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Criminal Law--The Standard of Care in Criminal Negligence--Manslaughter

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because the law is "unreasonable, arbitrary, or capricious";⁶⁴ that the means selected do not have a "real and substantial relation to the object sought to be attained";⁶⁵ that the law passed does not have a "reasonable relation to a proper legislative purpose";⁶⁶ or, that the law-making body is not acting "within its sphere of government".⁶⁷

Great stress is placed upon the economic factors involved, the real theme of the court appearing to be that when the theory of free economic competition has failed in a particular industry of vital importance to the public, by virtue of the importance of that industry to the public it is subject to regulation as a business owing the "public service" previously restricted to public utilities. In any such situation the court holds the power of final decision, and will pass upon the propriety of the intended control. In this field the court is essentially engaged in reading into the economic theory of the day the credo of the time, which by its nature is subject to the vagaries of contemporary theory. For these reasons it seems that the personnel of the court and the social concepts of the day are the prime factors in predicting the trend of future decisions. As the occasion for such regulation infrequently arises, it is to be doubted that the leanings of the court in any particular case, or series of cases, will prove binding upon subsequent opinions.

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CRIMINAL LAW—THE STANDARD OF CARE IN CRIMINAL NEGLIGENCE—MANSLAUGHTER.

The problem with which we are confronted here is to distinguish and develop that criterion which might be recommended to the courts for determining what degree of care is necessary in order for one to be exempt from criminal punishment after having committed a negligent act which has been the direct cause of death to another.

There are two leading theories which tend to define such a standard, and, though other theories may be worth consideration, we shall deal only with these two since this is a practical problem which must be dealt with without indulging in theoretical gestures which have no practical significance today. The first, and that which is generally recognized and used as the standard in the majority of the jurisdictions today, is the theory that criminal negligence can be imputed only to that conduct which denotes an "utter disregard for the lives and safety of others".¹ This may be termed the gross negligence theory. The second theory, and one which has gained a foothold in our judicial system, is the principle that "that degree of care must have been exercised which an ordinary prudent man would have exercised under like circumstances".² This latter is the tort theory of negligence applied

⁶⁴ *Id.*, at 525.

⁶⁵ *Id.*, at 525.

⁶⁶ *Id.*, at 537.

⁶⁷ *Id.*, at 538.

to criminal law, and we shall term it the ordinary negligence theory. Our problem is to determine which of these two theories is better qualified to be the criterion in the determination of a standard of care in criminal negligence.

First, let us consider the inconsistency in punishing a negligent act as a crime. Crime, by definition, signifies that the commission of the act must have been intentional. An act committed through negligence is certainly not intentional in the strict sense of the word. Thus it is difficult to reconcile punishment for such acts to the postulate of guilt established by the definition of Crime. However, the gross negligence theory can be reconciled to this definition since it rests on the assumption that the prisoner *did* know of the results of his acts, but was recklessly or wantonly indifferent to these results.² It can readily be seen how this assumption might be used as a direct substitute for actual intent. If one actually knows the consequences of his acts it can be assumed that if he then commits such acts he actually intended the results which must follow. But if one merely *ought to have known* the results of his acts, and there is no assumption that he actually did know (the basis of the ordinary negligence theory),³ how can actual intent to reach the injurious results be predicated from such act? It is extremely difficult, if not altogether impossible, to make ordinary negligence commensurate with our accepted conception of crime. Criminal negligence is, in essence, a substitute for criminal intent, and, in order for there to be such a substitution, the negligence must be something more than mere failure to exercise ordinary care.

In *Robertson v. State*⁴ the defendant, in sport and without criminal design, aimed a pistol at another, both supposing it to be unloaded, and the defendant pulled the trigger, whereby the pistol was discharged and the other was killed. Held: Not guilty, since an action accompanied not only with no intent to do harm but under a reasonable belief that no harm is possible, is clearly wanting in every essential element of crime. But if this set of facts were applied under the ordinary negligence theory, there seems to be little doubt that there would have been a conviction, since it is true that a man of ordinary prudence would not have aimed such a dangerous instrument at another even in sport. But should a man be subjected to severe punishment for a crime when he merely fails to exercise *all* the prudence that is necessary under the circumstances? It would be decidedly unfair and unjust to answer in the affirmative. The only apparent reason why such a slight degree of negligence should be punished would be to serve to deter such negligence. But, though criminal punishment may perhaps have this effect upon negligence of that degree which might be termed "gross" or which might serve as a direct substitute for actual intent, it

¹ *State v. Melton*, 226 Mo. 962, 33 S. W. (2d) 894 (1930); *State v. Millin*, 318 Mo. 553, 300 S. W. 694 (1927).

² *Bailum v. State*, 17 Ala. 679, 88 So. 200 (1921); *State v. Beckham*, 306 Mo. 566, 267 S. W. 817 (1924).

³ *People v. Campbell*, 237 Mich. 424, 212 N. W. 97 (1927).

⁴ *2 Lea (Tenn.)* 239, 31 Am. Rep. 602 (1879).

must readily be seen that criminal punishment does not often deter ordinary negligence, since ordinary negligence, as the term would imply, may be considered one of the frailties of human nature which is possessed by the ordinary individual to some extent and, consequently, could not possibly be eliminated by purely deterrent means. Thus the only reason supporting criminal punishment for ordinary negligence would seem to be groundless.

Negligence, to become criminal, must necessarily be reckless, or wanton and of such a character as to show an utter disregard for the safety of others, *under circumstances likely to cause injury*.⁵ In predicating criminal liability upon acts caused by ordinary negligence it is not essential that the circumstances were *likely to have caused injury*. It is sufficient in case of ordinary negligence that the circumstances *did* cause injury and that the defendant was the major factor in the promotion of such circumstances. For instance, in *Robertson v. State*⁶ both the prisoner and the deceased were satisfied that the weapon was not loaded, and were assured of that fact by a third person. But it must be admitted that the defendant used less care than a man of ordinary prudence under the circumstances would have used, since such a man, it may be presumed, would not have used such a weapon under those circumstances for purposes of making sport. But can we say that he promoted circumstances which were likely to cause injury? I think not. The weapon was not used under circumstances which were *likely* to cause injury, or even from which an injury should have been foreseen. Then, how could criminal intent be predicated from such a slightly negligent act? It could not! Criminal liability cannot be predicated upon every act carelessly performed merely because such carelessness results in the death of another.

It is the general rule, implied or express, in many jurisdictions that the degree of care required in the handling of instrumentalities is in more or less direct proportion to the degree of danger that will probably be caused.⁷ The use of a dangerous agency requires the care commensurate with the nature and uses of the agency and the conditions and circumstances under which it is operated or utilized. The rule that gross negligence must be shown does not mean that the same negligence must appear in each case, but each case must be determined on its merits. These merits depend to a large extent upon the dangerousness of the instrumentalities used. Though the careless use of a dangerous article or instrument in ignorance, or with a laudable purpose, is not necessarily unlawful,⁸ the degree of care required of the individual with the dangerous instrument is considerably greater than that required for the use of an instrument which is not recognized as dangerous. In *State v. Hardie*,⁹ for example, the defendant, in the

⁵ *People v. Sikes*, 328 Ill. 64, 159 N. E. 293 (1927).

⁶ *Robertson v. State*, 2 Lea (Tenn.) 239, 31 Am. Rep. 602 (1879).

⁷ *Carter v. J. Ray Arnold Lumber Co.*, 83 Fla. 470, 91 So. 893 (1922).

⁸ *Ann v. State*, 11 Humph. (Tenn.) 159 (1850).

⁹ *State v. Hardie*, 47 Iowa 647, 29 Am. Rep. 496 (1878).

spirit of fun or joke, pointed an old revolver containing a bullet, which he had many times previously attempted to discharge and which he therefore considered harmless, at deceased and snapped the trigger whereby it was discharged with resultant death to deceased. The court held the defendant guilty of manslaughter on the ground that when one commits an act which a man of ordinary prudence would not commit he should be held liable for the consequences of his act; in other words, the court used the ordinary negligence theory of criminal negligence. This decision is, in my opinion, correct, though reconciliation with the majority rule would be difficult in its accomplishment. I would base my opinion entirely upon the theory that a reckless and imprudent act, though not grossly negligent in itself, is justly censurable when committed in connection with so dangerous an instrumentality as a revolver which is known to have a bullet in it, regardless of a number of attempts previously made to discharge this bullet. The dangerousness of the instrumentality has been used by the courts in connection with the gross negligence theory to reduce the latter high standard to include just such cases as *State v. Hardie*, in order that justice might be done. I would suggest that the court include in its instructions in the future that the dangerousness of the agency or instrumentality be taken into consideration in determining whether sufficient care was used.

In conclusion and by way of summary, I would recommend that of the two practical theories under consideration, the majority rule is better qualified to be the criterion in the determination of a standard of care in criminal negligence: First, because the punishing of ordinary negligence is naturally inconsistent with our conception of Crime; Secondly, because the deterrent effect is more effective upon gross negligence than it is upon ordinary negligence due to the natural frailties of human nature; and Thirdly, because the theory of ordinary negligence cannot be reconciled to the reasonable theory that negligence, to become criminal, must be the result of circumstances likely to cause injury. But I do not recommend that the majority rule be accepted unqualifiedly. I would suggest that the element of the dangerous agency be taken into consideration by the courts in their instructions, because I am unwilling to leave so important an element as merely one of the "circumstances" of the case. A general instruction for the determination of the standard of care in criminal negligence, limited to manslaughter, might be framed as follows: Gentlemen of the Jury: If you believe that the negligence of the defendant under the circumstances was such as to be wanton and reckless to that degree which would indicate an utter disregard for the lives and safety of others, taking into consideration the apparent dangerousness of the instrumentality used at the time of the occurrence, you will be justified in finding the defendant guilty of manslaughter.

J. WIRT TURNER, JR.