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## Torts–Negligence–Degrees of

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privileged. *Blakeslee v. Carroll*, 64 Conn. 223, 29 Atl. 473. Cases similar to this have not arisen heretofore in West Virginia, the nearest being *Johnson v. Brown*, 13 W. Va. 71, which states that libelous matters published in due course of legal procedure are not actionable, if the court in which they were published had jurisdiction of the cause and they were pertinent to the suit. The rule does not apply to a tribunal which is not judicial or quasi-judicial in its character or nature. 36 C. J. 1251. There is no definite line of demarcation between those boards and commissions which are quasi-judicial and those which are not. The difficulty in determining whether a given body is or is not a quasi-judicial tribunal explains much of the apparent conflict of authority. In view, of the fact that the plaintiff in the principal case concedes that the Compensation Commissioner acts in a quasi-judicial capacity the case seems to be correct.

—Fred L. Davis

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TORTS—NEGLIGENCE—DEGREES OF.—Plaintiff's decedent with others was engaged in repairing a highway on which defendant was driving an automobile at a rate of speed variously estimated from twenty to sixty miles per hour. Defendant had passed a warning and danger sign a thousand feet before her car struck plaintiff's decedent and killed him. *Held*, that "in cases of such extraordinary hazard and danger the rule of reasonable care applicable in other cases is incomplete; a greater degree of care should be enforced, and a workman so at work on the public road has a right to rely on that degree of care by operators thereon which will protect him from injury \* \* \* \* \*"  
*Chaney v. Moore*, 101 W. Va. 621, 134 S. E. 204.

There was a time when the courts were pretty generally committed to the doctrine of degrees of care and corresponding degrees of negligence. Such adjectives as ordinary, great and utmost, were used to describe the care required, while negligence was divided into slight, ordinary and gross. There is still respectable authority for these distinctions among the decisions, and some statutes require them. However, decisions of present day courts show a marked trend away from such distinctions. They lay down a variable rule of ordinary care, which is defined as that care

exercised by the ordinarily prudent man under the same or similar circumstances, and the absence of it is negligence. Courts that have departed from the old rule contend that nothing is to be gained by following it except confusion for the jury. The advantage claimed for this modern standard of care is that the minds of the jury are relieved from the mystifying task of making hair splitting distinctions as to care and negligence, and then refitting them into their respective compartments. “\* \* \* What is reasonable care must depend upon the circumstances of each particular case. It is, however, inaccurate to say, as many of the cases do, that the degree of care varies with the particular circumstances. It is only reasonable care which is required in any case; but the greater the danger \* \* \* \* the more precautions and the closer vigilance reasonable care requires.” That is, circumstances change but not the standard of care. 13 AM. & ENG. ENCY. LAW (2nd ed.) 416; CASES ON TORTS, AMES & SMITH (Pound’s ed.) 77, 79n, 82n, 83, 85n; HUTCHINSON, CARRIERS (3rd ed.) §§893-8; SHERMAN & REDFIELD, NEGLIGENCE (6th ed.) §§47-8; 2 COOLEY, TORTS (3rd ed.) 1324-7; CHAPIN, TORTS, 523-8; 20 R. C. L. 21-22, 24-28, 51; 29 CYC. 422-24, 426-27, 460-1; 1 THOMPSON, NEGLIGENCE §§18-26; BURDICK, LAW OF TORTS, 20-21, 510-13. The West Virginia Court has repeatedly used expressions in accord with this rule. *Washington v. B. & O.*, 17 W. Va. 190; *Dimmey v. Rwy. Co.* 27 W. Va. 32; 55 Am. Rep. 292 (1885); *Berns v. Coal Co.*, 27 W. Va. 285, 55 Am. Rep. 304n (1885); *Gunn v. River R’d Co.*, 36 W. Va. 165, 172, 14 S. E. 465; *Graham v. Newberg O. C. & C. Co.*, 38 W. Va. 273, 278, 18 S. E. 584; *Dicken v. Salt & Coal Co.*, 41 W. Va. 511, 23 S. E. 582; *Baker v. R. R. Co.*, 51 W. Va. 423 at 425, 41 S. E. 148; *Meeks v. Rwy. Co.*, 52 W. Va. 99, 43 S. E. 118; *Mormile v. Traction Co.*, 57 W. Va. 132, 49 S. E. 1030; *Ritter v. Hicks*, 102 W. Va. 541, 544-5, 135 S. E. 601. In *Fowler v. B. & O.*, 18 W. Va. 583 (1818) ordinary care was defined in accord with the rule set out above and cases since have approved the rule of reasonable or ordinary care. *Moorefield v. Lewis*, 96 W. Va. 112, 123 S. E. 564; *Blackwood v. Traction Co.*, 96 W. Va. 1, 125 S. E. 350. Other cases have said that more than ordinary care is required. *Deputy v. Kimmel*, 73 W. Va. 595, 80 S. E. 919; *Glinco v. Wimer*, 79 W. Va. 669, 92 S. E.

112. Reasonable care has also been defined as that which the reasonable or prudent man would do on his own premises. *Snyder v. P. C. & St. L. Ry. Co.*, 11 W. Va. 14; *Keyser Canning Co. v. Klots Co.*, 98 W. Va. 487, 128 S. E. 280. In another rather large group of cases some of the words used to describe the necessary care have been, "high," "very high or highest," "highest possible," "very great," "necessary care and prudence," "reasonable precaution," etc. *Runyan v. Light Co.*, 68 W. Va. 609, 71 S. E. 259; *Love v. Power Co.*, 86 W. Va. 393, 103 S. E. 352; *Fisher v. Coal Co.*, 86 W. Va. 460, 103 S. E. 359; *Merril v. Torpedo Co.*, 79 W. Va. 669, 92 S. E. 112; *Thomas v. Electric Co.*, 54 W. Va. 395, 46 S. E. 217; *Snyder v. Elec. Co.*, 43 W. Va. 661, 28 S. E. 733. As authority for the principal case the court relied principally on *Deputy v. Kimmel*, 73 W. Va. 595, 80 S. E. 819. In the third point of the syllabus of that case the court says, "Because of the character of the vehicle and the unusual dangers incident to its use, a greater degree of care is required of the operator of an automobile while on the public highway, and especially at street crossings, than is required of persons using the ordinary or less dangerous instruments of travel. He should exercise such care in respect to speed, warnings of approach and the management of the car as will enable him to anticipate and avoid collisions which the nature of the machine and the locality may reasonably suggest likely to occur in the absence of such precautions." In the body of that opinion this language is used, "Both (the driver and other users of the road) must exercise such care as reasonably prudent persons would exercise under the same circumstances and conditions, in order to avoid being injured or causing injury." Toward the end of the opinion in the principal case this language is found, "The driver of an automobile on the public highway is guilty of actionable negligence if he fails to exercise that degree of care which he ought to observe under the particular circumstances in which he is placed." The court has said that the syllabus rather than the opinion states the law. *Bank v. Burdette*, 61 W. Va. 636, 637, 57 S. E. 53. If the language of the fourth point of the syllabus in the principal case is to be taken to mean what the plain import of the language would lead us to believe it does mean, auto-

mobile drivers are virtually insurers of persons working on the highway. In a situation such as was found in the principal case the court says ordinary care is not enough and that degree of care is necessary which will protect the workman from injury. In short a driver of an automobile must proceed at his peril if there are workmen on the highway. In the absence of statute the doctrine of absolute liability is very narrow. BURDICK, LAW OF TORTS, 536-46. Apparently the court would not apply the doctrine of the principal case except in situations of extreme hazard. But just how much must the situation change in order to necessitate the adoption of another standard of care? While the doctrine according to the principal case is confined to cases of automobile drivers on the one hand and workmen on the highway on the other, one cannot help sensing the possibility of its extension. The pronouncement seems unfortunate, especially since what is no doubt a correct result could have been reached by applying the standard of care of the reasonable man under the circumstances.

—Arlos Jackson Harbert.

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PUBLIC UTILITIES — INSUFFICIENT SUPPLY OF GAS AS GROUND FOR RELIEF FROM DUTY OF NATURAL GAS COMPANY TO SUPPLY AN APPLICANT FOR SERVICE.—A and B are natural gas companies located in same territory. C is a brick company. B had been, and is, furnishing C with adequate supply of gas, but at a higher rate than that charged by A, whose principal market is in Ohio and Kentucky. C seeks to compel A to furnish it with supply of gas, in order to get benefit of A's lower rate. From an order of the Public Service Commission requiring A to furnish C with a supply of gas, A appeals to the Supreme Court of Appeals, and B intervenes in order to protect its interest as a public service corporation. *Held*, to compel a public utility corporation at great expense to duplicate another's satisfactory supply of gas, not called for by circumstances, would be improper, and the court will annul an unreasonable order of the Public Service Commission requiring duplication of service of supplying gas. *United Fuel Gas Company v. Public Service Commission, et al.*, 138 S. E. 388 (W. Va. 1927). Hatcher, Pres., and Woods, J, dissented.