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# A Rationale of Criminal Negligence

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## A RATIONALE OF CRIMINAL NEGLIGENCE

(Continued from January Issue)

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### SECTION 9. CRIMINAL NEGLIGENCE AND CRIMES BY OMISSION

When a crime is predicated upon an omission to act because of negligence, the standard of care by which the defendant's conduct is measured and the magnitude of risk required for criminal liability are the same as in positive negligence. However, a special problem is raised in such cases by the fact that it is necessary to determine whether the defendant was under a legal duty to act.

#### A. THERE MUST BE A LEGAL DUTY TO ACT.

"A sees B drowning and is able to save him by holding out his hand. A abstains from doing so in order that B may be drowned, and he is drowned."<sup>374</sup> A has committed no offense.

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<sup>374</sup> Stephen, *op. cit. supra* note 163, at 151, art. 212. "I am under no legal obligation to protect a stranger. 'If I saw a man, who was not under my charge, taking up a tumbler of poison, I should not be guilty of any crime by not stopping him.' Nor by not warning a blind man whom I saw heading for the edge of a cliff." Kenny, *op. cit. supra* note 193, at 137. "Negligence is a word of abuse, and is often used by people without fully comprehending its meaning. I may act negligently to myself and that may not give anyone else a cause of complaint. It is only negligence that is the result of a breach of duty that comes before a tribunal." *Rex v. Murphy*, 49 Ir. L. Times Rep. 15 (1914)

One may have an abundance of wealth and yet let his neighbor starve. He may stand idly by and watch his neighbor's child who has strayed from its mother's care drown in a pail of water without stretching out his hand. Dozens of illustrations, all shocking to the moral sense, may be given. They point out that an act may be a moral wrong and yet not a criminal offense. An omission to perform an act of mercy is not indictable unless there is a legal duty to act.<sup>375</sup>

On the other hand, a sound public policy demands punishment for some negligent acts of omission. Consequently, the law has imposed a legal duty of care in a limited number of situations. Such duty may arise, (1) by relationship, (2) by contract, or (3) by the act of taking charge.

### 1. *Legal Duty Imposed by Relationship.*

A father who negligently withholds food or other necessities from his child when he has the means to supply them is criminally liable.<sup>376</sup> Although in a few cases, as in *Stehr v. State*,<sup>377</sup> the parent is charged with murder, the prosecution seldom attempts to convict him of such crime, the offense charged usually being involuntary manslaughter.<sup>378</sup>

The mother is not liable for such omission unless it appears that the food was supplied to her or was within her reach for

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<sup>375</sup> Lord Macauley, in his Report on the India Penal Code, discusses this question at some length. He points out that there is much logic and a great deal of common sense in the rule. Let us suppose that A is accosted by a starving beggar. One dollar will save his life. An additional dollar will save the life of his wife. Seven dollars will save the lives of their five children also. And there are other beggars. How far should A's responsibility go? Why should it be placed upon him in the first place? "Thou art thy brother's keeper" is a good moral rule, if not pressed too far. But it would be impossible and highly impracticable to attempt to fully enforce its spirit in the criminal law. See Lord Macauley's Report, reprinted in part, Wharton, *Homicide* (2nd ed. 1875) at 50 et. seq.

<sup>376</sup> "Desirable as the rule seems, that a parent be under a legally enforceable duty to support his child, courts have been curiously unwilling so to hold, even in cases of legitimate children. At common law in England and in a few American states, this duty was considered merely moral, and not sufficient to bind the father to third persons who furnished necessities. Such a doctrine, however, was too repugnant to a sense of justice to stand long, and in the great majority of our jurisdictions the duty is now held to be legal." Note (1923) 32 *Yale L. J.* 825.

<sup>377</sup> 92 Neb. 755, 139 N.W. 676 (1913)

<sup>378</sup> Annotation (1921) 10 A.L.R. 1137.

that purpose.<sup>379</sup> The duty is placed upon the father as the head of the household and the one responsible for its care and support. In instances where the mother is the head of the household, she becomes primarily responsible.<sup>380</sup>

Since the obligation of the parent rests upon the duty of care and support it does not continue after emancipation.<sup>381</sup>

The difficult cases are those in which the parent does not seek to evade his legal duty of care and support but attempts, because of religious belief, to fulfill it in a way unsatisfactory to the law.<sup>382</sup>

In *Commonwealth v Pierson*<sup>383</sup> the defendant and his wife had adopted a female child less than two years of age. The child became afflicted with whooping cough and later developed catarrhal pneumonia, dying within three days. The defendant testified that for about forty-eight hours before the child died he observed her symptoms were of a dangerous character, and yet he did not call a physician, although he was financially able to do so, because he believed in Divine healing, which could be accomplished by prayer. The court held that although the defendant loved his child and prayed for its life, his efforts did not meet the objective standards of the criminal law.<sup>384</sup> He was adjudged guilty of a misdemeanor.

Although some courts have been reluctant to force parents who were sincere in their religious belief to meet the standard of the law, the case represents the prevailing rule. It is culpable negligence for a father to fail to provide medical attention for his child and it is the duty of the state to see that the parent

<sup>379</sup> "If her husband supplied her with food for this child, and she wilfully neglected to give it to the child, and thereby caused its death, it might be murder in her. In these cases the wife is in the nature of the servant of the husband. To charge her you must show that the husband supplied her with food to give to the child, and that she wilfully neglected to give it." *Rex v Saunders*, 7 Car. & P 277, 278 (1836)

<sup>380</sup> *Reg. v Edwards*, 8 Car. & P 611 (1838)

<sup>381</sup> *Reg. v Shepherd*, 9 Cox C.C. 123 (1862)

<sup>382</sup> See *Com. v Breth*, 44 Pa. C.C. 56 (1915) student note on case; Note (1916) 65 U. of Pa. L. Rev 88. Lee, *Liability of Parent at Common Law on Charge of Manslaughter for Negligently Omitting to Furnish Medical Attendance to Child Because of Religious Disbelief in the Efficacy of Medicine* (1902) 55 Cent. L. J. 44.

<sup>383</sup> 176 N.Y. 201, 68 N.E. 243 (1903)

<sup>384</sup> See last two paragraphs of fn. 135, supra.

carries out his obligation.<sup>385</sup> The child is in no position to appreciate its need in most cases or to secure medical attention if it did, so it is the responsibility of the state in its interest in and care over the young to enforce the law. This should be done with sympathy and tolerance where the parent is sincere in his belief, but nevertheless with sufficient firmness to indicate unmistakably that individuals must meet the objective standard which the law demands in such cases.

A similar duty arising out of relationship is that of the husband to support and care for his wife. This duty likewise is founded upon his obligation as head of the household. There are just a few cases involving an omission of this duty. In *State v Smith*,<sup>386</sup> the wife of the defendant was insane and he left her in a cold upper room with no fire and with only a piece of canvas for a covering. She froze to death. He was held guilty of manslaughter.

Only one reported case of the conviction of a husband for failure to provide medical attention for his wife has been found. There is not as much reason for holding a husband liable in such a case as a parent, since, while the husband is under a like duty, a wife is usually of such mature years that she knows when she needs a physician and of means by which she can obtain one. In *Westrup v Commonwealth*<sup>387</sup> it was held that a husband was not guilty of involuntary manslaughter in failing to procure medical assistance for his wife during her confinement where it was shown that this was due to the fact that she desired to manage the case without the aid of a physician and that he secured one as soon as he discovered her peril.

The leading case on the liability of a husband for failure to care for his wife is *Territory of Montana v Manton*.<sup>388</sup> The defendant and his wife had been out drinking and carousing. On the way home, the wife fell in the snow within easy calling distance of the house. Although he had a hired man living with him who was willing to help bring her in, he left her there all night. They brought her in the next morning but she languished speech-

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<sup>385</sup> Compare *State v Staples*, 126 Minn. 396, 148 N.W. 283 (1914) and *Bradley v State*, 79 Fla. 651, 84 So. 677 (1920) where the courts reached opposite results in construing similar statutes.

<sup>386</sup> 65 Me. 257 (1876)

<sup>387</sup> 123 Ky. 95, 93 S.W. 646 (1906)

<sup>388</sup> 8 Mont. 95, 19 Pac. 387 (1888)

less for twenty-four hours and died. The husband was found guilty of manslaughter. It was his duty, imposed by the marital relationship, to help her into the house and to provide such care as she needed. Neither his nor her drunkenness excused him from the responsibility of fulfilling his obligation.

Suppose he had remained quietly at home that night, but, while looking from the window, had seen her fall in a drunken stupor? Would the fact that he had not participated in her degradation excuse him from omitting to go to her rescue? It is submitted that it would have been his duty considering all the circumstances, especially the severity of the weather, to bring her in and to care for her.<sup>389</sup>

## 2. *Legal Duty Arising Out of Contract.*

Generally, the breach of a contract is not an indictable offense. A civil action lies at law for the breach or in equity for specific performance. But one may become liable for manslaughter, or even murder, because of a failure, through negligence, to perform his contractual obligations.<sup>390</sup> The rule has

<sup>389</sup> Reg. v. Plummer, 1 Car. & K. 600 (1844) can be distinguished.

<sup>390</sup> Sometimes the courts have failed to distinguish between an omission to act and the negligent commission of an act. In *Regina v. Lowe*, 3 Car. & K. 123 (1850), the defendant, who was an engineer, was hired to manage a steam machine employed for the purpose of drawing up miners from a coal pit. When the cart containing the men arrived on a level with the mouth of the pit, it was his duty to stop the revolution of the windlass so that the men could get out. He deserted his post leaving the machine in charge of an ignorant boy who protested his lack of knowledge of the workings of the machine. The boy was unable to stop the machine on one of the trips and a worker was killed. Lowe was held guilty of manslaughter. The language of the court would indicate that this was considered as an omission to act but it was not. Lowe did an affirmative act in placing an ignorant boy in charge of the machine.

This distinction is pointed out quite definitely in *Hilton's Case*, 2 Lewin C.C. 214 (1838). Hilton was indicted for manslaughter. It was his duty to attend a steam engine. On the occasion in question he stopped the engine and negligently went away. During his absence an unskilled person came up, started the engine, and was unable to stop it again. In consequence of the machine being put in motion, the deceased was killed. The court held that the death was the act of the person who set the machine in motion after the defendant had negligently gone away. It is necessary that the negligent act which causes the death be that of the party charged. So in the *Lowe Case*. If Lowe had merely negligently gone away and left the engine, someone would have drawn the men out of the mine later. But he acted by placing an incompetent boy in charge of the engine. It was not his neglect of duty that made him liable criminally but this negligent act.

been consistently applied in the case of persons in charge of machinery, railroad trains, appliances, vessels, and in the conduct of mines,<sup>391</sup> where a death has occurred as a consequence of the omission of the defendant to carry out his contractual obligations.

Ordinarily, the neglect of duty results in the death of a fellow employee or of a passenger traveling on the railroad or other transportation system employing the defendant. Suppose, however, that a member of the general public is injured because of the omission to act?

This problem is involved in *Regina v Smith*.<sup>392</sup> Smith's employer was the owner of a tramway which crossed a highway. It was the defendant's duty to give warning to any persons who might be upon the highway when any of the employer's trucks from his colliery might cross the road. The tramway was in existence before the road and in the act by which the road was made there was no clause imposing upon the employer the duty of placing a watchman where the tramway crossed the highway. The deceased was killed by one of the trucks of the employer, while crossing the tramway. The defendant, contrary to orders, was absent at the time. So the injury occurred because of the negligence of the defendant in omitting to perform his duties under his contract of employment. Nevertheless, the court held that there was no duty between the defendant and the public since there was no duty in his employer to protect the public at this point.

One finds himself dissatisfied with the decision. What determines whether there is a legal duty arising out of the contract which will make the defendant criminally liable?

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<sup>391</sup> *United States v Thompson*, 12 Fed. 245 (1882) *United States v Knowles*, 26 Fed. Cas. 800 (1864) *State v Harrison*, 107 N.J.L. 213, 152 Atl. 867 (1931) *State v O'Brien*, 32 N.J.L. 169 (1867), *Clark v State*, 27 Okla. Cr. 11, 224 Pac. 738 (1924), *Reg. v Spence*, 1 Cox C.C. 352 (1846)

*Regina v Hughes*, 7 Cox C.C. 301 (1857) is a typical case. The deceased was working with others on a stage in a shaft which was being walled. It was the duty of the defendant who was working at the top of the shaft to send down bricks and materials in a bucket and to draw up the empty bucket. He was supposed to see that a stage was over the mouth of the shaft. He neglected to do this and a bucket of bricks fell into the shaft killing the deceased. The jury found that the death occurred from the negligent omission of the defendant to carry out his work. Lord Campbell held that he was guilty of manslaughter.

<sup>392</sup> 11 Cox C.C. 210 (1869)

In attempting to decide that question *Rex v Pittwood*<sup>393</sup> should be considered in connection with the Smith Case. In the Pittwood Case, the defendant was a gatekeeper at an accommodation railroad. He opened the gates, forgot to close them again, and went to get some lunch. Ten minutes later the deceased was crossing the track in a hay cart when a train came along and hit the cart, killing him. It is apparent that there was no legal duty in the employer to keep a watchman at this crossing. But the court held Pittwood guilty of manslaughter. Mr. Justice Wright considered that the employer "had assumed the liability of protecting the public whenever they crossed the road."<sup>394</sup>

It is submitted that the Pittwood Case overrules *Regina v Smith*. The employer in the Pittwood Case would not be criminally liable if he determined to take the guard off the crossing, notified the public, and thereafter an accident occurred. So in a primary sense there was never a duty owing to the public to guard this crossing. It therefore follows that it is the contract alone and his failure to carry it out that makes the watchman criminally liable. The duty arose out of his contract.

There is at least one case like *Rex v Pittwood* in this country. In *State v Harrison*,<sup>395</sup> the defendant was employed by a railroad company as a gateman at a crossing. The gates were operated from a tower. Although warned by an electric device of the approach of a train and knowing that the warning bell was out of order, he failed to lower the gates as it was his duty to do under the contract with the result that the decedent was hit and killed. He was convicted of manslaughter. There were no statutes involved imposing duty on the railroad to maintain a watchman so far as can be discerned in the opinion. In the absence of statute, ordinance, or some sort of official order, a railroad is ordinarily under no duty to maintain a flagman or gate at a crossing and negligence cannot be predicated upon a mere failure to do so. The case is taken, therefore, as a declaration of the common law on the subject.

There is one element in both of these cases not mentioned in the decisions. This is the fact that although there was no duty on the railroads to maintain gates or flagmen, they did so and

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<sup>393</sup> 19 Times L. Rep. 37 (1902)

<sup>394</sup> Id. at 38.

<sup>395</sup> 107 N.J.L. 213, 152 Atl. 867 (1931)



the public might have learned to rely upon them. Both the tower in the Harrison Case and the gate in the Pittwood Case were in view. However, nothing is said of this point in either case and it is not believed to be a necessary element in such cases. Let us suppose that the gates and tower had not been erected. The watchman in each instance was to step out and wave a red flag in order to warn the public. Suppose, further, that this was the first day the watchman had worked, the public had not yet learned to rely on him. It is submitted the decision would be the same in each of these hypothetical cases as it was in the original case. The gates and the tower are not the deciding factors, the *ratio decidendi* in each instance is the duty arising out of the contract.

The decision in the Harrison Case has been vigorously criticised in a note.<sup>396</sup> It is argued that in many of the cases where an omission to act has been punished there has been a helplessness created as a result of the contract that would not have resulted but for the agreement. Thus, passengers on an excursion steamer are lulled into a sense of security by their belief that the master of the boat and regularly appointed inspectors have carried out their contractual duties to inspect life-preservers and life-boats. In fact, most of them would not dare take such a trip except for the known fact that such equipment is supposed to be checked and inspected. They are helpless if the contracts are not carried out.<sup>397</sup>

This element of "helplessness" is found in all of these decisions in some form or other. But it need not be created *because of or by* the contract. X is under no duty to feed and care for Z, a poor but worthy gentleman living on the other side of town. Z is bed-ridden but too proud to ask for aid. X enters into a contract with A by which A is to feed and care for the aged man. A omits to fulfill his contract and Z dies. Z's helplessness is not changed by the contract. And yet, it may well be argued that A is guilty of manslaughter.

What is the basis of his liability? Although X is under no legal duty to Z, may he not, as suggested in the Pittwood Case, assume the duty if he desires? On the other hand, it is not neces-

<sup>396</sup> Note (1931) 11 Boston Univ. L. Rev. 273.

<sup>397</sup> U.S. v. Van Shaick, 134 Fed. 592. See Stein v. State, 37 Ala. 123 (1861). Note (1936) 25 Ky. L. J. 103, 105.

sary that he assume any duty whatever in order to hold A. This may be an act of pure mercy on the part of X and yet A is guilty of manslaughter.

A entered into a contract having to do with human life and safety. He well knew the danger to human life if he failed to carry out his contractual obligations. It is true that there was no duty in his employer toward Z. But a respectable line of authorities<sup>398</sup> has held that A's liability does not rest upon any duty of his employer toward the deceased. It arises out of *his* contract. In such a case it is well to emphasize the fact that if X had not obtained A he would have hired *somebody else*. So Z's death is really due to A's omission. While the law may not raise a legal duty in anyone to do an act of mercy in order to aid Z, it may seize upon the contract in order to raise one. After all, most obligations arising out of contract do not involve danger to human life. When they do and the defendant has made the contract with full knowledge of the danger, it may be in accord with sound public policy to hold him criminally liable for his omission to act. At least the trend of decisions is in that direction.

### 3. *Duty Arising Out of the Act of Taking Charge.*

If one voluntarily assumes the care and custody of a human being who, because of age, illness, or other incapacity, is unable to care for himself, omission to fulfill the responsibility so assumed has been held to render one criminally liable, if the helpless person dies as a result.<sup>399</sup>

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<sup>398</sup> *State v Harrison*, 107 N.J.L. 213, 152 Atl. 867 (1931); *State v. O'Brien*, 32 N.J.L. 169 (1867); *Rex v Pittwood*, 19 Times L. Rep. 37 (1902)

<sup>399</sup> *May*, op. cit. supra note 136, at 279.

"Every person under a legal duty, whether by contract or by law, or by the act of taking charge, wrongfully or otherwise, of another person, to provide the necessities of life for such other person, is criminally responsible if death is caused by the neglect of that duty and if the person to whom the duty is owing is, from age, health, insanity, or any other cause, unable to withdraw himself from the control of the person with whom it is due, but not otherwise." *Stephen*, op. cit. supra note 163, at 151, art. 213.

The Restatement of Torts provides:

"Sec. 324. Duty of one who takes charge of another who is helpless.

One who, being under no duty to do so, takes charge of another who is helpless adequately to aid or protect himself is subject to liability to the other for any bodily harm caused to him by

In *Regina v Marriott*,<sup>400</sup> the defendant persuaded an aged and infirm woman to live in his house and then left her in a cold room without sufficient food and clothing, which caused her death. He was convicted of manslaughter. The report of the case is rather vague and unsatisfactory but the testimony of two witnesses indicates that he took the responsibility of the care of the old lady under some sort of contract.<sup>401</sup>

Stephen has taken out the contract element and suggested a supposititious case based upon the other facts in the *Marriott Case* raising a nice problem as to the duty of care arising out of the act of taking charge. His supposititious case is as follows:<sup>402</sup>

"A persuades B, an aged and infirm woman, to live in his house, and causes her death by neglecting to supply her properly with food and fire, she being incapable of providing for herself from age and infirmity"

Stephen would hold A criminally responsible for her death. This is a fine illustration of a duty arising out of the act of taking charge. The relationship was voluntarily entered into. The old lady was in a position of extreme helplessness. If the defendant had not volunteered his services, it is likely that some other individual would have taken charge of her and placed her where she would not have been denied common comfort.

Since one owes no duty to play the good Samaritan by helping strangers no matter how great their peril, the duty in such cases must be assumed voluntarily. In *Regina v Shepherd*,<sup>403</sup> an unmarried girl of eighteen who had been supporting herself *by her own labor* returned to the home of her mother and stepfather to be confined. The stepfather was away and the mother, having

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- (a) the failure of the actor to exercise reasonable care to secure the safety of the other while within the actor's charge;
  - (b) the actor's discontinuing his aid or protection, if by so doing he leaves the other in a worse position than when the actor took charge of him."

Note the comments and illustrations, Restatement, Torts, op. cit. supra note 100, at 876-881.

As to the Tort rule, see also, Bohlen, *The Moral Duty to Aid Others as a Basis of Tort Liability* (1908) 56 U. of Pa. L. Rev. 217, 316. See *Weymire v Wolfe*, 52 Ia. 533, 3 N.W. 541 (1879) *Black v New York, N. H. & H. R. Co.*, 193 Mass. 448, 79 N.E. 797 (1907), *Depue v Flatau*, 100 Minn. 299, 111 N.W. 1 (1907)

<sup>400</sup> 8 Car. & P. 425 (1838)

<sup>401</sup> Id. at 433, fn. (a) See pp. 427 and 430 of the report.

<sup>402</sup> Stephen, op. cit. supra note 163, at 152.

<sup>403</sup> 9 Cox C.C. 123 (1862)

great ill-will toward her daughter because of her immoral acts purposely neglected to procure a mid-wife and the daughter died in childbirth. The court held that there was no legal duty in the mother to secure the aid of a mid-wife.

It is submitted that the case, on its facts, reaches the correct result. The daughter was emancipated and there was no duty in the mother to procure aid. Many poor women have children without the aid of mid-wives. Nor is it shown that she was able to incur the expense. But, aside from these factors, it is not believed that the mother ever took charge of the care of this wayward daughter. The child born out of wedlock could bring only shame and humiliation to the defendant. The daughter was an unwelcome guest in her home. The mother was in no way responsible for the situation and instead of voluntarily making the best of it and doing what she could for her daughter, as, perhaps, she was under a moral duty to do, she assumed an antagonistic attitude. She refrained quite vigorously from "taking charge."<sup>404</sup>

The rule under discussion applies in cases where the actor, owing no duty to do so, takes charge of another who is helpless at the time the responsibility is assumed.<sup>405</sup> Suppose, however, the incapacity develops subsequently? A asks B to go with him upon a hunting trip into an isolated section of Montana. They will be thirty miles from the nearest settlement. B replies that

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<sup>404</sup> *Regina v. Nicholls*, 13 Cox C.C. 75 (1874), is a difficult case. A grandmother took an infant whose mother was dead, although not bound by law to take care of it. Falling into bad circumstances, she was obliged to go out to service during the day and placed the child in the hands of a nine year old boy with instructions to look after it but he failed to do so properly and the child died of starvation. She was indicted for manslaughter. She could have sent the child to the parish authorities but she had strong scruples against doing this. The boy was too young to leave with the child. And she should have investigated to see that he was feeding the infant. However, the court took the circumstances of the prisoner into consideration in determining that she was not guilty of gross negligence.

<sup>405</sup> "The rule stated in this section is applicable to every case in which the actor, owing no duty to do so, takes charge of another who is *at the time* helpless adequately to care for himself. The most usual situation to which it is applicable is that in which the actor gives his services purely as a favor to the other. However, it is also applicable to determine the liability of one who, for his own purposes and as a necessary measure in the exercise of a privilege, takes charge of another who is incapable of adequately protecting himself." (Italics added). Restatement, Torts, op. cit. supra note 100, at sec. 324, comment f.

he has been having attacks of appendicitis and is afraid to risk it. A reassures him by promising that if an attack occurs, he will get him to a doctor. The first morning after the pair arrive at the hunting grounds B suffers an attack. A, without danger to himself, can take him to a doctor. But, disregarding B's pleas, A goes hunting. When he returns eight hours later, B is dead of a ruptured appendix. Although A is not criminally liable under the rule just stated because the incapacity developed subsequently, he can be held under another rule of law.<sup>406</sup> He voluntarily undertook to look out for B with full knowledge of the danger and of B's reliance upon him. The promise, though gratuitous, led B in reasonable reliance upon its fulfillment to undertake a course of conduct in which he would not otherwise have engaged.

The courts have shown little inclination to extend the law further. Assume that the facts in the hunting case, *supra*, are changed somewhat. A and B, friends, go on a hunting trip into an isolated region. Next morning B is deathly ill with an attack of appendicitis. He asks A to take him to a doctor. Instead, A goes hunting and, when he returns, B is dead with a ruptured appendix. The relationship between the two friends is not sufficient to raise a legal duty by operation of law, A did not take charge of B because he was in good health when they left home, and A made no gratuitous promise to cause B to enter upon a course of conduct which was dangerous to his safety unless the promise was carried out. In a case like this the law will not hold A guilty unless it can be said that he should have realized that his conduct would lead B to reasonably believe that the protection would be given in case of helplessness.<sup>407</sup>

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<sup>406</sup> "One who gratuitously undertakes with another to do an act or to render services which he should recognize as necessary to the other's bodily safety and thereby leads the other in reasonable reliance upon the performance of such undertaking

(a) to refrain from himself taking the necessary steps to secure his safety or from securing the then available protective action by third persons, or

(b) to enter upon a course of conduct which is dangerous unless the undertaking is carried out,

is subject to liability to the other for bodily harm resulting from the actor's failure to exercise reasonable care to carry out his undertaking." *Id.* at sec. 325. Prosser, *Torts* (1941) 196.

<sup>407</sup> "The actor may undertake to do an act or to render services either by an express promise to do so or by a course of conduct which the actor should realize would lead the other into the reasonable belief

In *People v Beardsley*<sup>408</sup> the defendant's wife was temporarily out of the city and he arranged with the deceased, a woman of thirty, to go to his apartment with him. They knew each other's habits and character. They spent the week-end together in a drunken, immoral debauch. On Monday afternoon she took several grains of morphine, in his presence. Later he had an attendant carry her to another room so she would not be discovered in the apartment by his wife. When removed she was in a stupor and died about nine o'clock that night without medical attention. After a full discussion of the authorities the court held that the relation existing between a man and his paramour is not sufficient to make him criminally liable for an omission to act under the circumstances.<sup>409</sup>

In *State v Berry, et al*<sup>410</sup> three men, the deceased and the two defendants, left Tres Piedras, New Mexico, for Truchas, a distance of nine miles, in a bobsled drawn by a team of horses. It was a very cold night in January and all suffered from the cold. According to the testimony of the defendants, the deceased, who had been drinking, got off the sled several times and walked behind in order to keep warm. Next morning his body was found in the snow. The indictment was framed upon the theory that the defendants assaulted the deceased and ejected him from the sled, leaving him wounded to freeze to death. The case was reversed on the ground that there was insufficient evidence to convict. Aside from the insufficiency of the evidence, the court was of the opinion that the defendants were not charged with an omission to act under the indictment. However, the court, by way of dictum, indicated that the duty which one owed to a fellow traveler under such circumstances was moral and not legal.

These two cases, it is submitted, reach the proper result under the existing law. In neither case is there an antecedent relationship such as parent and child, husband and wife, or master

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that the act would be done or the services rendered." Restatement, Torts, op. cit. supra note 100, at sec. 325, comment a.

<sup>408</sup> 150 Mich. 206, 113 N.W. 1128 (1907)

<sup>409</sup> "Respondent had assumed either in fact or by implication no care or control over his companion. Had this been a case where two men under like circumstances had voluntarily gone on a debauch together, and one had attempted suicide, no one would claim that this doctrine of legal duty could be invoked to hold the other criminally responsible for omitting to make effort to rescue his companion." *Id.* at 1131.

<sup>410</sup> 36 N. Mex. 318, 14 P. (2d) 434 (1932)

and servant raising a duty of care and protection by operation of law. In neither case did the defendant promise that he would take care of the other party if he became incapacitated. It may also be doubted whether the defendants in these cases entered upon a course of conduct which they should have realized would lead their companions into the reasonable belief that they would be taken care of if they became helpless.<sup>411</sup>

It may be urged that it is just and socially expedient that individuals under these or similar circumstances owe a legal duty of care to each other because of their mutual dependence. The association was voluntarily entered into by each with full knowledge of the conditions they would face. On the other hand to raise a duty of care and protection in such cases where there is no relationship between the parties other than that they are associates or companions would extend the rule of criminal liability to many new situations. Such extensions the criminal law, as yet,<sup>412</sup> refuses to recognize.

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<sup>411</sup> See fn. 407, supra.

<sup>412</sup> On the general question see the discussion by Macauley in his *Notes to Draft of Indian Penal Code*. Note N (Indian Penal Code, 1888 ed.), pp. 138 et seq., reprinted in part, Wharton, op. cit. supra note 375, at 50 et seq.

The late Dean Ames suggested the following "possible working rules":

"One who fails to interfere to save another from impending death or great bodily harm, when he might do so with little or no inconvenience to himself, and the death or great bodily harm follows as a consequence of his inaction, shall be punished criminally and shall make compensation to the party injured or to his widow and children in case of death." Ames, *Law and Morals* (1908) 22 Harv. L. Rev. 97, 113.

The Dutch Penal Code, art. 450, provides:

"He who, seeing another person suddenly threatened with the danger of death, omits to give or furnish him with assistance, which he can give or procure without any reasonable fear of danger to himself or others, is punished, if the death of the person in distress has resulted, with three months' imprisonment and fine." Cited, Warner, *Duty of a Railway Company to Care for a Person It Has Without Fault Rendered Helpless* (1919) 7 Cal. L. Rev. 312, 322. See also, 2 Livingstone, *Complete Works on Criminal Jurisprudence* (1873) 126-127, art. 484, reprinted Harno, *Cases on Criminal Law* (1933) 96-97; Wechsler & Michael, supra note 76, at 724-725.

PART III  
STATUTORY REFORM IN THE LAW OF  
CRIMINAL NEGLIGENCE  
SECTION 1. NEGLIGENT MURDER STATUTES

A New York statute provides

"The killing of a human being, unless it is excusable or justifiable, is murder in the first degree, when committed:

"2. By an act imminently dangerous to others, and evincing a depraved mind, regardless of human life, although without a premeditated design to effect the death of any individual; "413

The phraseology employed in this act is similar to that commonly adopted in other jurisdictions where state legislatures have attempted to describe the type of conduct requisite for the negligent murder. The same language is found in the Washington code<sup>414</sup> and, as in New York, the offense is first degree murder. A similar statute in Alabama,<sup>415</sup> however, substitutes the word *greatly* for *imminently*. The wording in the New York statute is found in the Florida,<sup>416</sup> Oregon,<sup>417</sup> and Wisconsin<sup>418</sup> codes, where the crime is murder in the second degree. In Minnesota,<sup>419</sup> it is murder in the third degree. In Mississippi,<sup>420</sup> North Dakota,<sup>421</sup> Oklahoma,<sup>422</sup> and South Dakota<sup>423</sup> the offense is designated simply as murder, since in these jurisdictions, as at common law, the crime is not divided into degrees.

In nine states, Arkansas,<sup>424</sup> Arizona,<sup>425</sup> California,<sup>426</sup> Georgia,<sup>427</sup> Idaho,<sup>428</sup> Illinois,<sup>429</sup> Montana,<sup>430</sup> and Nevada,<sup>431</sup>

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<sup>413</sup> Laws of N.Y. (Thompson, 1939) (Penal) sec. 1044.

<sup>414</sup> Rev Stat. Wash. (Remington, 1932) sec. 2392.

<sup>415</sup> Ala. Criminal Code (1923) sec. 4454

<sup>416</sup> Comp. Gen. Laws Fla. (1927) sec. 7137.

<sup>417</sup> Ore. Comp. Laws Ann. (1940) sec. 23-403.

<sup>418</sup> Wis. Stat. (1932) sec. 340.03.

<sup>419</sup> Minn. Stat. (Mason, 1927) sec. 10070.

<sup>420</sup> Miss. Code (1930) chap. 20, sec. 985.

<sup>421</sup> Comp. Laws N. D. (1913) sec. 9462.

<sup>422</sup> Okla. Stat. (1931) sec. 2216.

<sup>423</sup> Comp. Laws S. D. (1929) sec. 4012.

<sup>424</sup> Dig. Stat. Ark. (Pope, 1937) secs. 2964, 2967.

<sup>425</sup> Ariz. Code Ann. (1939) sec. 43-2901.

<sup>426</sup> Cal. Penal Code (Deering, 1937) secs. 187, 188.

<sup>427</sup> Ann. Code Ga. (Park, 1914) (Penal) secs. 60, 62.

<sup>428</sup> Idaho Code Ann. (1932) secs. 17-1101, 17-1102.

<sup>429</sup> Ill. Rev Stat. (1937) chap. 38, sec. 358.

<sup>430</sup> Rev Code Mont. (1935) secs. 10953, 10954.

<sup>431</sup> Nev. Comp. Laws (Hillyer, 1929) secs. 10066, 10068.



the language employed in the negligent murder statute bears unmistakable kinship to the terminology of the one in New York, although the wording is different. The provision in the California code<sup>432</sup> is typical

"Murder is the unlawful killing of a human being, with malice aforethought. Such malice may be express or implied. It is implied when the circumstances show an abandoned and malignant heart."

It will be noted that the descriptive phrase, "by an act imminently dangerous to others," has been eliminated in this statute and it is provided that the circumstances must indicate "an abandoned and malignant heart" rather than "a depraved mind" as in the New York code.<sup>433</sup>

Three jurisdictions, Colorado,<sup>434</sup> New Mexico,<sup>435</sup> and Utah,<sup>436</sup> must be placed in a separate category. The code provisions in these states combine *all* the above phrases. For example, the New Mexico code provides

"Malice shall be implied when all the circumstances show a wicked and malignant heart. All murder which shall be perpetrated by any act greatly dangerous to the lives of others, and indicating a depraved mind regardless of human life, shall be deemed murder in the first degree. "

No attempt has been made by the legislatures of the remaining twenty six states to describe the characteristics of the actor or the type of conduct required for the negligent murder. In fourteen states, Connecticut,<sup>437</sup> Delaware,<sup>438</sup> Maryland,<sup>439</sup> Massachusetts,<sup>440</sup> Michigan,<sup>441</sup> Missouri,<sup>442</sup> New Hampshire<sup>443</sup> New Jersey,<sup>444</sup> North Carolina,<sup>445</sup> Pennsylvania,<sup>446</sup> Rhode Island,<sup>447</sup> Vermont,<sup>448</sup> Virginia,<sup>449</sup> and West Virginia<sup>450</sup> the

<sup>432</sup> Cal. Penal Code (Deering, 1937) secs. 187, 188.

<sup>433</sup> Supra, n. 413.

<sup>434</sup> Colo. Stat. Ann. (1935) chap. 48, secs. 30, 32.

<sup>435</sup> New Mex. Stat. Ann. (1929) secs. 35-303, 35-304.

<sup>436</sup> Rev Stat. Utah (1933) secs. 103-28-2, 103-28-3.

<sup>437</sup> Gen. Stat. Conn. (1930) sec. 6043.

<sup>438</sup> Rev Code Del. (1935) sec. 5158.

<sup>439</sup> Ann. Code Md. (Bagby 1924) art. 27, sec. 401.

<sup>440</sup> Gen. Laws Mass. (1932) chap. 265, sec. 1.

<sup>441</sup> Comp. Laws Mich. (1929) sec. 16709.

<sup>442</sup> Rev Stat. Mo. (1929) sec. 3983.

<sup>443</sup> Pub. Laws N.H. (1926) chap. 392, sec. 1.

<sup>444</sup> Rev Stat. N. J. (1937) sec. 2-138-2.

<sup>445</sup> N.C. Code Ann. (1939) sec. 4200.

<sup>446</sup> Pa. Stat. (Purdon, 1936) tit. 18, sec. 2221.

<sup>447</sup> Gen. Laws R.I. (1938) chap. 606, sec. 1.

<sup>448</sup> Pub. Laws Vt. (1933) sec. 8374.

<sup>449</sup> Va. Code Ann. (1936) sec. 4393.

<sup>450</sup> W Va. Code Ann. (1937) sec. 5916.

statutes provide that certain named killings shall be murder in the first degree and then conclude generally, "All other kinds of murder shall be murder in the second degree." In these jurisdictions the tests for the negligent murder are the same as they were at common law,<sup>451</sup> and this is true, also, in four additional states, Iowa,<sup>452</sup> Maine,<sup>453</sup> South Carolina,<sup>454</sup> and Tennessee,<sup>455</sup> whose statutes provide, "Whoever kills any human being with malice aforethought, either express or implied, is guilty of murder."

No statutes covering the negligent murder have been found in the eight remaining states.<sup>456</sup> In those jurisdictions the offense is punished as a common law crime, except in those states where common law crimes have been abolished.<sup>457</sup>

All the statutes in effect in the twenty-two jurisdictions which have attempted to describe the type of actor and the conduct required in the case of the negligent murder are attempted codifications of the common law. They are therefore subject to the criticisms commonly leveled at the common law definitions of the offense. The phrases used do not describe either the crime or the actor with sufficient certainty.<sup>458</sup> They are picturesque but not satisfying; all are ambiguous. If a choice must be made between them, perhaps the statutes in Colorado, New Mexico, and Utah<sup>459</sup> are the most satisfactory. They have substituted the word *greatly* for *imminently*, a word which does not ordinarily carry the connotation intended in the New York statute.<sup>460</sup>

<sup>451</sup> See the discussion and commentaries, Report of Law Rev. Com., N.Y., *op. cit.* supra note 4, at 617-626.

<sup>452</sup> Iowa Code (1939) sec. 12910.

<sup>453</sup> Rev. Stat. Me. (1930) chap. 129, sec. 1.

<sup>454</sup> Code Laws S.C. (1932) sec. 1101.

<sup>455</sup> Tenn. Code Ann. (Williams, 1934) sec. 10767.

<sup>456</sup> These states are Indiana, Kansas, Kentucky, Louisiana, Nebraska, Ohio, Texas, and Wyoming.

<sup>457</sup> It appears that common law crimes have been abolished in Indiana, Kansas, Louisiana, Nebraska, Ohio, and Texas. See Hall and Glueck, *op. cit.* supra note 253, at 49. For the situation in Texas, see Note (1939) 27 Ky. L. J. 338 and *Banks v. State*, 85 Tex. Crim. Rep. 165, 211 S.W. 217 (1919), *Cockrell v. State*, 135 Tex. Crim. Rep. 218, 117 S.W. (2d) 1105 (1938). As to Kentucky see *Brown v. Com.*, 13 Ky. L. Rep. 372, 17 S.W. 220 (1891).

<sup>458</sup> See the discussion, supra pp. 139-155; also, Report of Law Rev. Com., N.Y., *op. cit.* supra note 4, at 617-646.

<sup>459</sup> Fns. 434, 435, and 436, supra.

<sup>460</sup> *Imminent* ordinarily means threatening to happen at once; close at hand. Funk and Wagnall's New Standard Dictionary (1937) Roget's Thesaurus (1937 Am. ed.)

Any attempt to define the negligence requisite for murder involves a description of the state of mind and the degree of risk required for liability.<sup>461</sup> Evidently, the legislatures in New Mexico and Utah and in the eleven jurisdictions represented by the statute in New York understood this, since the statutes in these states meet these requirements. If, then, these statutes are fundamentally sound and are to be criticised largely because they are not sufficiently clear, the question arises whether a more satisfactory statute can be drawn.

Such a task is not an easy one. It is difficult to deal concisely with a concept as evasive as the negligent murder. It is believed, however, that the following statute, which is based upon the conclusions in this study as to the offense,<sup>462</sup> is more satisfactory than existing legislative efforts

"The killing of a human being, unless it is excusable or justifiable, is murder in the second degree, when committed:

"2. By an act extremely dangerous to others, and evincing, if the actor has knowledge of the danger, a wanton disregard for human life and safety"

This statute is clearer than existing code provisions in several respects. It would seem that the word "extremely" describes the very high degree of dangerous conduct requisite for murder better than "imminently" or "greatly." The requirement that the actor have actual knowledge of the danger is plainly stated. The picturesque but ambiguous phrases commonly used to describe the state of mind required for liability have been replaced by the less colorful but more easily interpreted, "wanton disregard for human life and safety." This phrase seems better suited to describe the type of arrogant recklessness which characterizes the particularly reprehensible conduct punished as negligent murder. The statute punishes the offense as murder in the second degree, the rule in most jurisdictions.

## SECTION 2. NEGLIGENT MANSLAUGHTER STATUTES

The code provision in New York is typical of a number of negligent manslaughter statutes. It provides.<sup>463</sup>

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<sup>461</sup> See p. 139, et seq., supra.

<sup>462</sup> Ibid.

<sup>463</sup> Laws of N.Y. (Thompson, 1939) (Penal) sec. 1052.

" homicide is manslaughter in the second degree, when committed without a design to effect death:

"3. By (the) culpable negligence of any person, which, according to the provisions of this article, does not constitute the crime of murder in the first or second degree, nor manslaughter in the first degree."

Five states, Minnesota,<sup>464</sup> New Hampshire,<sup>465</sup> North Dakota,<sup>466</sup> Oklahoma,<sup>467</sup> and South Dakota,<sup>468</sup> have parallel statutes. Three jurisdictions, Florida,<sup>469</sup> Mississippi,<sup>470</sup> and Missouri<sup>471</sup> have similar code provisions but provide simply that the offense is manslaughter.

Various applications of the common law distinction between lawful and unlawful acts appear in the manslaughter statutes of twenty states. Involuntary manslaughter at common law embraced two closely related, not always distinguishable concepts. The first was that of an unintentional killing resulting from the doing of a *lawful* act, but without due caution and circumspection. The second and closely allied conception was that of an unintended homicide resulting from the doing of an *unlawful* act which was not a felony<sup>472</sup> Both principles are interpreted as requiring an act dangerous to life or limb, so there is an overlap in their application.

Both concepts are incorporated in the statutes in Arizona,<sup>473</sup> California,<sup>474</sup> Idaho,<sup>475</sup> Montana,<sup>476</sup> New Mexico,<sup>477</sup> and Utah,<sup>478</sup> each of which provides substantially as follows

"Manslaughter is the unlawful killing of a human being without malice. It is of two kinds. involuntary, in the commission of an unlawful act not amounting to a felony, or in the commission of a lawful act which might produce death in an unlawful manner, or without due caution and circumspection."<sup>479</sup>

<sup>464</sup> Minn. Stat. (Mason, 1927) sec. 10078.

<sup>465</sup> Pub. Laws N.H. (1926) chap. 392, sec. 9.

<sup>466</sup> Comp. Laws N.D. (1913) sec. 9491.

<sup>467</sup> Okla. Stat. (1931) sec. 2228. See pp. 13-14 supra.

<sup>468</sup> Comp. Laws S.D. (1929) sec. 4024.

<sup>469</sup> Comp. Gen. Laws Fla. (1927) sec. 7141.

<sup>470</sup> Miss. Code (1930) chap. 20, sec. 1002.

<sup>471</sup> Rev. Stat. Mo. (1929) sec. 3988.

<sup>472</sup> 1 East, op. cit. supra note 29, at 255-271, Foster, op. cit. supra note 15, at 258-265.

<sup>473</sup> Ariz. Code Ann. (1939) sec. 43-2904.

<sup>474</sup> Cal. Penal Code (Deering, 1937) sec. 192.

<sup>475</sup> Idaho Code Ann. (1932) sec. 17-1106.

<sup>476</sup> Rev. Code Mont. (1935) sec. 10959.

<sup>477</sup> New Mex. Stat. Ann. (1929) sec. 35-305.

<sup>478</sup> Rev. Stat. Utah (1933) sec. 103-28-5.

<sup>479</sup> This is the phraseology in the Arizona code, n. 473, supra.

The Oregon statute<sup>480</sup> likewise incorporates both the lawful and unlawful act concepts but omits the phrase, "not amounting to a felony." A similar but ambiguous statute in Arkansas<sup>481</sup> also omits this phrase, substituting "without the means calculated to produce death." In Colorado,<sup>482</sup> Georgia,<sup>483</sup> Illinois,<sup>484</sup> and Nevada,<sup>485</sup> the phrase, "which might produce such consequences," has been substituted for "without due caution and circumspection." The statutes in these jurisdictions also contain the ambiguous qualification that where the killing occurs in the commission of an unlawful act "which in its consequences naturally tends to destroy the life of a human being, it is murder." Such a limitation should be incorporated in the negligent murder provisions rather than in the one relating to involuntary manslaughter.

Kansas<sup>486</sup> and Wisconsin<sup>487</sup> have parallel ambiguous statutes providing that the killing of a human being by the "culpable negligence" of another while the other is engaged in the perpetration or attempt to perpetrate any crime or misdemeanor not amounting to a felony, "where such killing would be murder at common law," is manslaughter in the first degree. A carelessly drawn statute in Wyoming<sup>488</sup> provides that an unintentional homicide in the commission of an unlawful act *or* by culpable negligence *or* criminal carelessness is manslaughter.

In three jurisdictions, Indiana,<sup>489</sup> Nebraska,<sup>490</sup> and Tennessee,<sup>491</sup> the code provides simply that the killing of a human being "in the commission of some unlawful act" is involuntary manslaughter. The phrase "unlawful act" in these statutes is interpreted to include criminal-negligence.<sup>492</sup>

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<sup>480</sup> Ore. Comp. Laws Ann. (1940) sec. 23-406.

<sup>481</sup> Dig. Stat. Ark. (Pope, 1937) sec. 2982.

<sup>482</sup> Colo. Stat. Ann. (1935) chap. 48, sec. 36.

<sup>483</sup> Ann. Code Ga. (Park, 1914) (Penal) sec. 67.

<sup>484</sup> Ill. Rev Stat. (1937) chap. 38, sec. 363.

<sup>485</sup> Nev Comp. Laws (Hillyer, 1929) sec. 10072.

<sup>486</sup> Rev Stat. Kan. (1923) sec. 21-407.

<sup>487</sup> Wis. Stat. (1939) sec. 340.10.

<sup>488</sup> Wyo. Rev Stat. (1931) sec. 32-205.

<sup>489</sup> Ind. Stat. Ann. (Burns, 1933) sec. 10-3405.

<sup>490</sup> Comp. Laws Neb. (1929) sec. 28-403.

<sup>491</sup> Tenn. Code Ann. (Williams, 1934) sec. 10774.

<sup>492</sup> State v Dorsey 118 Ind. 167, 20 N.E. 777 (1889) Minardo v. State, 204 Ind. 422, 183 N.E. 548 (1923) Benton v State, 124 Nev 485, 247 N.W 21 (1933) Copeland v State, 154 Tenn. 7, 285 S.W 565 (1926), Hiller v. State, 164 Tenn. 388, 50 S.W (2d) 225 (1932)

Texas abolished the statutory offense of manslaughter in 1927;<sup>493</sup> since that time there have been two grades of "negligent homicide," corresponding approximately to involuntary manslaughter in that jurisdiction, based upon whether the killing occurred in the commission of an unlawful or a lawful act.<sup>494</sup> A statute<sup>495</sup> provides that the tort standard of care shall be used in determining whether the defendant is guilty of a negligent homicide under these code provisions.

In Alabama,<sup>496</sup> Connecticut,<sup>497</sup> Delaware,<sup>498</sup> Iowa,<sup>499</sup> Maryland,<sup>500</sup> Massachusetts,<sup>501</sup> Michigan,<sup>502</sup> New Jersey<sup>503</sup> North Carolina,<sup>504</sup> Ohio,<sup>505</sup> Pennsylvania,<sup>506</sup> Rhode Island,<sup>507</sup> South Carolina,<sup>508</sup> Vermont,<sup>509</sup> Virginia,<sup>510</sup> Washington,<sup>511</sup> and West Virginia<sup>512</sup> manslaughter is not defined, the code simply fixes the punishment for the offense. Maine<sup>513</sup> punishes manslaughter "as defined at the common law" Kentucky has no involuntary manslaughter statute, the negligent manslaughter is punished in that jurisdiction as a common law offense of involuntary manslaughter and also as voluntary manslaughter under the voluntary manslaughter statute. The decisions in this jurisdiction are in confusion, apparently, gross negligence in handling a *gun* or an *automobile* makes a killing voluntary manslaughter,<sup>514</sup> all other negligent manslaughter being involuntary, an illogical and unsupported distinction.

<sup>493</sup> Reisenfeld, op. cit. supra note 31, fn. 5.

<sup>494</sup> Penal Code Tex. (Vernon, 1936) secs. 1230, 1231, 1238.

<sup>495</sup> Id. at sec. 1233.

<sup>496</sup> Ala. Crim. Code (1923) sec. 4460.

<sup>497</sup> Gen. Stat. Conn. (1930) sec. 6046.

<sup>498</sup> Rev Code Del. (1935) sec. 5161.

<sup>499</sup> Iowa Code (1939) Sec. 12919.

<sup>500</sup> Ann. Code Md. (Bagby 1924) art. 27, sec. 354.

<sup>501</sup> Gen. Laws Mass. (1932) chap. 265, sec. 13.

<sup>502</sup> Comp. Laws Mich. (1929) sec. 16717.

<sup>503</sup> Rev Stat. N. J. (1937) sec. 2-138-5.

<sup>504</sup> N.C. Code Ann. (1939) sec. 4201.

<sup>505</sup> Ohio Gen. Code Ann. (Page, 1939) sec. 12404.

<sup>506</sup> Pa. Stat. (Purdon, 1936) tit. 18, sec. 2226.

<sup>507</sup> Gen. Laws R.I. (1938) chap. 606, sec. 3.

<sup>508</sup> Code Laws S.C. (1932) sec. 1107.

<sup>509</sup> Pub. Laws Vt. (1933) sec. 8377.

<sup>510</sup> Va. Code Ann. (1936) sec. 4397.

<sup>511</sup> Rev Stat. Wash. (Remington, 1932) sec. 2395.

<sup>512</sup> W Va. Code Ann. (1937) sec. 5920.

<sup>513</sup> Rev. Stat. Me. (1930) chap. 129, sec. 2. The statute also specifically provides that it is manslaughter to negligently omit to act where there is a legal duty to do so.

<sup>514</sup> May, op. cit. supra note 136, at 272, fn. 46. See Held v. Com.,

It is apparent that none of these statutes describes the kind of conduct requisite for the negligent manslaughter with any degree of precision. Tag phrases, such as "culpable negligence," "lawful act without due caution and circumspection," and "unlawful act not amounting to a felony" are vague and meaningless. The courts have done little better in interpreting what they mean. The stock descriptive phrase found in the decisions is, of course, "gross negligence."<sup>515</sup> But neither this phrase nor the equally nebulous supplemental ones used by judges describe such conduct with clarity.

Admittedly, it is not an easy task to draft a serviceable negligent manslaughter statute. As in the case of the negligent murder, it is difficult to deal so concisely with such an evasive problem as the character of negligence required for manslaughter. It is believed, however, that the following statute, which incorporates the findings in this study as to the offense,<sup>516</sup> offers a reasonably satisfactory solution to the problem.

" Homicide is manslaughter in the second degree, when committed without a design to effect death:

"2. By the criminal negligence of any person, which according to the provisions of this article does not constitute the crime of murder in the second degree. Criminal negligence as used in this provision means conduct creating such an unreasonable risk to human life and safety as to be recklessly disregarding of such interests. The standard of conduct to be applied is that of a reasonable man under like circumstances."

This statute is much clearer than existing code provisions. It brings to the surface the two most important problems in criminal negligence. The first of these has to do with the *kind of standard* which shall be employed in determining criminal negligence in the case of manslaughter. As to this the statute provides that the "conduct of a reasonable man under like circumstances" is the standard to be applied in determining liability. This is a clear adoption of the prevailing objective standard.<sup>517</sup>

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183 Ky 209, 208 S.W. 772 (1919) Jones v. Com., 213 Ky 356, 281 S.W. 164 (1926)

<sup>515</sup> See the discussion, *supra*, p. 9. Cf. Oklahoma, pp. 13-14 *supra*.

"Culpable negligence are the terms frequently used, and are less open to objection. But I will tell you that what the prisoner must be found guilty of is gross negligence." O'Brien, J., in Reg. v. Elliott, 16 Cox C.C. 710, 714.

<sup>516</sup> See the discussion, *supra*, pp. 31-41, 127-139.

<sup>517</sup> See the discussion, *supra*, pp. 34-41.

The second problem has to do with the *degree of negligence* required for conviction. This question presents greater difficulties to the codifier. The statute provides that this degree is reached when the conduct of the accused creates "such an unreasonable risk of danger as to be recklessly disregarding of human life and safety." This description makes the required degree of negligence synonymous with "recklessness," the word which most nearly describes it.<sup>518</sup>

### SECTION 3. THE STATUTORY OFFENSE OF NEGLIGENT HOMICIDE

In 1921 Michigan enacted a statute destined to have considerable effect on the law of criminal negligence. This statute,<sup>519</sup> creating the separate offense of negligent homicide committed in the operation of any vehicle, provided:<sup>520</sup>

"Section 1. Every person who, by the operation of any vehicle at an immoderate rate of speed or in a careless, reckless, or negligent manner, but not wilfully or wantonly, shall cause the death of another, shall be guilty of the crime of negligent homicide and upon conviction shall be sentenced to pay a fine not exceeding one thousand dollars, or to undergo imprisonment in the state prison for a period not exceeding five years, or by both such fine and imprisonment in the discretion of the court.

"Section 2. The crime of negligent homicide shall be deemed to be included within every crime of manslaughter charged to have been committed in the operation of any vehicle, if the jury shall find the defendant not guilty of the crime of manslaughter such jury may in its discretion render a verdict of guilty of negligent homicide.

"Section 3. In any prosecution under this act, whether the defendant was driving at an immoderate rate of speed shall be a question of fact for the jury and shall not depend upon the rate of speed fixed by law for operating such vehicle."

Vermont passed a similar statute in 1925.<sup>521</sup> It provides a punishment of five years imprisonment, \$2,000 fine, or both for death resulting from the "careless or negligent operation of a motor vehicle," and that the section shall not be construed "to limit or restrict prosecutions for manslaughter." New Hampshire passed a like statute in 1931,<sup>522</sup> substituting, however, "reckless" for "careless or negligent" and limiting the fine to \$1,000, as in

<sup>518</sup> See the discussion, pp. 128-137.

<sup>519</sup> Comp. Laws Mich. (1929) secs. 16743-16745.

<sup>520</sup> The words, "shall be a question of fact for the jury" in section 3 should be omitted in order to prevent the section from being unconstitutional. *People v McMurchy* 249 Mich. 147, 228 N.W. 723 (1930).

<sup>521</sup> Pub. Laws Vt. (1933) sec. 5152.

<sup>522</sup> N. H. Laws (1931) (Special Session, 1930) chap. 81, sec. 2.



the Michigan statute. A Louisiana<sup>523</sup> act adopted in 1930 names the offense "involuntary homicide" and provides a punishment of imprisonment for a term not exceeding five years where the vehicle is operated in a "grossly negligent or grossly reckless manner."

New Jersey<sup>524</sup> enacted a statute in 1935 making homicide through the "careless" operation of a motor vehicle a misdemeanor. There is no reference to manslaughter in the statute. Ohio<sup>525</sup> modified the manslaughter statute in 1935 so as to make an unintentional killing resulting from the unlawful use of the highway manslaughter in the second degree punishable by a fine not to exceed \$500 or imprisonment in the county jail or workhouse not less than thirty days nor more than six months, or imprisonment in the penitentiary not less than one nor more than twenty years. A California amendment<sup>526</sup> to the Vehicle Code, enacted in 1935, provides that a death resulting from the driving of any vehicle in a "negligent manner" shall constitute a felony punishable by imprisonment in the county jail for not more than one year or in the state prison for not more than three years. The offense is designated "Negligent Homicide." New York<sup>527</sup> passed a statute in 1936 providing that a person who commits a killing while engaged in the "reckless or culpably negligent" operation of a vehicle is guilty of criminal negligence and punishable by imprisonment for a term not exceeding five years or by a fine of not more than \$1,000, or by both.

These statutes<sup>528</sup> raise several questions. What is the purpose of such legislation? What is the relation of the new offense to other crimes in the jurisdiction involving an unintentional killing by negligence? What is the standard of care to be applied in determining whether the accused is guilty of the offense described in the statute?

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<sup>523</sup> La. Code Crim. Proc. (Dart, 1932) secs. 1047, 1049.

<sup>524</sup> Rev Stat. N. J. (1937) sec. 2:138-9. The distinction between felonies and misdemeanors is ignored in New Jersey and misdemeanors are often more serious offenses than in other jurisdictions. See *Jackson v State*, 49 N.J.L. 252, 9 Atl. 741 (1887).

<sup>525</sup> Ohio Gen. Code Ann. (Page, 1938) sec. 12404-1.

<sup>526</sup> Cal. Vehicle Code (Deering, 1937) sec. 500.

<sup>527</sup> Laws N. Y. (Thompson, 1939) secs. 1053-a, 1053-b.

<sup>528</sup> See, also, Supp. Conn. Gen. Stat. (1931, 1933, 1935) sec. 1685c; Comp. Stat. Neb. (1929) sec. 39-1106; Wyo. Rev Stat. Ann. (1931) sec. 72-128.

The purpose of such statutes is not altogether clear, although it is supposed to be a legislative attempt to provide for convictions in situations where juries refuse to convict of manslaughter. Professor Riesenfeld, in an excellent discussion of such legislation,<sup>529</sup> points out that there is a popular feeling that manslaughter is not the proper label for a considerable number of cases of manslaughter committed through violation of traffic rules. The term itself carries a connotation, it is believed, which is too harsh to apply to such cases and the punishment provided in ordinary manslaughter statutes is too severe.

This legislative purpose, "to get more convictions," is indicated by the fact that in most jurisdictions the new offense and manslaughter overlap. In other words, the jury has an election to convict of either involuntary manslaughter or of negligent homicide, a lesser offense, the standard of care as to both crimes being "gross negligence." It appears that this is the situation in Louisiana<sup>530</sup> and Wyoming<sup>531</sup> and probably in Nebraska,<sup>532</sup> New Hampshire,<sup>533</sup> and Vermont.<sup>534</sup> It is the situation in Canada.<sup>535</sup>

While the original statute in Michigan was also passed to secure additional convictions, it was because of a reason other than the failure of juries to apply the manslaughter statute. The appellate court of Michigan has adopted a very loose and illogical definition of the negligence requisite for manslaughter. In the leading case of *People v Barnes*,<sup>536</sup> the court set aside a conviction of manslaughter, saying

"In this case, in order to warrant the conviction of the respondent, it should have clearly appeared that Mary Robb's death ensued as a direct and natural result of the reckless or gross negligence of the respondent. The crime sought to be proven was involuntary homicide, caused by culpable negligence, and, to make an act carelessly performed resulting in death a criminal one, the carelessness must have been gross, implying an indifference to consequences; and the term 'gross negligence' means something more than mere negligence.

<sup>529</sup> Riesenfeld, *op. cit. supra* note 31, at 8. See, also, an excellent article, Tinchler, *Proposed Statutory Reform in the Law of Negligent Homicide in Kentucky* (1942) 30 Ky L. J. 341.

<sup>530</sup> *State v Flattmann*, 172 La. 620, 135 So. 3 (1931)

<sup>531</sup> See *State v McComb*, 33 Wyo. 346, 239 Pac. 526 (1925)

<sup>532</sup> See Riesenfeld, *op. cit. supra* note 31, at 16.

<sup>533</sup> *Idem.*

<sup>534</sup> *Idem.*

<sup>535</sup> *Rex v. Kennedy*, 2 D.L.R. 448 (1936), *Rex v Preusantanz*, 2 D.L.R. 421 (1936)

<sup>536</sup> 182 Mich. 179, 148 N.W. 400 (1914)

It means wantonness and disregard of the consequences which may ensue, and indifference to the rights of others that is equivalent to a criminal intent."<sup>537</sup>

This decision indicates a lack of knowledge of the qualities of "gross negligence." Criminal negligence is never the equivalent of criminal intent. A negligent act may be punished as severely as an intentional one, and frequently is, but negligence is always something different in *kind* from intention.<sup>538</sup>

It was felt that the definition left unpunished many negligent homicides of less culpability than those included in the definition, but which, nevertheless, should be punished.<sup>539</sup> It would appear that situations along the lower fringe of what is called gross negligence in other jurisdictions are not covered by the involuntary manslaughter statute under the court's definition of gross negligence. It is believed that the Michigan negligent homicide statute was passed to remedy this defect and thus effect coverage of the field covered in other jurisdictions by a broader, more rational definition of gross negligence. This position is strengthened by the fact that the new statute uses the word "reckless" to describe the conduct requisite for conviction, a word ordinarily used in describing the negligence requisite for manslaughter, and that section two of the act provides that the new offense is included in the crime of manslaughter.

However, the appellate court, in construing the new statute,<sup>540</sup> held that it applies only where the negligence is less than gross. The net result is that the statute is construed to cover killings in the operation of a vehicle resulting from *ordinary* negligence. The statute therefore enlarges the ground covered by the manslaughter statute and goes so far as to apply the standard of care in civil cases to situations coming within it. The question now arises whether, strictly speaking, situations along the lower fringe of what is called gross negligence in other jurisdictions are covered by *either* statute under the court's constructions.

<sup>537</sup> *Id.* at 406-407.

<sup>538</sup> See the discussion and analysis, *supra*, p. 151.

<sup>539</sup> This is not a necessary conclusion, since the word "reckless" appears in the court's definition in the alternative and this word is commonly considered to be sufficiently descriptive of the whole field of conduct in the negligent manslaughter. The ambiguity could have been cleared up in a subsequent decision of the court without overruling the decision in *People v Barnes*.

<sup>540</sup> "By the enactment of this statute, the Legislature of 1921 obviously intended to create a lesser offense than involuntary man-

It has been decided in California also that ordinary negligence is sufficient to support a conviction under the negligent homicide statute.<sup>541</sup> This conclusion is not surprising in that state in view of the wording of the statute, which provides for punishment where a killing results from the driving of a vehicle "in a negligent manner." The court reasons that it was the purpose of the legislature to create a crime different from that provided for in the definition of manslaughter. Since the standard of care in the case of manslaughter is gross negligence, the court concludes that the legislature intended that ordinary negligence should be sufficient under the new statute.<sup>542</sup>

The new Ohio statute<sup>543</sup> enlarges the ground covered by the ordinary manslaughter statute in that state but the result is obtained in a different way. The new statute creates the crime of manslaughter in the second degree, a special lesser degree of manslaughter.<sup>544</sup>

It would appear that the New York statute<sup>545</sup> does not enlarge the ground covered by the statutes defining manslaughter in the first and second degree since it merely creates a special offense of less culpability and with less punishment. The new statute will almost certainly be interpreted to require gross negligence since it requires "reckless or culpably negligent" conduct<sup>546</sup> resulting in giving the jury an election to hold the accused for second degree manslaughter or the new offense, if the indict-

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slaughter or common law negligent homicide, where the negligent killing was caused by the operation of a vehicle. To do this it eliminated as necessary elements of the lesser offense negligence classed as wanton or willful. Included in these terms is gross negligence. So that, in the enactment of the statute, there was expressly eliminated as elements of the crime all negligence of such character as to evidence a criminal intent; and, as we have before pointed out, wanton or willful or gross negligence was of that character. Therefore this statute was intended to apply only to cases where the negligence is of a lesser degree than gross negligence." *People v Campbell*, 237 Mich. 424, 428, 212 N.W. 97, 99 (1927)

<sup>541</sup> *People v. Warner*, 27 Cal. App. (2d) 190, 80 P (2d) 737 (1938).

<sup>542</sup> Accord, *People v Pociask*, — Cal. App. (2d) — 96 P (2d) 788 (1939), *People v Beckhard*, — Cal. App. — 93 P (2d) 158 (1939)

<sup>543</sup> See page 244, *supra*.

<sup>544</sup> In connection with the two manslaughter statutes in Ohio see Note (1938) 4 Ohio St. L. J. 234.

<sup>545</sup> See page 244, *supra*.

<sup>546</sup> So held in the New York Supreme Court, Appellate Division, Second Department, in *People v Sackett*, 37 N.Y.S. (2d) 748 (1942)

ment is properly framed. Consequently, no new ground is added by the statute.

What conclusion is to be drawn from an examination of these statutes? It appears that the motivating force behind such legislation is to secure additional convictions. Various factors have contributed to this need. In some instances it has been felt that the manslaughter label is too harsh, that juries would convict in such cases if the offense had a less atrocious name, or a less severe punishment. In Michigan, the statute was enacted because the judicial definition of manslaughter was too narrow to include a number of such cases which it was felt should be punished. In California, the legislature apparently intended to extend criminal liability to cases where death results from ordinary negligence in the operation of a vehicle.

Such legislation is still in the transition stage. It is impossible to prophesy how popular it will be or its final form. It does appear, however, that if juries in California show a reluctance to convict of manslaughter where *gross* negligence is the standard, they will show an even greater reluctance to convict of negligent homicide with *ordinary* negligence as the standard.<sup>547</sup> Ordinary negligence as a basis for criminal liability has gained little headway in our law, except in Texas.<sup>548</sup>

Nor does it appear that anything has been gained by changing the name of the offense. The phrase "negligent homicide" is just as harsh a label as "negligent manslaughter." On the other hand, while the maximum punishment for the new offense is usually as severe as the minimum punishment for manslaughter, the minimum punishment is less. Perhaps that is the most important factor in such statutes.

It would appear that the New York statute points the way such legislation will go. The harsh label has been removed as far as possible, the offense is simply described with particularity as "criminal negligence in the operation of a vehicle resulting in death."<sup>549</sup> The maximum punishment is five years, whereas in the case of manslaughter in the second degree, it is fifteen.<sup>550</sup> It

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<sup>547</sup> Cal. Vehicle Code (Deering, 1937) sec. 500.

<sup>548</sup> See the discussion, *supra*, pp. 10-11.

<sup>549</sup> Laws N.Y. (Thompson, 1939) sec. 1053-a.

<sup>550</sup> Laws N.Y. (Thompson, 1939) sec. 1053-b.

may be that more convictions can be secured under such a statute. However, it is altogether possible that there is a fundamental feeling on the part of juries that one should not be convicted of a killing resulting from a negligent violation of a road law, except in such a flagrant case that a conviction of manslaughter is justifiable.<sup>551</sup>

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<sup>551</sup> At least two states have refused to enact such statutes. See *Riesefeld*, *op. cit. supra* note 31, at 6 and *State v. Whatley*, 210 Wis. 157, 161, 162, 245 N.W. 93, 95, 99 A.L.R. 749, 752 (1932)

PART IV  
CONCLUSION

As this study of criminal negligence has progressed, it has become clear that the drafting of a formula for the offense involves the determination of two fundamental questions.

First, a decision must be made as to whether criminal negligence is objective or subjective. Second, the extra degree of negligence requisite for criminal liability must be defined.

Although frequent references to the "ordinary prudent man" will be found in the cases,<sup>552</sup> judges have not faced the first problem frankly. Civil negligence is objective as far as possible.<sup>553</sup> It has been the thesis of this study that criminal negligence, except in the case of murder,<sup>554</sup> is also objective. This theory is best expressed by the phrase so often used in the cases,— "civil and criminal negligence are the same in kind."<sup>555</sup> The acceptance of the objective view of criminal negligence furnishes the opportunity to use "the reasonable man," a convenient objective abstraction, as the norm by which the conduct of the defendant is measured.

A few jurisdictions hold a defendant criminally as well as civilly liable if he has failed to conform to the conduct of the reasonable man considering the circumstances in the particular case.<sup>556</sup> However, most jurisdictions require a higher degree of negligence to establish criminal liability than is required in civil cases.<sup>557</sup> This presents the second major problem in criminal negligence, that of defining the extra degree of negligence requisite for criminal liability.

The following formula for criminal negligence has been suggested.<sup>558</sup>

- (1) Criminal negligence is conduct creating such an unreasonable risk of harm to life, safety, property or other interest for the unintentional invasion of which the law prescribes punishment, as to be recklessly disregarding of such interest. The standard of conduct to be applied is that of a reasonable man under like circumstances.

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<sup>552</sup> See, supra, fn. 106.

<sup>553</sup> See, supra, p. 172, fn. 299.

<sup>554</sup> See the discussion, supra, pp. 139-155.

<sup>555</sup> See, supra, p. 27 and fn. 108.

<sup>556</sup> See the discussion, supra, pp. 10-20. See also, supra, pp. 246-247.

<sup>557</sup> See, supra, p. 9, fn. 31.

<sup>558</sup> See, supra, p. 31.

- (2) Criminally negligent conduct may be either:
- (a) An act which the actor as a reasonable man should realize as involving under the circumstances a reckless disregard of an interest of others, or
  - (b) A failure to perform a legal duty which the actor as a reasonable man should realize amounts to a reckless disregard for human life and safety under the circumstances.

This formula ties up civil and criminal negligence, using as far as possible the language in the Restatement of Torts as the common measure of expression. Since civil and criminal negligence are the same in kind, differing only in degree, there are distinct advantages in such common statement. It facilitates their development along parallel lines, so far as that is expedient, and makes studies and judicial opinions in either field of substantial value in the other.

The formula brings to the surface the two problems which have been mentioned as the most important ones in criminal negligence. The first of these is presented by the enunciation that negligence is "conduct," an objective view of the offense, the second by the description of the "higher degree" of negligence necessary for criminal liability as conduct creating such an unreasonable risk of harm as to be "recklessly disregarding of an interest of others."

Of course, the concepts, "conduct" and "recklessly disregarding," must be broken down in order that they may be applied to individual cases. The abstract statement of a formula is only the first step in a process. With that in mind, several devices have been suggested for breaking down the formula and describing criminal negligence so that those who have the duty of applying the definition to the facts of particular cases can do so intelligently.<sup>559</sup> In addition, the importance of the "circumstances of the case" in the determination of negligence has been stressed.

Under this phrase, the "reasonable man" is endowed with the very qualities of the individual whose conduct is being measured and he is placed, as nearly as possible, in the very same objective circumstances that the actor occupied when the injury occurred. If the objective circumstances created an unusually dangerous situation, he must have exercised a degree of care commensurate with the danger. If he is an unusually abnormal in-

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<sup>559</sup> See, *supra*, pp. 127-139.



dividual, some allowance will be made for that fact. The law has catalogued a number of these "unusual circumstances," objective and subjective, and worked out rules concerning them. These have been considered in some detail.<sup>560</sup>

It is now concluded, that criminal negligence can be described with practically the same degree of clarity that the courts attain in describing civil negligence. This study, modeled as far as possible on the framework devised by the law for the description of civil negligence, shows that it is possible to describe the criminal offense in almost equal detail. Of course, the law deals with one of its most difficult problems in describing negligence, civil or criminal. Taking that fact into consideration, the description of civil negligence is generally believed to be reasonably adequate for the needs of judges and juries.<sup>561</sup> It is believed that a similar conclusion can be made in the case of criminal negligence.

This is true also as to the legislative phase of the problem. Modern statutes dealing with criminally negligent conduct are largely declaratory of the common law and therefore subject to the criticisms commonly leveled at the common law definitions of negligent offenses. But this need not be. The model murder and manslaughter provisions which have been submitted<sup>562</sup> show that statutes can be drawn which describe negligent crimes with reasonable precision.

However, it must not be concluded that further development is not needed. The law of negligence, civil and criminal, is still largely uncrystallized and one may expect continued improvement in statement and in the substantive law

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<sup>560</sup> See supra, pp. 155-188.

<sup>561</sup> Cf. Green, *The Negligence Issue*, supra note 97.

<sup>562</sup> See pp. 238 and 242 supra.

## APPENDIX



## APPENDIX

### INSTRUCTIONS ON CRIMINAL NEGLIGENCE

Since the negligence issue may be raised procedurally by demurrer or by appropriate motions several times in the trial of a criminal case based upon the offense,<sup>563</sup> the adequacy of the definition and description of criminal negligence is tested several times in each proceeding.

Such procedural problems put the negligence issue directly to the judge and he cannot shift his responsibility to the jury. For such duties the law must provide him with a "working description" of what criminal negligence is. In the case of the instructions, however, the judge has an additional task. Not only must he know what negligence is, he must be able to describe it so that the jury, a body of laymen, can understand what it is and determine whether the defendant is guilty of it under the facts of the particular case. Consequently, the instructions provide a particularly good medium for determining whether the formula for criminal negligence and the devices provided for breaking it down are reasonably adequate.

The case of *State v Tucker*<sup>564</sup> was appealed because of alleged error in the instructions. The defendant, a boy apparently about twelve years of age, got his father's pistol out of the bureau and was "projecting" around with it in a room occupied by the deceased, a boy ten years of age, his sister, and one or two other, smaller children. The defendant playfully snatched a dime from the pocket of his sister, and she tried to recover it, whereupon he said to her, "If you don't sit down I am going to shoot you." The sister sat down and then the deceased tried to take the money from the defendant who told him that if he did not sit down he was going to shoot him. Deceased said, "No, you won't either." The defendant replied, "If you don't believe it, hold out your hand, I will show you." The deceased held out his hand, then snatched it back. Shortly afterwards the pistol was discharged striking the deceased in the neck, killing him. The defendant immediately cried out, "Lord have mercy! Did I shoot him?" and, being frightened, ran off for a couple of hours. He testified at the trial

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<sup>563</sup> See the discussion, *supra*, pp. 21-25.

<sup>564</sup> 86 S.C. 211, 68 S.E. 523 (1910)

that he was sitting down rubbing the pistol and that the deceased was sitting by his side and that without knowing that the gun was loaded or that the deceased had moved in front of him, he pulled the trigger without meaning to do so.

In describing the negligence requisite for manslaughter, the court gave the following charge to the jury<sup>565</sup>

"Where a person handles firearms in a criminally careless way and causes the death of some person, he would be guilty of manslaughter. Now, it is necessary for me to define to you what we mean by carelessness or negligence. Negligence is the want of due care; it is the failure to observe due care under the circumstances; or I might put it this way it is the failure to do that which a person of ordinary firmness and reason would have done under the circumstances, or it is doing something that a person of ordinary care and prudence would not have done under the same circumstances."

The defendant was convicted of manslaughter<sup>566</sup> and appealed contending that the instruction in effect charged that criminal negligence was to be determined by the standard of simple negligence, whereas the court should have charged that the criminal negligence required for manslaughter is such lack of care as amounts to recklessness or gross negligence. The court, relying upon a previous decision in the state, held, however, that the instruction was not erroneous, since one who causes the death of another by the negligent use of a pistol or gun is guilty of manslaughter, unless the negligence is so wanton as to make the killing murder.

It would appear that the instruction given by the lower court employed the tort standard of care. However, although the method of statement is unfortunate, it is possible that the lower court intended to instruct and the appellate court to affirm that the want of ordinary care in handling a dangerous instrumentality in the presence of others is gross negligence.<sup>567</sup> At any rate both the instruction and the opinion lack clarity<sup>568</sup>

Assume that the defendant in the Tucker Case is charged

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<sup>565</sup> Id. at 524.

<sup>566</sup> The defendant was indicted for murder but convicted of manslaughter. It would appear that the facts did not warrant an indictment for murder.

<sup>567</sup> Such reasoning and method of statement appear in some cases. See *State v Davis*, 128 S.C. 265, 122 S.E. 770 (1924) *Held v Com.*, 183 Ky 209, 208 S.W 772 (1919)

<sup>568</sup> It is believed that South Carolina follows the majority rule requiring gross negligence in criminal cases, although the decisions in that jurisdiction are not clear. See the discussion, *supra*, pp. 11-13, and, particularly, *fn.* 47.

with manslaughter and that the judge desires to instruct the jury as to the kind and degree of negligence requisite for the offense in a jurisdiction which has repudiated the tort standard of care in criminal cases. Since the charge is only manslaughter, the judge is not faced with the problem of describing the degree of negligence requisite for murder. Omitting those portions of the instructions which are not pertinent, he might charge as follows

“Gentlemen of the Jury

“2. You are further instructed that the words, ‘criminal negligence’ as used in these instructions, mean conduct which is recklessly disregarding of the interests of others. In determining whether or not the defendant was guilty of criminal negligence, you should consider the dangerous character of the firearm handled by the defendant, and also the fact that the defendant was a boy twelve years of age, together with all the other circumstances of the case.

“You are instructed that the burden is on the state to show beyond a reasonable doubt that the defendant, notwithstanding his youth, had the capacity to understand and realize the danger in handling firearms.

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This instruction has the advantage of brevity. It is not erroneous since it correctly describes criminal negligence and does so, probably, sufficiently, as a matter of law. Briefly, it tells the jury that criminal negligence is the equivalent of recklessness. Recklessness itself is not defined, although the jury is told that the dangerous character of the instrumentality used, the defendant’s youth, and the other circumstances of the case are factors in determining whether the defendant was guilty of it.

The question now arises whether the judge should break the law down further for the jury. Would the jury, as a practical matter, be aided materially by an instruction worded substantially as follows?

“2. I will now charge as to criminal negligence. Negligence, in the law is the failure to exercise the care that a ‘reasonable man’ would have exercised under the circumstances. Of course, the reasonable man is a fiction, an assumed ‘average person, the community ideal of reasonable behavior. If the defendant’s conduct did not meet that standard he would be civilly liable.

“However, in order to convict the defendant of a crime, his negligence must be greater than the negligence required for civil liability. The law expresses this by saying that criminal negligence is the same as civil in kind, but greater in degree. This greater degree of negligence required for criminal liability may be described as conduct which is ‘recklessly disregarding of an interest of others.’ In other words, criminally negligent conduct is *reckless* conduct. Conduct becomes reckless when it involves a risk to others which is not merely in excess of its utility but is *out of all proportion thereto*.

"I will give you an additional test of criminal negligence. Civil negligence leads, of course, to compensation by the negligent party. But to establish criminal liability the negligence of the accused must be such as to go beyond a mere matter of compensation between parties. In other words before the defendant can be guilty his conduct must go so far beyond civil liability as to *deserve punishment*.

"I have told you that the defendant's conduct is to be judged by the 'circumstances. One of the circumstances in this case to be taken into consideration is the fact that the accused is about twelve years of age. There is a presumption that a child twelve years of age lacks the mental capacity to commit crime. You are to determine, therefore, whether the prosecution has shown beyond a reasonable doubt, that the defendant had the capacity to understand the nature and consequences of the act he is alleged to have committed and a knowledge that his conduct was wrong and unlawful (if he did commit the act alleged)

"The external circumstances of the case will also be taken into consideration by you. Since the care required in a particular case is proportional to the danger, the actor must exercise a high degree of care if he is using a dangerous agency Firearms are a dangerous agency and a high degree of care is demanded of those who use them, particularly where other persons are in the immediate vicinity. You will consider not only these but all the other circumstances in the case. The importance of none of them can be properly estimated except in relation to the others."

This instruction is considerably longer than the other, but it is also, at least from a lawyer's viewpoint, much clearer. "Reckless disregard" is broken down and its meaning, as used in the instruction, is explained. The description, however, is a technical one, one that lawyers would understand. Although the language is simple, laymen, perhaps, would not understand it, or refuse to take the time to consider it carefully, and, consequently would apply their own individual concepts of what recklessness is. If that were so, the first instruction would suit the purpose as well as the second.

Suppose, however, the judge desires to go even further and to describe the negligence requisite for manslaughter in still greater detail. If so, he might instruct as follows

"Gentlemen of the Jury

"2. It is now necessary for me to explain what criminal negligence is. Criminal negligence may be defined as follows:

- (1) Criminal negligence is conduct creating such an unreasonable risk of harm to life, safety, property or other interest for the unintentional invasion of which the law prescribes punishment, as to be recklessly disregardful of such interest. The standard of conduct to be applied is that of a reasonable man under like circumstances.

- (2) Criminally negligent conduct may be either:
- (a) An act which the actor as a reasonable man should realize as involving under the circumstances a reckless disregard of an interest of others, or
  - (b) A failure to perform a legal duty which the actor as a reasonable man should realize amounts to a reckless disregard for human life and safety under the circumstances.

"I will now try to make this definition clear. Negligence in the law is conduct which creates an unreasonable risk of harm. In determining what is an unreasonable risk under the facts of a particular case the law has chosen the conduct of 'a reasonable man' as the standard in both civil and criminal cases. There is no such actual person, of course. The reasonable man is a fiction, an assumed 'average person,' the community ideal of reasonable behavior. One way to apply the standard is to ask yourselves what such a reasonable man in the community, would have done under the circumstances. If the defendant's conduct does not meet that standard, he would be civilly liable.

"However, in order to convict the defendant of a crime, his negligence must be greater than the negligence required for civil liability. The law expresses this by saying that criminal negligence is the same as civil in kind, but greater in degree. To illustrate, suppose that negligent conduct were measured on an ordinary yardstick. After the place on the yardstick corresponding to the amount of dangerous conduct required for civil liability is reached, it will be necessary to move an appreciable distance *farther* along the stick to mark the place where criminal liability begins.

"The formula I have given you describes this 'higher degree' of negligence which is required for criminal liability by calling it conduct which is 'recklessly disregarding of an interest of others.' In other words, criminally negligent conduct is *reckless* conduct. But, you ask, when does conduct become reckless? What is the meaning of recklessness? Well, you have your own understanding of the meaning of the word, but I will give you some aids to supplement your knowledge of the concept. The first aid will be in the nature of a definition. A factor in determining whether the risk is unreasonable in a particular case is the utility of the act which creates the risk. When the danger to the interests of others outweighs the utility of the act the risk becomes unreasonable and civil liability for negligence occurs. When conduct is such that it involves a risk to others which is not merely in excess of its utility but is *out of all proportion thereto*, it becomes 'recklessly disregarding of the interests of others' and criminal liability attaches, if an injury results therefrom.

"Let me give you a case to illustrate what I mean. Suppose a defendant set an unlabeled box of dynamite caps down in a school yard without apparently appreciating the risk while he went inside to use the telephone. Some children found the box and while playing with it caused the caps to explode killing one of them. Since children of tender years were wont to use the school yard for play, it will not be denied that the defendant was negligent. And since a reasonable man would consider such conduct as creating a high degree of probability of substantial harm, out of all proportion to its utility, it amounted to recklessness and the defendant is guilty of manslaughter. By a slight variation of the circumstances in the foregoing case the dividing line between recklessness and ordinary negligence can be approached.



Suppose the defendant is engaged in digging a well in one corner of the school yard and, familiar with study hours and playground rules, knows (1) that the children have been forbidden to play in that part of the school yard where the work is being done, and (2) that there will not be any play period for forty-five minutes. He sets the box down in the restricted area at a time when there are no children around, knowing that he can be back in five minutes. However, in the interim the teacher of the third grade lets her pupils out to play as a reward for some task well done. Some of them violate the rule and play in the restricted part of the yard where they find the box of caps and one of them is killed. The defendant in the second illustration may easily be found guilty of ordinary or civil negligence. To leave an unlabeled box of dynamite caps in a public place, unless necessity demands it, probably creates an unreasonable risk to anyone who could be expected to come upon them there. Though it was unlikely from the point of view of anyone in the defendant's position that any child would be injured by the caps before he returned, still, the fact that schedules of work and play in public schools are generally known to be quite elastic, coupled with the fact that children are known to frequently violate playground regulations, plus the fact that the injury if any child did come in contact with the box might be very serious, would almost certainly brand the defendant's conduct as negligent. However, it could hardly be said that his act involved such a high degree of probability of substantial harm as to create liability for manslaughter. Remember, this is not the case you are deciding but just an illustration to help you understand the difference between civil and criminal negligence. Other illustrations could be given, also.

"I will give you one additional test of criminal negligence. Civil negligence leads, of course, to compensation by the negligent party. But to establish criminal liability the negligence of the accused must be such as to go beyond a mere matter of compensation between parties. It must show 'such disregard for the life and safety of others as to amount to a crime against the state and conduct deserving punishment. In other words, before the defendant can be guilty his conduct must go so far beyond civil liability as to *deserve punishment*."

"Let me call your attention to another phrase in the formula. You are to test the conduct of the defendant by what a reasonable man would have done 'under the circumstances. In other words, you are to put the reasonable man, who is your standard for measuring the conduct of the defendant, under the same circumstances, as nearly as possible, as the defendant when he committed the act (if he did commit it) which is alleged to have been criminally negligent. His age is one of the 'circumstances' in the case. There is a presumption that a child twelve years of age lacks the mental capacity to commit crime. Therefore the burden of showing that he has the capacity is upon the prosecution in this case. You are to determine from the evidence whether the prosecution has shown, beyond a reasonable doubt, that the defendant had the capacity to understand the nature and consequences of the act he is alleged to have committed and a knowledge that his conduct was wrong and unlawful (if he did commit the act alleged)

"There are certain objective circumstances in the case which you will also take into consideration in determining whether the defendant was criminally negligent as charged. The nature of the instrumentality being used by the defendant when the alleged injury occurred is one of the most important circumstances to be taken into consideration. This is because the kind of instrumentality used by the actor has a

great deal to do with the degree of danger which his conduct creates. X handles a cane negligently in a crowded room. There is little danger to human life and safety. But if he had handled a sword negligently in the same room the risk of harm would have been increased many times. Since the care required in a particular case is proportional to the danger, the actor must exercise a high degree of care if he is using a dangerous agency. Firearms are a dangerous agency and a high degree of care is demanded of those who use them, particularly where other persons are in the immediate vicinity.

“In closing this part of my instructions to you, it is well to emphasize that each, separate factor is but *one* of the circumstances in the case. The importance of none of them can be properly estimated except in its relation to the others.  
”

This instruction, a lengthy one, employs not only definitions but illustrations in describing the negligence requisite for manslaughter. It is believed that the judge has not invaded the province of the jury in using the illustrations since they are not based upon the facts in the case and the jury is warned that they are used for illustrative purposes. The lawyer would find this instruction clearer than either of the others and it would seem that a jury composed of laymen would also, all things considered, if they had the time and inclination to consider it carefully. This raises the whole question of the nature and extent of the instructions that should be given to the jury, a difficult problem in itself. The various instructions are given, not as models, but, as indicating, progressively, the means available to the judge for describing criminal negligence to the jury.