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Jurisdictions Adopting the Tort Standard of Care in Criminal Negligence

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be affirmative or would passive acquiescence with knowledge of the facts bind the other spouse?

Then too suppose the following factual situation in the *Haddock* case:

The wife sues in state X for separate maintenance and later the husband sues in state Y for a divorce *a vinculo*. The husband gets a decree in state Y never having been personally served in state X. Can the wife now secure the relief sought in state X? It would appear that she could not since by asking for separate maintenance she seemingly consents that the husband acquire a separate home and yet this result is at variance with the *Haddock* case.

Moreover in the above case, state X may give full faith and credit to the decree of state Y on the basis of comity[12] regardless of the consent or non-consent of the domiciliary wife to the establishment of a separate home by the husband. Yet the Restatement holds that unless the wife consents to the husband's acquisition of a new home, or loses her right to object, the Y decree is void for any purpose because of lack of jurisdiction and only state X can issue a valid decree of dissolution without personal jurisdiction of both parties.

In addition, the uniformity claimed becomes illusory when it is considered that two jurisdictions have the right to pass on the question of fault and thus a cloud is placed on any subsequent marriage which can only be removed by the Supreme Court. It should be noted that in many cases this is not feasible since the complaining party is in no position to complain of an ajudication in his favor and the other party may not decide to carry the case up to the highest court for several years.

In conclusion it is submitted that the Restatement is of little if any real help in that it introduces greater factors of uncertainty than those already existing and that therefore a divorce is entitled to full faith and credit:

(1) If granted at the domicil of both parties.

(2) If granted at the domicil of either spouse with personal jurisdiction of the other through service or appearance.

(3) If granted at the last matrimonial domicil even though there was no actual service within the state and no appearance, so long as there was such constructive notice as is required by the law of the state.[13]

B. T. MOYNAHAN, JR.

JURISDICTIONS ADOPTING THE TORT STANDARD OF CARE IN CRIMINAL NEGLIGENCE.

It is the purpose of this note to discuss the degree of negligence necessary to constitute manslaughter in those jurisdictions which have adopted the negligence rule used in civil cases.

This rule, although the minority one, is rather definite and readily

[12] Haddock v. Haddock, 201 U. S. 562, 581 (1906).

[13] Cheely v. Clayton, 110 U. S. 701, 4 Sup. Ct. 328, 28 L. Ed. 298 (1884); Atherton v. Atherton, 181 U. S. 155, 171, 172 (1901).

defined. In such cases, the actor will be guilty of manslaughter for death resulting from his negligent act if he fails to exercise that degree of care and caution which an ordinarily reasonable and prudent man would use under like and similar circumstances.[1]

The courts of the state of Texas have followed the tort standard of care closer than any other jurisdiction and apply it in all instances of negligent homicide.[2] The court has stated, "It may be doubted if there is greater unanimity among the courts of all jurisdictions upon any one thing than in the general definition of negligence, as being a failure to do what a man of ordinary care and prudence would do under the same or like circumstances".[3]

In following a statutory provision, the Oklahoma courts have adopted and followed this rule. The courts require that the actor shall be guilty of culpable negligence but define culpable negligence as "the omission to do something which a reasonable, prudent, and honest man would do, or the doing of something which such a man would not do, under the circumstances surrounding the particular case".[4]

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[1] Maynard v. Buck, 11 Exchequer 781, 156 Eng. Reprint 1047 (1856) (Negligence is the omission to do something which a reasonable man, guided by those considerations which ordinarily regulate the conduct of human affairs, would do, or doing something which a reasonable and prudent man would not do.)

[2] Gribble v. State, 85 Tex. Crim. Rep. 52, 210 S. W. 215 (1919) (In a prosecution for negligent homicide, the court held that an instruction defining negligence as the failure to use or exercise that degree of care and caution which a man of ordinary prudence would use under like and similar circumstances, was correct); Young v. State, 120 Tex. Crim. Rep. 39, 47 S. W. (2d) 320 (1932) (The defendant struck a child while driving an automobile down a narrow street in the city of Houston. He was violating a city ordinance at the time by driving at a rate of fifty miles an hour. The court held that an instruction which defined negligence as "a failure to do what a man of ordinary care and prudence would do under like circumstances" was correct.

[3] Haynes v. State, 88 Tex. Crim. Rep. 44, 224 S. W. 1100 (1920) (The defendant was charged with manslaughter for negligently handling a gun in front of the home of the deceased. The appellate court held that there was no error in a charge to the jury defining negligence as "the failure to exercise that degree of care and caution which a man of ordinary prudence would use under like and similar circumstances".)

[4] Kent v. State, 8 Okla. Crim. Rep. 188, 126 Pac. 1040 (1912) ("Culpable negligence is the want of that usual and ordinary care and caution in the performance of an act usually and ordinarily exercised by a person under similar circumstances and conditions"); Pamplin v. State, 21 Okla. Crim. Rep. 136, 205 Pac. 521 (1922) (In an instruction to the jury the court stated, "culpable negligence is the want of that usual and ordinary care and caution in the performance of an act which is usually and ordinarily exercised by a person under similar circumstances and conditions, and you are instructed that a person handling a gun or a deadly weapon will be required under the law to use a higher degree of care and circumspection than if using an instrument ordinarily harmless"), Nail v. State, 45 Okla. Crim. Rep. 100, 242 Pac. 270 (1929) ("Culpable negligence is the omission to do something which a reasonable, prudent, and honest man would do, or the doing of something which such a man would not do.")

In the case of State v. Gilliam,[5] the South Carolina court charged the jury as to a homicide resulting from a negligent act as follows: "Negligence and carelessness is the want of ordinary care". The courts in this state still follow this rule even though there are some cases which seem rather questionable.[6]

The courts of the state of Georgia tended to follow the tort standard as is evidenced by the words of the court in the case of Flannigan v. State,[7] in which they stated that a homicide is manslaughter if the defendant failed to observe necessary discretion and caution in the performance of a lawful act. The same court repudiated this decision to a certain extent, if not altogether, in a recent case in which they stated that gross or criminal negligence, within the Criminal Code, is

[5] 66 S. C. 422, 45 S. E. 6 (1903) (The defendant will be guilty of negligent homicide if he fails to use ordinary care); State v. Tucker, 86 S. C. 211, 68 S. E. 523 (1910) (The deceased was killed as a result of the defendant playfully and negligently handling a gun and the court, in its charge to the jury, defined criminal negligence as: "Negligence is the want of due care; it is the failure to observe due care under the circumstances, or I might put it in 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 circumstances"); State v. McCalla, 101 S. C. 303, 85 S. E. 720 (1921) (The court held that a person was subject to a conviction for manslaughter when he was only guilty of ordinary negligence in the handling of a pistol which results in the killing of a bystander); State v. Badgett, 87 S. C. 543, 70 S. E. 301 (1911) (Gross negligence was not necessary to convict the defendant for manslaughter for negligently handling a deadly weapon); State v. Quick, 168 S. C. 76, 167 S. E. 19 (1932) (The court held that the defendant would be guilty of manslaughter if he failed to use the care and caution of an ordinarily careful and prudent man.)

[6] State v. Davis, 128 S. C. 265, 122 S. E. 770 (1924) (The defendant was charged with negligent homicide and the trial court instructed the jury that he would be guilty as charged if the homicide was a result of simple negligence. The case was reversed by the appellate court on the above instruction but the court failed to state that gross negligence was necessary, and there is some question as to what the trial court meant by "simple negligence"); State v. Williams, 131 S. C. 294, 127 S. E. 264 (1925); State v. Cameron, 137 S. C. 371, 135 S. E. 364 (1926) (A charge that it is manslaughter when it is more than a mere accident, is reversible error); State v. Sussewell, 149 S. C. 128, 146 S. E. 697 (1929) (A verdict of manslaughter based on "simple negligence" cannot be upheld.)

[7] 136 Ga. 132, 70 S. E. 1107 (1911) (The homicide is involuntary manslaughter if the defendant fails to observe the necessary discretion and caution in the commission of a lawful act); Nathan v. State, 131 Ga. 48, 61 S. E. 994 (1908) (The court instructed the jury as follows: "If you should conclude from the evidence in this case that the defendant had a pistol in his hand, and, without any intention to kill the deceased or anyone else, was attempting to breach or unbreach the pistol but doing so in a careless or reckless way—that is, without due caution and circumspection—in such a way as might probably produce death, and did result in death to the deceased, he would be guilty of involuntary manslaughter in the commission of a lawful act without due caution and circumspection".)

reckless disregard or a heedless indifference to the rights and safety of others and is more than ordinary negligence.[8]

Generally, the Federal Courts will not reject the gross negligence rule and adopt the tort standard in the absence of legislation.[9] This is also true as regards the courts of the different states, but it is suggested that there is a tendency on the part of the legislatures to depart from the gross negligence rule and adopt the tort standard. This is especially true in those cases relating to the negligent operation of an automobile in violation of a statute.[10]

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[8] Cain v. State, 55 Ga. 376, 190 S. E. 371 (1937) ("Gross or criminal negligence, within the Criminal Code, is reckless disregard of the consequences or a heedless indifference to the rights and safety of others and is more than ordinary negligence, and the word is synonymous with culpable negligence.")

[9] United States v. Warner, 4 McL. 463 (1848) (The defendant was held guilty of manslaughter under the following statute in the absence of gross negligence: "That every captain . . . on vessel . . . by whose misconduct, negligence, or inattention to his or their respective duties, the life or lives of any person on board such vessel may be destroyed, shall be deemed guilty of manslaughter".) Affirmed in United States v. Holmes, 104 Fed. 884 (1900); United States v. Van Schaick, 134 Fed. 592 (1904) (Violation of certain inspector's rules requiring vessels to keep the fire apparatus on such vessels in complete working order and to exercise other duties for the safety of passengers, a failure to do so, resulting in the death of a passenger, would render the negligent person guilty of manslaughter".) Affirmed in Story v. United States, 16 F. (2d) 342 (1926).

[10] State v. Emery, 78 Mo. 77, 47 Am. Rep. 92 (1883). (Defendant was displaying a loaded pistol in his saloon and it was discharged, killing the deceased. The court charged the jury that the defendant would be guilty of manslaughter if he was culpably negligent in handling the gun, and defined "culpable negligence" as the omission to do something which a reasonable, prudent, and honest man would do, or doing something which such a man would not do under all of the circumstances surrounding the particular case); State v. Horner, 266 Mo. 109, 180 S. W. 873 (1915). (The court held that one who operates his automobile in such a manner as to kill another is guilty of manslaughter if he omitted to do something which a reasonable and prudent man would do, or did something which such a man would not do under the circumstances surrounding the particular case); People v. Seiler, 57 Cal. App. 195, 207 Pac. 396 (1922). (Evidence showed that the defendant was driving his automobile in the nighttime, either in the center or on the left hand side of the road at a speed of fifty miles an hour, when he collided with two other cars at a sharp curve and killed one of the occupants of one of the other cars.

The court held that the defendant could be held guilty of manslaughter if his act caused the death of the deceased and the defendant had failed to use due caution and circumspection, and the lack of care and caution need not go to the extent of being wanton and reckless.) Compare State v. Millin, 318 Mo. 553, 300 S. W. 694 (1927) (The court stated that "the definition of culpable negligence as used in our statutes means something more than negligence that would be actionable in a civil suit."), with State v. Horner, 266 Mo. 109, 180 S. W. 873 (1915), cited note 10, supra. (In this case the court held the defendant guilty of manslaughter for "omitting to do something that a reasonable man or a prudent man would do, or doing something that such a man

Our conclusion is that the legislatures have been responsible for the changes that have been made from the gross negligence rule to the tort standard in those jurisdictions applying it in all cases and also in those jurisdictions applying it in certain cases only. It is further suggested that any future changes will depend upon legislation on the particular subject and will not be made by the courts in the absence of such legislation.

RAMON A. WOODALL, II.

THE SIGNIFICANCE OF NEBBIA v. THE PEOPLE—A CLASSIFICATION OF BUSINESSES DEVOTED TO PUBLIC USE.

In ascertaining the significance of *Nebbia* v. *The People*[1] and determining its effect upon the classification of businesses subject to governmental regulation, it is first necessary to review, briefly, the history of the development of the law of public utilities which has led up to this momentous case.

More than two hundred fifty years ago, in his treatise *De Portibus Maris*,[2] Lord Hale laid the foundation of the historical approach to the determination of the question, what is a public utility? The earliest cases on this question held that inns and carriers were subject to governmental regulation, because of the fact that the public were at their mercy.[3] Gradually, starting from these historical public callings as a base, the courts, reasoning by analogy, soon extended their classification to include other related public callings. A notable example of this is a case decided in 1810, where the English court said that the government could regulate the rates charged by a public warehouse, since this business was "clothed with a public interest".[4]

Munn v. *Illinois*[5] in which the Supreme Court held that the business of storing grain was subject to regulation by the state, was the first of a line of decisions in this country adopting the "historical approach" to the problem. The analogy to the historic public calling, carriers, is

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would not do under all of the circumstances surrounding the particular case.") Accord: People v. Anderson, 58 Cal. App. Rep. 267, 208 Pac. 315 (1923); Michael and Wechsler, *A Rationale of the Law of Homicide* (1937) 37 Col. L. Rev. 1261; Risenberg, *Negligent Homicide: A Study in Statutory Interpretation* (1936) 25 Calif. L. Rev. 1; Notes (1936) 25 Ky. L. J. 70, 98, 103, (1930) 70 L. J. 118, (1935) 10 Temp. L. Q. 67, (1937) 22 Iowa L. Rev. 659, (1936) 24 Calif. L. Rev. 555, 569, (1923) 11 Calif. L. Rev. 434.

[1] 291 U. S. 502, 54 Sup. Ct. 505, 78 L. Ed. 940 (1934).

[2] 1 Harg. Law Tracts 78, as cited in 11 Amer. Juris., Sec. 293, p. 1059, where Lord Hale said: "When private property is affected with a public interest, it ceases to be *juris privati* only. . ."

[3] Regulation was necessary in order to prevent the murder or robbery of the guests at the hands of their hosts.

[4] Aldnutt v. Inglis, 12 East. 527 (1810).

[5] 94 U. S. 113, 24 L. Ed. 77 (1876).