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Criminal Negligence--In the Use of Firearms and Automobiles

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duce more criminals.[25] By sterilizing the mentally deficient we are checking crime at its source. We are not permitting children to be born in an environment entirely unsuited for the development of a normal personality. It is not, however, to be inferred that depriving the mentally deficient persons of parenthood will herald the end of crime, but it will be a huge step toward the prevention of crime, the clearance of our slums, and the betterment of society.

It is submitted that the mentally deficient should be permitted to marry, to remain as functioning members of society, to be free individuals and not prisoners in an institution, but only after they have been sterilized.

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CRIMINAL NEGLIGENCE—IN THE USE OF FIREARMS AND AUTOMOBILES

Any negligence, whether civil or criminal, is based upon the violation of some duty. As a crime is an offense against the state, criminal negligence is imposed for the violation of some duty owed to the state.[1] This duty may be violated in the negligent commission of an act,[2] or in the negligent omission of an act.[3] It is elementary to say that the state is interested in the preservation of the lives of its members and that each individual owes it a duty so to limit and control his conduct as not to cause the death or great bodily harm of another.[4] This duty may arise in various ways. It may be voluntarily assumed.[5]

We have learned from experience that firearms are dangerous to life. One who takes upon himself the responsibility of using firearms assumes voluntarily, a duty not to injure others.[6] While automobiles are not considered dangerous instrumentalities, they are yet the

[25] Healey and Bronner, supra note 21, at 216. "That unless the stream of delinquency is checked at or near its source, its progressive flow represents a cost to society, vast in its negative and positive aspects, in non-contribution to society by the offender as well as the actual outlay for his arrests, trials, attempted reformation, and safe keeping." Sutherland, supra note 9, at 618. "The logical policy in regard to crime is the policy of prevention. Punishment is at best, a method of defense; prevention is a method of offense. It is evidently futile to continue to take the individuals out of the situation in which they become criminals, punish them, and permit the situation to remain in other respects as they were. A case of delinquency is more than a physiological act of an individual; it involves a whole network of social relations, and if we deal with that whole set of social relations we shall be working to prevent crime.

[1] Miller, Criminal Law (1934) 65.

[2] Banks v. State, 85 Tex. Cr. Rep. 165, 211 S. W. 217 (1919).

[3] State v. O'Brien, 32 N. J. Law 169 (1867).

[4] Stephens, Digest Criminal Law (1877) 158.

[5] Miller, *op cit., supra* note 1.

[6] Saye v. State, 50 Tex. Cr. Rep. 569, 99 S. W. 551 (1907).

cause of an increasing number of casualties. The condition created by the use of high powered motor vehicles upon the public highways is most conducive to death if proper care is not used. For this reason one who assumes the task of operating a motor vehicle upon a public road assumes voluntarily a duty to operate it so as not to cause injury to another.[7] It is the relationship existing between society and the individual assuming the use of a firearm or an automobile that is the foundation of this duty. The standard whereby it may be determined when this duty is violated is most conflicting.[8]

In the case of *State* v. *Hardie*[9] the defendant took a loaded pistol that had been discarded for several years and, having reason to believe that it was useless and, intending to frighten deceased as a joke, discharged the instrument causing death. The court ruled that the degree of care required of one handling a dangerous and deadly weapon is not the highest degree of care and prudence, but only such care as a reasonable and prudent man would exercise under the circumstances. The jury returned a verdict of manslaughter.

And in *Nail* v. *State*[10] the defendant drove her car on a straight road at a speed of about forty miles an hour and struck deceased and his car which was parked about eighteen inches over on the pavement on the right side of the road. A statute authorized a conviction for manslaughter if the homicide was due to culpable negligence. The court ruled that culpable negligence was the want of ordinary care ordinarily exercised under the circumstances and a verdict of manslaughter was entered. The court also stated that there was no distinction between negligence and culpable or gross negligence, but only a difference of degree.

While the majority of courts make a distinction between negligence and gross negligence and refuse to apply the ordinary tort standard of care, and require such varying terms as gross negligence, culpable negligence, or reckless disregard,[11] the minority rule as applied in the above cases seems to state the sounder view.

The intent which is always an essential element of crime is implied from the negligence.[12] Criminal negligence at best is only a substitute for the intent,[13] and is therefore purely fictional. As a practical matter an actual intent cannot be required in all cases because of the numerous homicides due to the careless and reckless conduct of persons who did not actually intend to harm anyone. In order to deter future similar conduct and thus protect the interests of the state, we have the invocation of this fictional doctrine. Since it is at best only fictional in the beginning there is no logical reason for saying that it

[7] Lauterbauch v. State, 132 Tenn. 603, 179 S. W. 130 (1915)
[8] Note (1930) 28 Mich. L. Rev. 933.
[9] 47 Iowa 647 (1878).
[10] 33 Okl. Cr. 100, 242 P. 270 (1925).
[11] *Supra* note 8.
[12] Johnson v. State, 94 Ala. 35, 10 So. 667 (1892).
[13] Note (1930) 16 Va. L. Rev. 637.

cannot be inferred from negligent acts as well as from what many courts call "gross negligence". In any event the criminal intent need not be alleged or proved where the death was the result of a known duty.[14]

The state is not so much interested in the punishment of individuals after lives have been taken as it is in the preservation of those lives. Prevention is the basic aim. Theoretically, then, punishment is inflicted for its deterrent effect. Would the result be to deter future similar occurrences if, in the use of a pistol or automobile, a person is held criminally liable for a failure to exercise that care which a reasonable and prudent man would ordinarily exercise under the circumstances? While there is opinion to the contrary,[15] it would seem that if any credence is to be put in the theory at all, such punishment would necessarily have a large deterrent effect. Should persons assuming such a duty to the state be deterred from being grossly negligent by punishment, they should likewise be deterred from acting beyond the bounds of ordinary men under those particular circumstances.

In *Pamplin* v. *State*[16] the defendant policeman leaned out of his moving car and shot at the tire of an automobile in an effort to stop it and make an arrest for exceeding the speed limit. The shot killed a bystander. The court ruled that "culpable negligence is the want of ordinary care ordinarily exercised by persons under similar circumstances, but a person handling 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." There are in fact no degrees of care. There is no higher degree of care. There is no ordinary care as such. It is all ordinary care under the circumstances.[17] If the jury are told that one handling a deadly weapon is required to exercise extraordinary care or a higher degree of care, they may well get the impression that a high and almost impossible degree is required. Because of the nature of the deadly weapon, more vigilance and precaution should be exercised, but this would naturally be expected of an ordinary man under that circumstance. What is ordinary care in one situation may not be ordinary care in another. A rate of speed may be excessive at night but not in the daytime, or it may be excessive on a city street but not on an open country road.[18] Any particular situation therefore requires that only ordinary care be used.[19]

It is submitted that the case of *Nail* v. *State* was right in holding that a line could not be drawn between negligence and criminal negligence, and that the only difference between any form of negligence

[14] State v. Smith, 65 Me. 257 (1876).
[15] *Supra* note 8.
[16] 210 Okl. Cr. 136, 205 P. 521 (1922).
[17] Note (1928) 6 Can. Bar. Rev. 327.
[18] State v. Rountree, 181 N. C. 535, 106 S. E. 669 (1921).
[19] State v. Murphy, 324 Mo. 183, 23 S. W. (2nd) 136 (1929); State v. Horner, 266 Mo. 109, 180 S. W. 873 (1915).

was a matter of degree. So long as the basis of criminal responsibility is predicated upon negligence it is immaterial whether the defendant was engaged in a lawful or an unlawful act,[20] or what the degree of the homicide happened to be,[21] the only question being whether, under that particular situation, the defendant's conduct measured up to that of an ordinary man. It, therefore, seems erroneous to instruct that simply because the defendant was using a dangerous weapon a higher degree of care should be required, or on the other hand that criminal liability cannot be imposed unless there is something in the nature of gross negligence. In determining criminal responsibility based upon violation of any duty owed to the state, the jury should be instructed as to whether, under that particular situation, the defendant exercised such care as an ordinary man would have exercised.

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CRIMINAL NEGLIGENCE—STANDARD OF CARE NECESSARY

The defendant was indicted for manslaughter. The act of culpability as alleged in the information was that defendant feloniously and recklessly, without regard to the lives or safety of others, placed a loaded trap gun in such a position and manner on the inside of his chili stand in Joplin, Missouri, as to cause said gun to be fired or discharged by the movement or opening of a certain window in the building. The court instructed the jury that culpable or 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 and prudent man would do under like circumstances, or the doing of some act, under given circumstances, which an ordinarily careful and 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. The supreme court of the state of Missouri upheld the instructions of the lower court as being correct.[1]

The court in the principal case adopted the standard of care laid down by the majority of the courts in civil cases based on actions of tort. It shall be the purpose of this paper to attempt to show that such a standard of care should be followed by the courts in cases based on criminal negligence. However, the court must keep in mind the fact that in these cases they are dealing with *Crime*, and not mere civil liability. Therefore, they should instruct the jury that the negligence of the accused must be established beyond a reasonable doubt, and not by mere preponderance of the evidence, as is the general rule in cases involving civil liability.

[20] Comm. v. Adams, 114 Mass. 323 (1873).
[21] Gregory v. State, 152 Miss. 133, 118 So. 906 (1928).
[1] State v. Beckham, 306 Mo. 566, 267 S. W. 817 (1924).