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Criminal Negligence--Is It Subjective or Objective in Homicide Cases?

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know and understand the business in which he is engaged—that it is in making a will", is approved. While some courts require testator to remember property or beneficiaries only in a general way,[43] or reasonable manner,[44] others would seem to require testator to remember details as to his property or beneficiaries,[45] or to comprehend perfectly conditions of his property, his relation to objects of his bounty, and scope of his will,[46] that he must be capable of comprehending all the conditions which affect the act in which he is engaged.[47] It is said that testator must have sufficiently active memory to collect in his mind, without prompting, elements of business to be transacted,[48] and hold them in his mind long enough, at least, to perceive their obvious relations to each other[49] and be able to form some rational judgment in relation to them.[50] Nothwithstanding this variation among the courts in emphasizing the different requisites for testamentary capacity and the tendency of some to raise the standard above the general rule, it is to be noted that by far the greater number of courts in recent cases have tended to use the simpler statement of the standard for capacity to make a valid will or testament. It might be repeated here that no exact measure can be set, that it is a matter of degree which is to be determined in the particular case at hand from the circumstances of the case. "In whatever form the standard is stated, greater capacity is not necessary; less is sufficient; and in each case it is a question of fact, or of mixed law and fact, whether the testator possesses the requisite capacity."[51]

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CRIMINAL NEGLIGENCE—IS IT SUBJECTIVE OR OBJECTIVE IN HOMICIDE CASES?

In a recent New York case, the proximate cause of the death of a pedestrian was defective brakes on a truck; the owner of the truck was held guilty of manslaughter though he was not an occupant of the truck at the time of the accident.[1] This is another example of the increasing inclination of the courts to place emphasis upon societal harm rather than upon the evil intent and blameworthy mental attri-

[43] Ellis v. Britt, 181 Ga. 442, 182 S. E. 596 (1936); Niemes v. Niemes, 97 Oh. St. 145, 119 N. E. 503 (1917); In re Nitey's Estate, 175 Okla. 389, 53 P. (2d) 215 (1936).

[44] In re Combs, 118 N. J. Eq. 119, 177 Atl. 849 (1935).

[45] In re Ross' Will, 182 N. C. 477, 109 S. E. 365 (1921).

[46] In re Salomon's Estate, 287 N. Y. S. 814, 159 Misc. 379 (1936).

[47] Ramseyer v. Dennis, 187 Ind. 420, 119 N. E. 716 (1918).

[48] In re Salomon's Estate, 287 N. Y. S. 814, 159 Misc. 379 (1936).

[49] Appeal of Martin, 133 Me. 422, 179 Atl. 655 (1935).

[50] In re Salomon's Estate, 287 N. Y. S. 814, 159 Misc. 379 (1936).

[51] I Page on Wills, Sec. 141.

[1] People v. Rauch and Washington, New York Times, Feb. 10, 1937; see note (1937) 46 Yale Law Journal 1411.

butes of the individual.[2] Such inclination raises the question: Can the subjective or mental phenomena in criminal negligence be disregarded and the objective quality of the conduct alone be construed as the criterion?[3]

"Before the law can punish the act an inquiry must be made into the mental attitude of the doer."[4] The principal case would tend to indicate that the courts are departing from this concept, i. e., that some type of *mens rea* is a necessary element in the imposition of criminal liability, at least in so far as criminal negligence is concerned. But the problem will bear consideration from the standpoint of the fundamental purposes of criminal liability.

Though some authorities cling to the ancient retributive theory of criminal punishment as a substantial factor to be considered,[5] it is more often conceded that the primary purpose of criminal punishment is the realization of some future good.[6] This utilitarian justification is achieved through the application of three component factors: The preventive theory, the reformatory and educative theory, and the deterrent theory.[7] Will a purely objective outlook toward criminal negligence satisfy this utilitarian idea?

A good quality of mind, that is, a normal regard for the safety and welfare of society, will generally prevent an individual from committing dangerous acts.[8] Yet, regardless of that mental excellence, that individual may at *some* time commit acts which will be considered abnormally dangerous.[9] In the principal case, it was undeniably dangerous conduct on the part of the owner to allow another to drive his truck which had defective brakes. But it is conceivable that the owner had a normal regard for the safety of society regardless of that

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[2] Bigelow, *Torts* (8th ed., 1907), p. 19. Bigelow suggests a similar trend in civil law.

[3] Edgerton, *Negligence, Inadvertence and Indifference* (1926) 39 Harvard Law Review 849 (possibilities of the objective theory in connection with civil liability).

[4] "There are two conditions to be fulfilled before penal responsibility can rightly be imposed. One is the doing of some act by the person to be held liable. * * * The other is the *mens rea* or guilty mind with which the act is done." Salmond, *Jurisprudence* (3rd ed., 1910), s. 127.

[5] Holmes, *The Common Law* (1881), p. 41.

[6] Willoughby, *Social Justice* (1900), pp. 322–380; Holmes, *The Common Law* (1881), pp. 42–44; Salmond, *Jurisprudence* (7th ed., 1924), ss. 28–31; Clark, *Clark's Criminal Law* (3rd ed., 1915), p. 4; Glueck, *Principles of a Rational Penal Code* (1928), 41 Harvard Law Review 453, 455.

[7] *Supra* note 6.

[8] Edgerton, *supra* note 3, at 865. "To say that an act is negligent is to say that it would not have been done by the possessor of a normal mind functioning normally." Terry, *Negligence* (1915), 29 Harv. L. R. 40, 41.

[9] "Just as a man can do right though his state of mind is blameworthy so he can do wrong though his state of mind is not blameworthy." Terry, *Negligence* (1915), 29 Harvard Law Review 40, 41.

single dangerous act. It is probable that the owner, having such *normal* regard, would not have been guilty of dangerous conduct *again*.[10] Continuing with our supposition, by applying the objective theory to such circumstances, an individual may be held liable for dangerous conduct though he has a quality of mind which is above reproach, and though there is little or no probability that he will be guilty of dangerous conduct in the future.

This conclusion is inconsistent with the utilitarian justification of criminal punishment. From the standpoint of the preventive theory, which is based solely upon the probability that similar injuries will be instigated by the same offender[11] certainly such punishment could not be justified. And from the standpoint of the reformatory and educative theory, committing one to punishment for the purpose of teaching him that he should not commit such acts[12] would seem ridiculous when it is an admitted fact that, without such training, that individual probably will not be instrumental in committing that or other dangerous acts again. Not only would this inflict injustices upon the individual, in being imprisoned and punished for the purpose of teaching him that which he already knows by virtue of the excellence of his regard for the welfare of society, but also injustice would be inflicted upon the community in being deprived of such individual's services, allegedly for its protection from that individual, but admittedly where protection from that individual is utterly unnecessary.

The remaining factor of the utilitarian justification, i. e., the deterrent theory, when viewed from its subjective effect might also be construed as inconsistent with the imposition of criminal liability under such circumstances. Would-be law breakers are supposedly dissuaded from the commission of such acts when the offender is subjected to punishment;[13] he is persuaded or encouraged to attain a degree of mental excellence by such punishment. But if the potential criminal should realize that regardless of the achievement of that degree of mental excellence he may nevertheless be held liable criminally, it seems apparent that he would not be encouraged to attain a degree of mental excellence. Furthermore, individuals who have striven to acquire or retain that mental attribute might realize the futility of their efforts and relax their vigil. Thus the imposition of criminal

[10] "The mental excellence may prevent him (the offender) from causing harm another time, but it did not prevent him this time, from causing harm by dangerous conduct." Edgerton, *supra* note 3, at 865. Professor Edgerton urges that regardless of the little likelihood of similar injury occurring again at the hands of that offender, he should nevertheless be held civilly liable. "Negligent conduct may be due to a mere error in judgment, where the actor gives due consideration to the possible consequences, and mistakenly makes up his mind that the conduct does not involve any unreasonably great risk. He is not therefore excused if his conduct is in fact unreasonably dangerous." Terry, *supra* note 9, at 44.

[11] Sayre, *Cases on Criminal Law* (1927), p. 12.

[12] *Ibid.*

[13] *Ibid.*

liability under such circumstances might actually discourage the acquisition or retention of a quality of mind tending to prevent the commission of dangerous acts.

In many cases we cannot distinguish between the intentional and the negligent wrongdoing, save by looking into the mind of the offender and observing his subjective attitude towards his act and its consequences.[14] A father allows his infant daughter to die from a disease which in all probability could have been cured by proper medical attention which could have been obtained without great hardship.[15] A woman places a poisonous drug in a place where children would be likely to discover it, and the deceased infant ate it and died of its effects.[16] Whether the consequences were truly intended or were the result of a high degree of negligence cannot be determined without contemplating the mental attitude of the offenders. "Negligence is the opposite of wrongful intention, and since the latter is a subjective fact the former must be such also.[17]

In Banks v. State,[18] it was the quality of mind of the prisoner which was primarily instrumental in securing a conviction of murder rather than manslaughter. The court referred to this conduct as "evincing a heart regardless of social duty and fatally bent on mischief". The prisoner had fired his revolver at a moving freight train, killing a negro brakeman; his previous conduct indicated that he not only realized the danger involved, but displayed an attitude of utter indifference to the consequences of his act. By looking at the quality of the conduct alone, a distinction between murder and manslaughter in such cases would be difficult to define. Whereas an abnormally dangerous quality of conduct produced and accompanied by a blameworthy quality of mind would supply the requisite implied malice prepense of second degree murder, the abnormally dangerous quality of the conduct alone and unaccompanied by a blameworthy quality of mind would be insufficient to raise the presumption of malice and insufficient to support a conviction of murder.[19] Thus, in so far as a distinction between manslaughter and murder is concerned, the subjective elements must be a primary consideration in criminal negligence.

In conclusion and by way of summary, it is suggested that the application of the objective theory alone to the quality of the conduct in criminal negligence is inconsistent with our conception of the purposes of criminal punishment, and would tend to inflict gross injustice upon the individual and upon society by punishing the individual who

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[14] Salmond, *Jurisprudence* (7th ed., 1924), p. 422.

[15] *Ibid.*

[16] *Id.*, at 421.

[17] *Id.*, at 422.

[18] 85 Tex. Crim. Rep. 165, 211 S. W. 217 (1919).

[19] "Manslaughter * * * is principally distinguishable from murder in (that) * * * the malice either express or implied, which is the very essence of murder, is presumed to be wanting in manslaughter." East, *Pleas of the Crown* (Vol. I., 1803), 218.

is no more likely to promote dangerous conduct again than is any ordinarily prudent and mentally alert individual. Without observing the subjective attitude of the offender towards his act and its consequences, a distinction cannot be made between the intentional and the negligent wrongdoing, making it equally as difficult to distinguish between conduct justifying a conviction of murder and that justifying a conviction of manslaughter. It is submitted that regardless of the increasing inclination of the courts to place emphasis upon societal harm rather than upon the subjective attitude of the offender, the subjective attitude must continue to play an important role in the formulation of a defintion of criminal negligence.

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THE CONTROL OF INFERIOR JURISDICTIONS BY THE KENTUCKY COURT OF APPEALS

The superintending control over inferior tribunals possessed by the Kentucky Court of Appeals is of ancient inception, and relates back to and has its origin in the power exercised by the King's Bench in England.[1] It has been said that the exercise of this supervisory power is recognized by the common law, apart from constitutional and statutory provisions. However, in most of the recent cases which have discussed the power *eo nomine*, its existence has been based on a constitutional or statutory grant.

Thus, we find the Kentucky Court of Appeals receiving its power by a constitutional grant which states, "The Court of Appeals shall have power to issue such writs as may be necessary to give it a general control of inferior jurisdictions."[2]

The writs which have been used by the court have been those of mandamus, certiorari, and prohibition. The use of the writ of prohibition greatly predominates.[3] It would seem that the writ of mandamus could not be granted in Kentucky, since the code states that the writ of mandamus shall be granted by courts having original jurisdiction and the Court of Appeals is one of appellate jurisdiction. However, the court has stated in effect, that whenever the necessity for such writ shall arise, the jurisdiction to grant it shall be theirs, as it was before the adoption of the Civil Code.[4]

From time to time controversies have arisen as to whether the Court of Appeals has such supervisory power and jurisdiction over

[1] Arnold v. Shields, 5 Dana. 18, 30 Am. Dec. 669 (Ky. 1837).

[2] Kentucky Constitution, Section 110 (1892).

[3] Rush v. Denhart, 138 Ky. 238, 127 S. W. 785 (1910); Patterson v. Davis, 152 Ky. 530, 153 S. W. 780 (1913); Ohio River Contract Co. v. Gordon, 170 Ky. 412, 186 S. W. 178 (1916); Smith v. Ward, 256 Ky. 213, 75 S. W. (2d) 538 (1934).

[4] Vance v. Field, 89 Ky. 178, 12 S. W. 190 (1889).