md. 411, 426, 177 A.2d 701, 709 (1962) ("The test [for ordinary negligence] . . . is whether the defendant exercised such care and caution as a reasonably prudent man would have exercised under all of the surrounding circumstances of the case."); *Texas Co. v. Pecora*, 208 Md. 281, 295, 118 A.2d 377, 383 (1955) (stating that in determining whether negligence has occurred, all of the circumstances must be measured by the standard of a reasonably prudent man).

396. *See* PROSSER & KEETON, *supra* note 332, at 171.

397. *MCIC, Inc. v. Zenobia*, 86 Md. App. 456, 466, 587 A.2d 531, 536 (1991) (quoting *Eagle-Picher Indus., Inc. v. Balbos*, 84 Md. App. 10, 73, 578 A.2d 228, 259 (1990)); *see also Nast v. Lockett*, 312 Md. 343, 367, 539 A.2d 1113, 1125 (1988).

398. 24 Md. 108 (1866).

399. *Id.* at 124; *see also Foor v. Juvenile Servs. Admin.*, 78 Md. App. 151, 170, 552 A.2d 947, 956 (1989).

400. 303 Md. 619, 495 A.2d 838 (1985).

401. *Id.* at 637, 495 A.2d at 847 (citing *Smith v. Gray Concrete Pipe Co.*, 267 Md. 149, 172, 297 A.2d 721, 734 (1972)).

another.”⁴⁰² Others have focused on the extent to which the risk is foreseeable or readily perceptible.⁴⁰³ The majority of cases, however, do not present any explicit analysis of the degree of risk or probability of harm, but merely conclude whether the defendant’s conduct rises to the appropriate level.

One thing is clear, the outrageous or extraordinary conduct required under this element of the gross negligence test mandates something more than ordinary negligence,⁴⁰⁴ a breach of fiduciary duty,⁴⁰⁵ or even simple recklessness.⁴⁰⁶ Frequently, this “something more” seems to derive from the heightened risk imposed by the defendant’s conduct. *Nast v. Lockett*⁴⁰⁷ provides such an example, where the court held that a gross negligence claim could proceed against a driver who was intoxicated, but not against a driver who was only driving under the influence.⁴⁰⁸ The court’s opinion was phrased in terms of the defendant’s state of mind, but clearly required an assessment of the extent of the risk created by the defendant and the probability of likely injury, considering that “[a]s the degree of impairment by the voluntary consumption of alcohol increases, the need for other aggravating circumstances lessens, and vice versa. In other words, a high degree of impairment calls for other aggravating circumstances, if any at all, of a less serious nature.”⁴⁰⁹

Nast demonstrates another problem with applying the objective standard consistently. Many of the cases, like *Nast*, do not distinguish between this objective measure of the outrageous nature of the defendant’s conduct and the subjective question of whether the defendant was aware of the risk, because the same evidence will often relate to

402. *Minor v. State*, 326 Md. 436, 443, 605 A.2d 138, 141 (1992).

403. *Harley-Davidson v. Wisniewski*, 50 Md. App. 339, 347, 437 A.2d 700, 705 (1981) (requiring, in a products liability case, “a readily perceptible danger”).

404. *See Baublitz v. Henry*, 73 Md. App. 538, 547, 535 A.2d 497, 501 (1988) (rejecting a gross negligence claim, even though “[t]he size and weight of the truck, together with the ‘worn’ brakes, are sufficient to support a finding of ordinary negligence”).

405. *See Jacob v. Davis*, 128 Md. App. 433, 464, 738 A.2d 904, 920 (1999).

406. *See Nast v. Lockett*, 312 Md. 343, 352, 539 A.2d 1113, 1117 (1998) (“Simple negligence will not be sufficient—even reckless driving may not be enough Reckless driving may be a strong indicator, but unless it is of an extraordinary or outrageous character, it will ordinarily not be sufficient.”).

407. 312 Md. 343, 539 A.2d 1113 (1988).

408. *Id.* at 366, 539 A.2d at 1124.

409. *Id.* at 362, 539 A.2d at 1122.

both tests.⁴¹⁰ As stated in *The Law of Torts*, the defendant's subjective indifference "is almost never admitted, and can be proved only by the conduct and the circumstances."⁴¹¹ The language of the opinions, however, does not always make it clear which element of the gross negligence standard is under discussion or is supported by a particular piece of evidence.⁴¹²

It should be clear, though, that the Maryland courts weigh the extent of the risk created by the defendant in determining whether his or her conduct is grossly negligent. In *Maryland State Department of Personnel v. Sealing*,⁴¹³ for example, the court not only examined what the correctional officer knew at the time he brought racist materials into the prison, the court explicitly considered the degree of risk created by this conduct.⁴¹⁴ In concluding that the correctional officer acted wantonly when he brought racist material into a prison, the court relied on testimony by prison supervisors that such material "could cause a hardship on white correctional officers . . ." from minority inmates, and that the material "was bound to cause some type of trouble between the officers and inmates," including a "possible riot" if it were circulated.⁴¹⁵

The "something more" than ordinary negligence may also arise from the extent of the likely injury. For example, in the cases addressing whether a landowner is liable to a trespasser, both the likelihood and extent of injury are factors that distinguish between the wanton act of placing a "spring gun" on one's property, which is likely to shoot and kill a trespasser, and allowing a vicious dog to roam the

410. See *infra* notes 450-52 and accompanying text for a discussion on the interrelations between the objective nature and subjective intent and the fact that a jury needs to use objective factors to infer the subjective intent.

411. PROSSER & KEETON, *supra* note 332, at 213.

412. See *Nast*, 312 Md. at 362-63, 539 A.2d at 1122-23 (finding that it is unclear whether the level of intoxication goes more to the objective element of recklessness or to the subjective knowledge of risk); *Potomac Elec. Power Co. v. Smith*, 79 Md. App. 591, 611, 558 A.2d 768, 778 (1989).

413. 298 Md. 524, 471 A.2d 693 (1984).

414. *Id.* at 538-39, 471 A.2d at 700.

415. *Id.* at 538, 471 A.2d at 700. Similarly, in *Thorne v. Contee*, the court of special appeals found that the defendant was grossly negligent when he drove with the knowledge that he was susceptible to seizures, where the risk caused by his driving was enhanced by the fact that his job was to drive "heavy tractor-trailers on public highways," and that he continued "to drive a tractor, with poor steering, that required all his faculties to be operating at an optimum level." *Thorne v. Contee*, 80 Md. App. 481, 495, 565 A.2d 102, 108 (1989); see also *Exxon Corp. v. Yarema*, 69 Md. App. 124, 163, 516 A.2d 990, 1010 (1986) (concluding that Exxon was grossly negligent because of its disregard of "the serious risks of ground water contamination").

property, which may or may not injure a trespasser.⁴¹⁶ The element of the gravity of the risk involved runs throughout the gross negligence opinions, even where the courts address it in terms of the defendant's knowledge of the risk.⁴¹⁷

Another approach that has been adopted in some cases is to ask whether a reasonable person could have acted in the same manner as the defendant, according an appropriate range of reasonableness. In *Murphy v. Edmonds*,⁴¹⁸ for example, the court found that the defendants were not grossly negligent where "it could be inferred that, while one or both of the defendants observed the hole in the tire's surface during inspection, they [reasonably] concluded that it was not serious enough to require immediate attention since the tire was not losing air."⁴¹⁹ The same approach has been used in criminal cases by asking whether an "ordinarily prudent citizen similarly situated" could have acted in the same way.⁴²⁰

These approaches are not mutually inconsistent. The best formulation may be that, in order to determine if the defendant's conduct is sufficiently outrageous, a court must consider, (a) the probability and foreseeability of the risk, (b) the extent of foreseeable harm that might result from the undertaking of the risk, and (c) the difference between the defendant's conduct and that of a similarly situated "reasonable person." Different parts of this analysis necessarily have greater significance in some cases or classes of cases than in others.⁴²¹

416. See *Bramble v. Thompson*, 264 Md. 518, 526, 287 A.2d 265, 270 (1972). This may also explain why the power company was held liable in *Potomac Electric Power Co. v. Smith*, which involved a downed power cable, a hazard that is more dangerous than a wire across a driveway or a vicious dog. See *Potomac Elec. Power Co.*, 79 Md. App. at 608, 558 A.2d at 777.

417. See, e.g., *Thorne*, 80 Md. App. at 493-94, 565 A.2d at 109 (emphasizing the defendant's knowledge of his medical condition and his withholding of that information from his employer); *Potomac Elec. Power Co.*, 79 Md. App. at 609, 558 A.2d at 777 (emphasizing the dangerousness of downed power lines and the fact that PEPCO had received numerous complaints about the downed powerline which resulted in a child's death); *Exxon*, 69 Md. App. at 152, 516 A.2d at 1009-10 (discussing the defendant's knowledge of the gasoline leak, the serious risks it posed, and defendant's failure to inform the proper authorities of the leak).

418. 325 Md. 342, 601 A.2d 102 (1992).

419. *Id.* at 377, 601 A.2d at 119.

420. See *State v. Albrecht*, 336 Md. 475, 501, 649 A.2d 336, 348-49 (1994).

421. See *infra* Part IV.

2. Justification of the Risk: Exigency and Social Utility

As the court of special appeals has stated, "to qualify a defendant as 'reckless,' it is necessary that the risk that is consciously disregarded be, objectively measured, not only quantitatively substantial but also qualitatively unjustified."⁴²² Where justified by the circumstances, a defendant may properly engage in conduct that endangers himself or another.⁴²³ This issue has arisen in two main contexts. First, the courts have refused to impose liability upon a defendant who is forced to make decisions, albeit negligent ones, under exigent circumstances.⁴²⁴ Second, the courts have been far more deferential where a defendant's conduct arises from or relates to some favored social policy.⁴²⁵

The first modern case discussing exigent circumstances was *Smith v. Gray Concrete Pipe Co.*,⁴²⁶ which introduced the implied malice standard for punitive damages. There, the court held that the defendant company could be liable for punitive damages because the company's conduct reflected a "premeditated decision, deliberately arrived at, by an indifferent employer,"⁴²⁷ while the driver's conduct was nothing more than "a breach of duty . . . in operating a truck without being assured of its condition, and a failure to respond correctly to the emergency confronting him when the hood flew up."⁴²⁸ As the court noted, "[t]he failure to respond properly under exigent circumstances underscores the very distinction we make between a situation reflecting 'mere' negligence . . . and [gross negligence]."⁴²⁹

422. *Williams v. State*, 100 Md. App. 468, 504, 641 A.2d 990, 1007 (1994).

423. *Id.* at 503, 641 A.2d at 1007. *But See* *People's Drug Stores, Inc. v. Windham*, 178 Md. 172, 184, 12 A.2d 532, 538 (1940) (quoting *American Express Co. v. Terry*, 126 Md. 254, 262, 94 A. 1026, 1029 (1915) and rejecting claim that the plaintiff was contributorily negligent where he was injured after stopping to assist people involved in an automobile accident, and stating that, "[a] decent and courageous attempt to discharge a high moral duty cannot be termed negligence, unless the actor's conduct exhibits such a reckless indifference to danger as to amount to 'rashness entailing almost certain injury'").

424. *See supra* notes 422-23 and accompanying text.

425. *See supra* Part II.B.2.

426. 267 Md. 149, 297 A.2d 721 (1972).

427. *Id.* at 172, 297 A.2d at 734.

428. *Id.* at 171, 297 A.2d at 733.

429. *Id.*; *see also* *Boucher v. Riner*, 68 Md. App. 539, 548, 514 A.2d 485, 490 (1986) (excusing a parachute jumpmaster's actions in directing a student into power lines, because "the conduct alleged here reflects, at worst, poor judgment on the part of [defendant]," but did not provide any evidence of a "premeditated decision, deliberately arrived at, by an indifferent

*Lovelace v. Anderson*⁴³⁰ provides another illustration of the court's deference to the judgment of an individual acting under exigent circumstances. There, the court found there was no evidence of gross negligence against the defendant police officer because a reasonable police officer could have elected to stop a robbery with gunfire.⁴³¹

The defendant in *Lovelace* was actually entitled to two layers of justification for his actions.⁴³² In addition to the exigent circumstances involved in the attempted armed robbery in *Lovelace*, the defendant police officer also benefited from the court's reluctance to find a defendant's conduct to have been grossly negligent when the defendant was engaged in some task that promotes the social good.⁴³³ This is reflected, not merely in an increased amount of deference to an officer's judgment, but in the standard which is applied to his or her conduct: "where the accused is a police officer, the reasonableness of the conduct must be evaluated not from the perspective of a reasonable civilian but rather from the perspective of a reasonable police officer similarly situated."⁴³⁴

The additional leeway given to defendants furthering a social policy is most likely to arise in cases where a defendant claims one of the twenty-four statutory immunities. These immunities were enacted for the purpose of encouraging individuals to perform functions such as assisting others in need, volunteering at charitable events, or providing medical care and assistance, and they do so by freeing those individuals from liability in most cases.⁴³⁵ While a statutory immunity is

jumpmaster"); *Cambridge Iron & Metal Co. v. Hartman*, 65 Md. App. 629, 637, 501 A.2d 877, 881 (1985) (finding that the defendant's failure to warn firefighters of a box containing magnesium "amounts to no more than mistake, thoughtlessness or inadvertence occasioned by the excitement and confusion of the moment").

430. 126 Md. App. 667, 730 A.2d 774, (1999), *cert. granted*, 355 Md. 610, 735 A.2d 1105 (1999).

431. *Id.* at 704, 730 A.2d at 794 (holding that "[i]t was objectively reasonable for [defendant] 'to make a split-second determination in the heat of the moment that deadly force was necessary to stop' the two robbers").

432. *Id.* at 675, 692, 730 A.2d 778, 787. Because Anderson was a police officer he was "entitled to qualified public official immunity." *Id.*

433. *Id.* at 704, 730 A.2d at 794 (basing the decision in part on the fact that the defendant "acted to protect two civilians and himself from not only serious injury, but fatal injury").

434. *State v. Albrecht*, 336 Md. 475, 501, 649 A.2d 336, 349 (1994).

435. *See Mayor & City Council of Baltimore v. Chase*, 360 Md. 121, 141, 756 A.2d 987, 998 (2000) (citing the hearing summary of the Senate Judicial Proceedings Committee discussing Senate Bill 731 of the 1983 Session and discussing the purpose of [section 5-604] as to "protect volunteer fire departments from liability arising from suits which do not involve acts of

not, by itself, a grounds for any change in applying the gross negligence standard, the courts properly consider the social utility of a defendant's underlying actions in determining whether they are justifiable.⁴³⁶

This deference may be seen in *Boyer v. State*,⁴³⁷ where the defendant police officer was accused of chasing a drunk driver through a heavy traffic area at extremely high rates of speed without engaging his emergency equipment.⁴³⁸ While such conduct may have been reckless for a civilian, the court granted summary judgment for the officer under the applicable immunity statute because he "did not act with wanton or reckless disregard for the safety of others."⁴³⁹ *Tatum v. Gigliotti*⁴⁴⁰ provides another example, where the alleged conduct by two emergency medical technicians amounted to a lengthy list of negligent acts or omissions, including possibly falsifying an ambulance report, that might have been sufficient to infer a reckless state of mind in a different case.⁴⁴¹

Social policy also appears to provide the justification for the enhanced level of deference provided to landowners who are sued by trespassers.⁴⁴² Certainly, property rights are an important social policy protected by the law.⁴⁴³ And, while the formulation of the wanton and willful conduct standard is the same as that for gross negligence in other contexts, in landlord-trespasser cases, "[t]he Maryland cases have generally looked to . . . conduct calculated to or reasonably expected to lead to a desired result," requiring evidence much closer to a showing of actual malice than has been required in other con-

gross negligence"). The final form of section 5-604 omitted the word "volunteer" and does not apply to volunteer fire companies but indicates the general purpose of the immunity statutes. *See id.*

436. *See supra* Part II.B.2.

437. 323 Md. 558, 594 A.2d 121 (1991).

438. *Id.* at 562-63, 594 A.2d at 123-24.

439. *Id.* at 580-81, 594 A.2d at 132.

440. 80 Md. App. 559, 565 A.2d 354 (1989), *aff'd*, 321 Md. 623, 583 A.2d 1062 (1991).

441. *See id.* at 569; *see also* *Khawaja v. Mayor & City Council of Rockville*, 89 Md. App. 314, 318, 598 A.2d 489, 491 (1991), *appeal dismissed*, 326 Md. 501, 606 A.2d 224 (1992) (finding that the officer's conduct was not grossly negligent as a matter of law, where she sped through an intersection without her lights on, after allegedly observing the plaintiff's car approaching the intersection).

442. *See supra* Part II.B.4.

443. Historically, rights in private property were deemed important enough to warrant constitutional protection. *See* U.S. CONST. amend. XIV, § 1 ("[N]or shall any State deprive any person of life, liberty, or property, without due process of law . . .").

texts.⁴⁴⁴ Indeed, the courts' decisions in this area often have the feel of pronouncements of a right, such as the landowner's right to protect his or her property with a vicious watchdog.⁴⁴⁵

Underlying social policy also may explain *Potomac Electric Power Co. v. Smith*,⁴⁴⁶ one of the few cases in which a landowner was found to have been wanton. The defendant power company was found to have been willful and wanton when it failed to repair a downed power line after it was informed three times over a month period that the line had fallen.⁴⁴⁷ While ordinarily a landowner would not be required to fix a dangerous condition on his or her property, the property at issue here was a right-of-way granted to the power company for the exclusive purpose of running the lines.⁴⁴⁸ One reading of *Potomac* may be that there is no social policy reason to accord a utility the same freedom of action in its right-of-way as in other landowner-trespass cases, thus enhancing the court's determination that the company's conduct was outrageous and extraordinary when it failed to repair the line despite its knowledge of the danger to the residents.⁴⁴⁹

3. The Objective Test in a Nutshell

As stated earlier, there is no precise way to quantify the objective question of whether a defendant's conduct is sufficiently extraordinary or outrageous so as to justify liability under a gross negligence standard, or to create a triable issue of fact.⁴⁵⁰ The addition of the issue of justification does not improve matters, but merely adds to the mix. Courts determining whether a defendant's conduct is objectively extraordinary or outrageous must consider, (a) the probability and foreseeability of the risk, (b) the extent of foreseeable harm that might result from the undertaking of the risk, (c) the extent to which the defendant's actions are encouraged or justified by underlying social policies, and (d) the difference between the defendant's conduct and that of a similarly situated reasonable person.⁴⁵¹ Unfortunately, while such an analysis is an objective test, it is not a precise one because it is not possible to specifically define the level of "outrage" or "extraordinariness" that must be attributable to the defendant's conduct in a given circumstance in order to plead gross negligence, to entitle a jury to consider it, or to justify an award after trial. While one can

444. *Doehring v. Wagner*, 80 Md. App. 237, 562 A.2d 762 (1989).

445. *Bramble v. Thompson*, 264 Md. 518, 525-26, 287 A.2d 265, 269-70 (1972).

446. 79 Md. App. 591, 558 A.2d 768 (1989).

447. *Id.* at 611, 558 A.2d 778.

448. *Id.* at 597, 558 A.2d 771.

449. *See id.* at 609-11, 558 A.2d at 777-78.

450. *See supra* Part III.C.1.

451. *See supra* Part III.C.1.

enumerate the factors that the courts consider, they have treated each case according to its own facts, frequently analogizing to similar decisions in other jurisdictions.⁴⁵²

IV. A FEW POINTS OF PLEADING AND PROOF

Comparing the standards discussed above with any single case will usually not provide a demonstration of each of the elements of the gross negligence test described above. The individual cases have focused on the elements that are most pertinent to each dispute.⁴⁵³ A court reviewing a grant or denial of a motion to dismiss or for summary judgment does not review the legal standards in the abstract, but must determine whether the facts of the case are sufficient to infer that the legal standards have been met.⁴⁵⁴ Thus, a court must address not only the legal standard, but the facts before it in the context of the issues in dispute and inferences that may be properly drawn from the record.

As the courts have repeatedly stated, a finding of gross negligence is a factual determination, and "unless the facts are so clear as to permit a conclusion as a matter of law, it is for the trier of fact to determine whether a defendant's negligent conduct amounts to gross negligence."⁴⁵⁵ At the same time, however, the plaintiff must meet specific burdens of pleading and proof before any claim of gross negligence may go to a jury. The mere recitation of the words "wanton," "reck-

452. *See, e.g.*, *Thorne v. Contee*, 80 Md. App. 481, 488-93, 565 A.2d 102, 105-07 (1989) (looking to cases from Florida, Georgia and New York to aid in the decision).

453. *See, e.g.*, *Nast v. Lockett*, 312 Md. 343, 362-64, 539 A.2d 1113, 1122-23 (1988) (deciding the case by focusing on the state of mind element); *Lovell v. Anderson*, 126 Md. App. 667, 694-97, 730 A.2d 774, 788-90 (1999) (focusing on the reasonableness of the officer's acts); *Wells v. State*, 100 Md. App. 693, 702-06, 742 A.2d 874, 883-85 (1994) (focusing on the lack of malice); *Thorne v. Contee*, 80 Md. App. 481, 492-93, 565 A.2d 102, 107 (1990) (focusing on subjective knowledge of recklessness).

454. *See Liscombe v. Potomac Edison Co.*, 303 Md. 619, 621, 495 A.2d 838, 839 (1985) (finding that when a court reviews an appeal of summary judgment, a court is to be "concerned with whether there was a dispute as to any material fact and if not whether the moving party was entitled to judgment as a matter of law").

455. *Artis v. Cyphers*, 100 Md. App. 633, 652, 642 A.2d 298, 308 (1994), *aff'd*, 336 Md. 561, 649 A.2d 838 (1994); *see also Shoemaker v. Smith*, 353 Md. 143, 167, 725 A.2d 549, 561 (1999) (stating that gross negligence is a factual dispute for a jury to decide); *White v. King*, 244 Md. 348, 360, 223 A.2d 763, 770 (1966) ("[W]hat constitutes gross negligence is generally to be determined on the consideration of all the facts in the particular case.").

less,” or “gross” cannot transform a factually deficient complaint into a complaint properly alleging gross negligence:

Characterizations of acts or conduct, no matter how often or how strongly adjectively asserted, are, without supporting statements of fact (not evidence), conclusions of law, or expressions of opinion . . . Allegation of fraud or characterizations of acts, conduct or transactions as fraudulent, arbitrary, capricious or as constituting a breach of duty, without alleging facts which make them such, are conclusions of law insufficient to state a cause of action.⁴⁵⁶

In *Wells v. State*,⁴⁵⁷ for example, the plaintiff alleged a few facts, and then simply alleged “that those acts or omissions were committed willfully, wantonly, and with reckless disregard of [the plaintiff’s] rights.”⁴⁵⁸ The court ruled that such characterizations were “of course, . . . conclusory one[s]; whether appellants have sufficiently pled wantonness or wilfulness [*sic*] must be determined by the more specific allegations” of fact.⁴⁵⁹

In addition, even though the ultimate question is a factual one, the courts must remain vigilant to weed out legally insufficient claims. It is true that a court must “assume the truth of all relevant and material facts that are well pleaded and all inferences which can be reasonably drawn from those pleadings” where a defendant moves to dismiss a complaint,⁴⁶⁰ and must resolve all factual disputes and draw all reasonable inferences in favor of the plaintiff when a defendant files a motion for summary judgment.⁴⁶¹ In either case, however, the court must decide whether the facts upon which the plaintiff relies sufficiently provide direct proof for each element of gross negligence, or

456. *Greenbelt Homes, Inc. v. Board of Educ.*, 248 Md. 350, 360, 237 A.2d 18, 24 (1968). The same rule applies to such terms such as “without just cause, or illegally, or with wanton disregard, or recklessly, or for improper motive does not suffice.” *Elliott v. Kupferman*, 58 Md. App. 510, 528, 473 A.2d 960, 969 (1984) (“To overcome a motion raising governmental immunity, the plaintiff must allege with some clarity and precision those facts which make the act malicious.”).

457. 100 Md. App. 693, 642 A.2d 879 (1994).

458. *Id.* at 703, 642 A.2d at 884.

459. *Id.*

460. *Sharrow v. State Farm Mutual*, 306 Md. 754, 768, 511 A.2d 492, 500 (1986).

461. *See Nerenberg v. RICA of S. Md.*, 131 Md. App. 646, 674, 750 A.2d 655, 670 (2000).

would enable a trier of fact to reasonably infer that each element exists.⁴⁶²

The difficulties in evaluating the sufficiency of the evidence are particularly acute with respect to the defendant's subjective state of mind, because "[i]t is often difficult to demonstrate one's mental state through direct evidence."⁴⁶³ While the ultimate goal is to divine the defendant's subjective thoughts, the jury must use objective facts to *infer* what those thoughts were.⁴⁶⁴ "As a matter of common sense, in judging the sufficiency of the evidence as to state of mind, the jury must be able to weigh the conduct of the defendant,"⁴⁶⁵ and "[r]eckless indifference . . . can readily be inferred from the defendant's behavior towards individuals situated similarly to plaintiff."⁴⁶⁶

The court encounters similar ambiguity in analyzing whether there is a triable issue with respect to the objective test of the outrageousness of the defendant's conduct. This too is a factual issue,⁴⁶⁷ and much of the same evidence may be used to prove that the defendant's conduct was outrageous, that the defendant acted intentionally or was aware of the risk he or she created, or that the defendant should have known of the risk's severity.⁴⁶⁸ With respect to both the subjective and objective tests, a major focus in any gross negligence case will be the defendant's knowledge or those facts that demonstrate the defendant's knowledge.

At the most basic level, if the facts in front of a defendant would have been obvious to a reasonable person, a court or jury will more easily infer that the defendant knew or was aware of them. In *Nast v. Lockett*, for example, one defendant's intoxication was sufficient evidence to infer that the defendant acted with reckless indifference, while another defendant's actions in driving under the influence were not.⁴⁶⁹ In essence, the severely impaired driver was more readily charged with knowledge of his degree of impairment than the more mildly impaired driver.⁴⁷⁰ This rule also applies to basic duties im-

462. See, e.g., *Nast*, 312 Md. at 349, 539 A.2d at 1116 ("[T]he sufficiency of the evidence to submit the question of punitive damages to the trier of fact is a question of law."); *Khawaja*, 89 Md. App. at 318-19, 598 A.2d at 491.

463. *Naughton v. Bankier*, 114 Md. App. 641, 652, 691 A.2d 712, 717 (1997) (applying Delaware law).

464. See *id.*

465. *Plass v. State*, 457 A.2d 362, 365 (Del. 1983).

466. *Naughton*, 114 Md. App. at 652, 691 A.2d at 717.

467. See *State v. Albrecht*, 336 Md. 475, 502, 649 A.2d 336, 349 (1994).

468. See, e.g., *Nast*, 312 Md. at 362, 539 A.2d at 1123.

469. *Id.* at 362-63, 539 A.2d at 1122.

470. *Id.* (discussing the "sliding scale" involved in deciding whether an intoxicated driver's conduct was grossly negligent).

posed on a defendant under certain conditions, such as looking both ways before crossing the street.⁴⁷¹ Courts may be ready to infer recklessness where there is evidence that such basic duties have not been performed, perhaps because such duties are so fundamental that a failure to perform them is as likely to result from a conscious indifference to harm as from a simple omission.⁴⁷² Matters of common knowledge, or that are commonly known in a corporate defendant's industry, are also used as support for inferences as to the defendant's state of mind or the outrageousness of his conduct.⁴⁷³ The sophistication of the defendant and its level of expertise may also be considered.⁴⁷⁴

Perhaps one of the most important factors in inferring the defendant's state of mind is evidence of any prior knowledge by the defendant of similar conditions or events to those that caused the plaintiff's harm. In *White v. King*, for example, the fact that the defendant had already run off the road twice was significant in the court's analysis that the driver had been grossly negligent in continuing to drive.⁴⁷⁵ The number and frequency of the defendant's seizures were a key piece of evidence in *Thorne v. Contee*.⁴⁷⁶ The products liability cases also heavily relied upon such prior knowledge.⁴⁷⁷

Beyond such basic principles, one of the most significant and repeated factors in the cases addressing both outrageous conduct and the defendant's state of mind is conduct by the defendant to conceal the risky condition that has been created. In *Thorne v. Contee*, for example, the court emphasized that the plaintiff not only drove with knowledge of his susceptibility to seizures, but he also withheld the

471. See *supra* note 80 and accompanying text for a discussion of early cases where gross negligence was found as a matter of law when a common duty was not followed.

472. See, e.g., *Washington, Baltimore & Annapolis R.R. v. State*, 140 Md. 115, 118, 116 A.2d 911, 912 (1922) (stating that if the deceased "used his eyes he must have seen the approaching train in time to avoid danger, and if he listened he must have heard it").

473. See, e.g., *Owens-Illinois v. Armstrong*, 87 Md. App. 699, 721, 591 A.2d 544, 554 (1991), *aff'd in part, rev'd in part*, 326 Md. 107, 607 A.2d 47 (1992) (discussing generally accepted safe level of asbestos exposure in 1946).

474. See *Exxon Corp. v. Yarema*, 69 Md. App. 124, 163, 516 A.2d 990, 1010 (1988) (noting that Exxon "possessed . . . the expertise and resources to minimize the possible contamination" and that "Exxon's conduct was not founded on lack of knowledge or inexperience, but on managerial decisions to maximize profits").

475. *White v. King*, 244 Md. 348, 361, 223 A.2d 763, 771 (1966).

476. *Thorne v. Contee*, 80 Md. App. 481, 486, 565 A.2d 102, 104 (1990).

477. See, e.g., *Harley-Davidson Motor Co. v. Wisniewski*, 50 Md. App. 339, 346-47, 437 A.2d 700, 704-05 (1981).

information relating to those seizures on his employment application.⁴⁷⁸ In *Exxon Corp. v. Yarema*, the court similarly found that Exxon's representations to residents and government officials "could appear to have been calculated to mislead."⁴⁷⁹

The courts also look for other conduct by the defendant that acknowledges or accommodates a risk that defendant has created, even if the risk is not concealed. In *Owens-Illinois v. Armstrong*, for example, the court of special appeals emphasized that the manufacturer began a safety program for its workers in its warehouse and shipping departments, thereby acknowledging the risk in that context, but failed to begin any safety program for the plaintiff asbestos installers.⁴⁸⁰

Finally, a showing of bad faith or an intentional violation of a duty, where sufficiently extreme, may be enough to state a prima facie case of gross negligence. The court of special appeals in *Catterton v. Coale* held that the plaintiff's gross negligence claim was sufficient to survive a motion to dismiss where the sole pertinent allegation was that the defendant had falsified a report in bad faith.⁴⁸¹ In *Jacob v. Davis*, the court of special appeals opined that if the trustees read the will creating the trust, and then intentionally deviated from those provisions, "a determination of gross negligence would be for the trier of fact."⁴⁸²

On the defendant's side, the defendant frequently seeks to demonstrate the absence of the types of evidence described above.⁴⁸³ The defendant may also, however, attempt to make a more positive showing to negate one of the elements of subjective knowledge of a risk, or indifference to such a risk.⁴⁸⁴ For example, evidence by the defendant to show that he or she made *some* effort to minimize a risk will cut

478. *Thorne*, 80 Md. App. at 494-95, 565 A.2d at 108.

479. *Exxon*, 69 Md. App. at 162, 516 A.2d at 1010.

480. *See Armstrong*, 87 Md. App. at 722, 591 A.2d at 555; *see also* *Wedeman v. City Chevrolet Co.*, 278 Md. 524, 533, 366 A.2d 7, 13 (1976) (finding punitive damages where the dealer only promised to fix the car if the customer would retract the true statement that the car had been previously damaged).

481. *Catterton v. Coale*, 84 Md. App. 337, 343-44, 579 A.2d 781, 783-84 (1990) (stating that allegation of bad faith was "sufficient to show malice or gross negligence" at the stage of a motion to dismiss and that "[p]erhaps additional discovery will reveal the source of the report and whether [defendant] acted in 'good faith'").

482. *Jacob v. Davis*, 128 Md. App. 433, 465, 738 A.2d 904, 920, (1999), *cert. denied*, 357 Md. 482, 745 A.2d 436 (2000).

483. *See id.* at 454, 738 A.2d at 915 ("A major theme advanced by [the defendant] in defense is that appellant . . . was unable to demonstrate precisely where and how the trustees failed to follow their obligations . . .").

484. *Id.*

against a finding that the defendant was indifferent to it.⁴⁸⁵ A claim that a defendant's attempt to prevent a risk was inadequate should not normally be sufficient to show gross negligence.⁴⁸⁶ The defendant also may show that he or she did not create the risk or could not prevent it.⁴⁸⁷

At least one court of appeals decision suggests that the defendant may directly present evidence of his or her own state of mind, through his or her own testimony. In *White v. King*,⁴⁸⁸ the court of appeals reviewed for a second time this automobile case.⁴⁸⁹ After the court's first opinion, the case was remanded for trial, where the defendant's attorney asked the defendant to testify "whether or not [defendant] had any intent [at that time] to do anything dangerous in the operation of the [automobile]," and the defendant replied, "I would have no idea of ever hurting anyone in an automobile or any other place."⁴⁹⁰ The defendant won, and the court of appeals affirmed, even though:

Admittedly, the conduct of a person, and his intention or state of mind, must be judged by what he does under the circumstances prevailing at the time, regardless of what he later may declare had been in his mind at the time. But this is not to say he must not be heard to testify what he intended to do or not to do.⁴⁹¹

Indeed, given that the Maryland rule requires some awareness by the defendant of the risk that he or she has created, even if the *extent* of the risk need not be appreciated, the defendant's subjective state of

485. See *Boucher v. Riner*, 68 Md. App. 539, 548, 514 A.2d 485, 490 (1986) (finding jumpmaster was not grossly negligent where he "was attentive to [student's] descent"); *Marriott Corp. v. Chesapeake & Potomac Tel. Co.*, 124 Md. App. 463, 480-81, 723 A.2d 454, 463 (1998) (stating that "uncontroverted evidence showed that [defendant's employee] did exert some effort to avoid a severance of the cable").

486. See, e.g., *Liscombe*, 303 Md. at 637, 495 A.2d at 847 (finding no gross negligence where defendants had taken steps to prevent harm to dump truck drivers from low power lines).

487. See *Wells*, 100 Md. App. at 705-06, 642 A.2d at 885 (rejecting claims based upon alleged knowledge by supervisory defendants that an agency was understaffed and underfunded, where plaintiffs do not indicate what these defendants could have done to remedy that lack of resources).

488. 250 Md. 192, 242 A.2d 494 (1968).

489. The court of appeals first decision in this case is discussed *supra* Part II.A.5.

490. *White*, 250 Md. at 194, 242 A.2d at 495-96.

491. *Id.* at 197, 242 A.2d at 497. The court also stated that "[s]uch a statement, of course, would be flimsy evidence, suspiciously self-serving and not at all likely to overcome any inference to be drawn from preponderant, conspicuous and significant objective evidence." *Id.*

mind is clearly relevant, even if such self-serving testimony may not be particularly credible.⁴⁹²

V. CONCLUSION

The definition of gross negligence in Maryland is not nebulous at all. Rather, the civil law has borrowed the standard that has been developed under the criminal law, and the same standard is used for recklessly indifferent, willful and wanton, and grossly negligent conduct.⁴⁹³ As previously discussed, gross negligence requires a showing of four elements: (1) an intentional act by the defendant or an intentional failure to perform a duty;⁴⁹⁴ (2) awareness by the defendant that his or her conduct will create a risk of harm to another person or class of persons, even though the extent of the risk may not be appreciated;⁴⁹⁵ (3) knowledge of facts underlying the risk such that the defendant should have appreciated its extent;⁴⁹⁶ and (4) the creation, as a result of a defendant's act or omission, of a risk of harm to another person that is extreme and outrageous, as measured by considering the probability of the risk that the defendant created, the severity of the harm that may result, any justification for the defendant's conduct, and whether a similarly situated reasonable person would act in the same manner as the defendant.⁴⁹⁷

As shown in the above discussion, this four-element standard is not based upon any single case, but can be derived from the treatment of "gross negligence" in the numerous factual contexts in which it has arisen.⁴⁹⁸ Because of the fact-intensive nature of the gross negligence

492. The defendant asbestos manufacturer took a similar approach in *MCIC, Inc. v. Zenobia*, where the manufacturer presented testimony by its industrial hygienist that the company did not believe that there was any danger to its own employees from its asbestos product. See *MCIC, Inc. v. Zenobia*, 86 Md. App. 456, 467-68, 587 A.2d 531, 536-37 (1991).

493. See *supra* Part III.A.

494. See *supra* Part III.B.1.

495. See *supra* Part III.B.2.

496. See *supra* Part III.B.3.

497. See *supra* Part III.C.

498. A few cases, however, do refer to each of the four elements. *Smith v. Gray Concrete Pipe Co.*, provides one such example, where the defendant was found to be grossly negligent because its conduct reflected a "premeditated decision, deliberately arrived at, by an indifferent employer in possession of facts which should have indicated almost certain harm to others." *Smith v. Gray Concrete Pipe Co.*, 267 Md. 149, 172, 297 A.2d 721, 734 (1972). The "premeditated decision" reflects an intentional act or omission by the employer. The requirement of "indifference" reflects an awareness of some amount of risk, whether or not the extent of risk is known. The fact that

inquiry, courts must take particular care to seek consistency and to insure that such claims truly state claims for gross, as opposed to simple, negligence. Such consistency is particularly important, given the primary uses for gross negligence under modern law. Where the term "gross negligence" is used to define a statutory immunity, the term has been adopted by the Legislature with the specific intention of allowing most defendants to avoid trial or liability.⁴⁹⁹ The same reasoning applies to an exculpatory clause, which is essentially a private form of immunity.⁵⁰⁰ Thus, the courts have a particular need to weed out insubstantial claims of gross negligence at early stages in proceedings, so as to give the full and proper effect to such immunities or contractual provisions. A focus on the elements listed above, rather than a simple incantation of "reckless," "willful," "wanton," or "gross," may assist in consistently applying these principles when gauging the merits or sufficiency of gross negligence claims.

the employer is in "possession of facts which should have indicated almost certain harm to others," reflects the third subjective requirement that the defendant should have appreciated the extent of the risk. Finally, the fact that the defendant's conduct resulted in "almost certain harm to others" and was not justified by any emergency shows that the risk was objectively unreasonable.

499. See *supra* Part II.B.2.

500. See *supra* Part II.B.3.

