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The Standard of Care in Criminal Negligence; Manslaughter

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quently, in view of the varying economic conditions in the divers parts of the United States one must expect a conflict of authorities in the absence of statutory declaration of policy. And even state legislatures may favor different policies.

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THE STANDARD OF CARE IN CRIMINAL NEGLIGENCE; MANSLAUGHTER

It will be the purpose of this paper in general to define the standard of care in criminal negligence cases resulting in manslaughter, and to set up as a suggestion to the courts such a definition as will enable them to discover, without wading through a sea of phrases and generalities, when the defendant is guilty of negligent manslaughter.

The writer will make no attempt to classify manslaughter cases according to the instrumentality used. It is his belief that the main test of criminal negligence is not the instrumentality, but rather the state of mind of the actor. And thus the instrumentality is important only as it furnishes evidence of this state of mind.

A few jurisdictions hold to the torts standard as the one for criminal liability also.[1] This, however, makes one liable criminally every time he would be liable in tort, and ordinary negligence alone would result in sentences of imprisonment or perhaps death. The writer urges that this is too strict a standard for human beings who are normally prone to make many mistakes negligently in their course of life.

Most jurisdictions, as a result, realize that mere ordinary negligence is not enough to sustain criminal liability.[2] As Bishop puts it, "there may be a degree of carelessness so inconsiderable as not to be taken into account as criminal by the law."[3] And one court said: "Criminality can not be affirmed of every lawful act carelessly performed. . . . The carelessness . . . must be gross."[4] Again, in *People* v. *Barnes*,[5] the court said "to render the . . . (defendant) . . . criminally liable, his carelessness . . . must be gross."

So one limiting part to our standard of care has been pointed out. Mere ordinary negligence is not enough. To hold one liable criminally for manslaughter as a result of negligence we must look for more than

[1] Missouri: State v. Emery, 78 Mo. 77 (1883); State v. Armbruster, 228 Mo. 187, 63 S. W. (2d) 144 (1933). South Carolina: State v. Gilliam, 66 S. C. 419, 45 S. E. 6 (1903); State v. McCalla, 101 S. C. 303, 85 S. E. 720 (1915); State v. Quick, 167 S. E. 191 (1932). Texas: Haynes v. State, 88 Tex. Cr. Rep. 39, 47 S. W. (2d) 320 (1932). Wisconsin: Clemens v. State, 176 Wis. 289, 185 N. W. 209 (1921); Njecick v. State, 178 Wis. 94, 189 N. W. 147 (1922).

[2] Clark and Marshall, Crimes (3rd ed., 1927), Sec. 264a.

[3] 1 Bishop, Criminal Law (9th ed., 1923), Sec. 216.

[4] Fitzgerald v. State, 112 Ala. 34, 20 So. 966 (1896).

[5] 182 Mich. 179, 148 N. W. 400 (1914).

mere carelessness. We have found the lower limit of our standard; now let us find the upper one.

It is the opinion of this writer that the case of *Banks* v. *State*,[6] is the leading one he has found showing us this upper limit, above which the offense is properly termed murder. In that case, a negro walking along the railroad tracks fired a gun into a moving freight train without specific intent to injure anyone, but killing a brakeman thereon nevertheless. He was held guilty of murder. The state of this defendant's mind was as close as we can possibly get to intent without actual intent present. The defendant showed an extreme, wanton disregard of the lives and safety of others. His was a wanton use of a deadly weapon, evidencing as some courts have said "a heart devoid of social duty and fatally bent on mischief."

Out of these phrases the writer seizes on the word "wanton" as the upper limit for our standard of care in manslaughter. One whose negligent conduct is wanton, and as a result of such conduct death occurs, should, in the writer's opinion, be liable for murder. As Webster defines it, "wanton" means "wild, unrestrained, malicious, perverse, and dissolute". Such a state of mind evidences the closest possible to actual intent, and as a result naturally should make the actor guilty of murder if we are to make negligence a basis for criminal liability at all.

And now we have set the limits within which we shall find the standard of care in criminal negligence for manslaughter cases. It lies between ordinary negligence, as described in *Fitzgerald* v. *State*, and wanton negligence as evidenced in *Banks* v. *State*.

So let us look into gross negligence in a few manslaughter cases, remembering that "criminal negligence is incapable of precise definition"[7] and that "gross negligence lacks that clearness of definition and exactness of application which should characterize terms used in defining an act intended to be made penal".[8]

One court attempted to define it in these words:

> "Criminal negligence within the meaning of the law is the omission on the part of a person to do some act under given circumstances which an ordinarily careful or prudent man would do under like circumstances, or the doing of some act under given circumstances which an ordinarily careful, prudent man under like circumstances would not do, and by reason of which omission or action another person is endangered in life or bodily safety."[9]

We can see that is the tort standard.

In order to gain any approximation of the true standard, it is necessary to turn to many different cases and look at the language of

[6] 85 Tex. Cr. Rep. 165, 211 S. W. 217 (1919).

[7] State v. Lester, 127 Minn. 282, 149 N. W. 297, 298 (1914).

[8] Wright v. State, 90 Tex. Cr. Rep. 435, 437, 235 S. W. 886, 887 (1921).

[9] State v. Beckham, 306 Mo. 556, 267 S. W. 817 (1925).

the court. In a Kentucky case, gross negligence was held to be an act or omission "showing general malignity and recklessness of the lives and personal safety of others, which proceed from a heart void of just sense of social duty and fatally bent on mischief."[10] And many courts use the phrase "disregard of the lives and safety of others".[11]

Let us see what the courts have done with the word "reckless." An Illinois court said, "Gross negligence is a reckless heedlessness of consequences".[12] Gross negligence is "reckless indifference to life", says a Wyoming judge.[13] "Negligence to become criminal must necessarily be reckless", says a third.[14] And the writer has found innumerable cases in which the courts have used the word "reckless" to describe negligent conduct in manslaughter cases.[15]

Are there any other phrases or descriptive adjectives which the judges have used to describe the state of mind of the criminally negligent? The writer has found many. Judge Holmes called it "foolhardy presumption".[16] And a Georgia court termed it acting "without due caution and circumspection".[17]

But it is the writer's belief that of all these terms, the word "reckless" is the one we should turn to in making our standard. Webster defines the word as follows: "that does not heed of one's duty, character, life, or the like; rash, rashly negligent, heedless; characterized by or manifesting undue carelessness, a disregard for consequences".[18] In our opinion, with the use of this word, and the modifying phrase "under the circumstances", we can bring all criminal negligence manslaughter cases under one head. This would obviate the difficulty of atempting to reconcile different standards of care which courts have held to be required in the use of different instrumentalities.

For example, many states which have no definite standard such as we are forming make mere ordinary negligence sufficient to maintain criminal liability when an automobile is concerned.[19] But the

[10] Brown v. Commonwealth, 162 Ky. 778, 173 S. W. 220 (1915).

[11] See State v. Goetz, 83 Conn. 437, 76 Atl. 1000 (1910); People v. Falkovitch, 280 Ill. 321, 117 N. E. 398 (1918); People v. Barnes, 182 Mich. 179, 148 N. W. 400 (1914); State v. Lester, 127 Minn. 282, 149 N. W. 297 (1914); Schultze v. State, 89 Neb. 34, 130 N. W. 972 (1911).

[12] People v. Adams, 289 Ill. 339, 124 N. E. 575 (1919).

[13] State v. McComb, 33 Wyo. 346, 239 Pac. 526 (1925).

[14] People v. Falkovitch, 280 Ill. 321, 117 N. E. 398 (1918).

[15] State v. Goetz, 83 Conn. 437, 76 Atl. 1000 (1910); Schultze v. State, 89 Neb 34, 130 N. W. 972 (1911); State v. Rountree, 181 N. C. 500, 106 S. E. 669 (1921); Sparks v. Commonwealth, 66 Ky. (3 Bush) 11 (1868); Peoples v. Commonwealth, 87 Ky. 487 (1888); Brown v. Commonwealth, 162 Ky. 778, 173 S. W. 220 (1915).

[16] Commonwealth v. Pierce, 138 Mass. 165, 5 Am. Crim. Rep. 391 (1891).

[17] Leonard v. State, 133 Ga. 435, 66 S. E. 251 (1910).

[18] Webster's New International Dictionary (2d ed. unabridged, 1934).

[19] Connecticut: State v. Goetz, 83 Conn. 437 (1910); Kentucky: Held v. Commonwealth, 183 Ky. 209, 208 S. W. 772 (1919); Nebraska,

writer submits that when an automobile is being driven in an ordinarily negligent manner, the dangerous potentialities to life and limb show that the operator is manifesting a disregard for consequences. And a disregard for consequences fits into our definition of the term "reckless".

With any other dangerous instrumentality we would make the same analogy. Be it poison, a gun, knife, or whatever else dangerous, the very possibility of dire and harmful results would make even ordinary negligence a manifestation that the actor is heedless of his duty to refrain from harming others, or to endanger his or their lives. This, too, fits perfectly into the category of recklessness.

And we have shown, in cases cited above, that many of the courts have used the word "reckless" to define criminal negligence in manslaughter cases. All the other courts in cases cited above and those which the writer has read have used words which are synonymous with Webster's definition.

All of which has led us to the conclusion that the standard of care for criminal negligence in manslaughter cases should be recknessness. And we suggest as a statute to incorporate this idea, covering, we believe, all situations, the following: "One shall be held criminally liable for manslaughter who unintentionally causes the death of another by negligent conduct which evidences that under all the circumstances, the actor was reckless in causing the injury."

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TESTAMENTARY CAPACITY—STANDARD FOR MENTAL CAPACITY

Some qualifications as to mental capacity for making a will have been required by courts from the earliest times. In the first Wills Act of Henry VIII (1540)[1] were used the words "all and every persons" without any restrictions as to mental capacity, but the Statute of 34 and 35 Henry VIII[2] two years later, provided that a will or testament of lands, tenements, or hereditaments by an idiot or any person *de non sane memoria* should not be taken as valid in law. The amendment followed the original act so closely and has since been copied so generally that no courts have been called upon to decide the question but it is quite likely that this exception would have been implied in the language of the original act.[3]

Under the ecclesiastical law neither a lunatic nor an idiot could make a testament.[4] In modern legislation it is generally required that

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Schultze v. State, 89 Neb. 34, 130 N. W. 972 (1911); Texas: Harr v. State, 263 S. W. 1055 (1924). But see also Illinois: People v. Adams, 289 Ill. 339, 124 N. E. 575 (1919); Michigan: People v. Barnes, 182 Mich. 179, 148 N. W. 400 (1914); Wyoming: State v. McComb, 33 Wyo. 346, 239 Pac. 526 (1925).

[1] 32 Henry VIII, c. 1.

[2] 34 & 35 Henry VIII, c. 5, sec. 14.

[3] I Page on Wills, sec. 136.

[4] Swinburn on Testaments, P. II, secs. 3, 4.