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Should the Objective Test Be Applied in Negligent Murder Cases? (Affirmative View)

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SHOULD THE OBJECTIVE TEST BE APPLIED IN NEGLIGENT MURDER CASES? (Affirmative View)*

The function of this note is to determine whether or not the objective test should be applied to the negligent murder. As used in this note the objective test will be taken to mean that the conduct of the actor shall be measured by the conduct of a reasonably prudent man under the same or similar circumstances, and not by the actor's own mental understanding. The negligent murder shall be taken to mean a homicide resulting from the defendant's having conducted himself with a "wanton disregard"[1] for human life and safety, although without any intent to effect the death of any individual.

Before discussing whether the proper test for the negligent murder is objective or subjective, it should be made clear that in either case the negligent murder is not a crime of intent. It is sometimes said that murder is necessarily an intentional crime;[2] but if such were so, this note could have no meaning whatever, for we are here confined to a discussion of the negligent murder, and it must be understood at the outset that a *negligent* act cannot be an *intentional* act.[3]

The introduction of negligence into the law of murder and its subsequent development will not be herein discussed except to say that whatever might have been the early view on the subject, it now appears that the negligent murder is an established part of our criminal common law.[4] It is quite generally accepted that one may conduct himself with such extreme lack of proper regard for the lives and safety of others that he may become guilty of murder even though he has no intent to kill.[5]

One of the most difficult problems in the negligent murder is the question whether or not it is essential that the wrongdoer have present in his mind at the time he commits the act an actual know-

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* A companion note taking the subjective view of this question is printed pp. 252–256.

[1] MORELAND, A RATIONALE OF CRIMINAL NEGLIGENCE (1944) 63.

[2] Palmore v. State, 29 Ark. 248 (1847); Daly v. Stoddard, 66 Ga. 145 (1879).

[3] Louisville & N. R. Co. v. Perkins, 152 Ala. 133, 44 So. 602, 604 (1907); Pittsburgh, C., C. & St. L. Ry. Co v. Ferrell, 39 Ind. App. 515, 78 N. E. 988, 989 (1906); 1 SHEARMAN & REDFIELD, NEGLIGENCE (1941) 2.

[4] MORELAND, *op. cit. supra* note 1 at 53-68; Tincher, *The Negligent Murder* (1939) 28 KY. L. J. 53.

[5] Mayes v. People, 106 Ill. 306, 46 Am. Rep. 698 (1883) (throwing a beer glass at his wife); Brown v. Commonwealth, 13 Ky. Law Rep. 372, 17 S.W. 220 (1891) (shooting on a dance floor); Halloway's Case, Cro. Car. 131, 79 Eng. Rep. 715 (1628) (tying a boy to a horse's tail); CLARK & MARSHALL, LAW OF CRIMES (4th ed. 1940) 291-297; MILLER, CRIMINAL LAW (1934) 268.

ledge or awareness of the danger involved. If it is necessary that the actor have such knowledge or awareness of the danger the test is subjective. Under the subjective theory the jury must in each case look into the defendant's mind and determine whether or not the defendant at the time he committed the crime had, not only knowledge of the circumstances surrounding him that made his act dangerous, but also an actual awareness of the danger itself. They must determine as a fact whether or not he knew his act was dangerous.

If the test is whether or not a reasonably prudent man under the same or similar circumstances would have had knowledge then the test is an objective one. Under the objective theory, whether or not the actor had knowledge of the danger involved in his act would be immaterial. There the jury would be asked whether or not the actor had knowledge of the *circumstances* which made his act dangerous. If they answered that question affirmatively, they would be asked the further question of whether or not a reasonably prudent man with knowledge of such circumstances would have been aware of the danger thus created. If that question should also be answered in the affirmative the defendant would be liable as if he had knowledge of the *danger* and the court would not be concerned with whether or not such knowledge actually existed in fact.

The early writers gave little or no attention to whether or not actual knowledge of the danger was necessary. Probably the first clear statement on the subject, and one which appears on its face to set forth the subjective standard, was made about 1877 and was embodied in section "(b)" of Stephen's analysis of the meaning of malice aforethought.[6] The words used by Stephen lend themselves

[6] "Malice aforethought means any one or more of the following states of mind preceeding or co-existing with the act or omission by which death is caused:

"(a.) An intention to cause the death of, or grievous bodily harm to, any person, whether such person is the person actually killed or not;

"(b.) *Knowledge that the act which causes death will probably cause death of, or grievous bodily harm to, some person, whether such person is the person actually killed or not, although such knowledge is accompanied by indifference whether death or grievous bodily harm is caused or not, or by a wish that it may not be caused.* (italics supplied);

"(c.) An intent to commit any felony whatever;

"(d.) An intent to oppose by force any officer of justice on his way to, in, or returning from the execution of the duty of arresting, keeping in custody, or imprisoning any person whom he is lawfully entitled to arrest, keep in custody, or imprison, or the duty of keeping the peace or dispersing an unlawful assembly, provided the offender has notice that the person killed is such an officer so employed." STEPHEN, A DIGEST OF THE CRIMINAL LAW (1877) Art. 223.

to the theory that there must be actual knowledge on the part of the actor of the danger involved in his act before he can be convicted, but even here there is a possibility that Stephen could have been using these words in the sense of requiring that the actor have knowledge of the surrounding circumstances creating the danger and not necessarily an awareness that the act was dangerous. There is not available a reported case in which Judge Stephen had an opportunity to apply this section of his own analysis but there is indication that he might have given it an objective interpretation had such a case come before him.[7] Holmes appears to have taken this latter view of Stephen's work, for in his book, *The Common Law*, he quotes Stephen's analysis and then by way of explanation says that the test applied is an objective one.[8] Holmes gave no indication that he felt that he was disagreeing with Stephen's view, but in his explanation of that view he ruled out any possibility of its meaning that there had to be present in the mind of the accused an awareness that his act endangered human life. Rather he explained that knowledge of the danger, as used in this sense, meant foresight of the consequences, and then he added, "The test of foresight is not what this very criminal foresaw, but what a man of reasonable prudence would have foreseen."[9] Thus it is seen that it is possible to harmonize the apparently conflicting theories of Stephen and Holmes if Stephen is not interpreted too strictly; however, the generally accepted interpretation is that Stephen took the subjective and Holmes the objective view of the negligent murder.

When the cases decided by the American courts on this subject are examined it becomes necessary to give particular attention to the facts involved in each case rather than to the language used in the opinions. The courts appear to be unanimous in using vague and ambiguous language when it comes to describing the state of mind required for the negligent murder. The language used includes such phrases as "wicked and depraved mind,"[10] "abandoned and malignant heart,"[11] "manifest depravity of mind,"[12] "barbarous and depraved conduct,"[13] and "malicious recklessness, disregarding

[7] In another connection Stephen did say: " . . . it would be reasonable to say that any act known to be dangerous to life, and likely in itself to cause death done for the purpose of committing a felony which caused death should be murder." Reg. v. Serne, 16 Cox, C. C. 311 (1887). (See Section "c," Stephen's analysis, *ibid*). Since Judge Stephen in this case made no mention of any necessity that the defendant have knowledge that his act was dangerous it would appear reasonable to believe that he might have been equally objective even if he had not had the felony involved.

[8] HOLMES, THE COMMON LAW (1881) 51-54.

[9] *Ibid* at 54.

[10] People v. Jernatowski, 238 N. Y. 188, 144 N. E. 497, 498 (1924).

[11] Mayes v. People, 106 Ill. 306, 46 Am. Rep. 698, 701 (1883).

[12] State v. Trott, 190 N. C. 674, 130 S. E. 627, 629 (1925).

[13] People v. Jernatowski, 238 N. Y. 188, 144 N. E. 497, 498 (1924).

any and all consequences."[14] Expressions such as these and other similar ones represent the words actually used by the courts, but it is obvious that they are useless when it comes to attempting to determine the test that has in fact been applied. For that reason it is highly important in making a study of such cases that particular attention should be given to the fact situation presented and to the decision rendered rather than to the language used.

A study of the decisions rendered on the subject reveals that there is a respectable number of cases supporting the objective theory and holding that if a reasonably prudent man, with such knowledge of the circumstances as was available to the defendant, would have been aware of the danger, a conviction may be sustained. A good example of such a case is *Oborn* v. *State*.[15] There the defendant shot and killed the deceased by shooting through the panel of a door. The defendant requested that the jury be instructed to the effect that if he pointed the gun at some object other than the deceased and the bullet was deflected, thereby causing the death, then the defendant would not be guilty of the crime charged. That instruction was refused and a conviction of second degree murder was sustained, the court saying that "if there were evidence that the gun was not pointed at the deceased, but yet was handled so as to be imminently dangerous to him or to some other human being and regardless thereof, though without design to effect the death of any one, the accused was, nevertheless guilty of some homicidal offense."[16] There was no indication in the opinion that the court felt that it was necessary that the defendant have knowledge that his act was "imminently dangerous." They appeared to be contented with a showing that it was dangerous in fact. If the sentence as stated by the court is taken standing alone it merely pertains to a "homicidal offense," which of course does not necessarily mean that it pertains to murder. However, the case before the court was a case of murder and the conviction sustained was a conviction for murder; therefore, it seems reasonable to assume that murder is included.

There are numerous cases in which a conviction for murder has been sustained when a death resulted from the defendant's wanton use of firearms. In *Banks* v. *State*[17] the defendant killed the deceased by shooting into a passing train, but at the trial it was not shown that the defendant had any intent or desire to kill any human being. A conviction for murder was sustained, the court saying that such a reckless use of the deadly weapon was sufficient proof of malice to establish the crime. The court avoided any direct discussion of whether or not the defendant had any actual awareness of the danger and it was not shown that he did. The court appeared

[14] Mayes v. People, 106 Ill. 306, 46 Am. Rep. 698, 702 (1883).
[15] 143 Wis. 249, 126 N.W. 737, 31 L. R. A. (N.S.) 966 (1910).
[16] Oborn v. State, 143 Wis. 249, 126 N. W. 737, 748 (1910).
[17] 85 Tex. Cr. R. 165, 211 S.W. 217, 5 A. L. R. 600 (1919).

to content itself by saying that the necessary recklessness was displayed by the defendant's firing into a train where human beings "necessarily are," thus giving some indication, although not actually stating, that whether or not the defendant in fact knew they were there was immaterial. Where they "necessarily are" is but another way of saying that a man of ordinary intelligence would have known they were there. Even if it were held that this very defendant must have known they were there, that is still far from saying that he was necessarily aware of the danger involved in his act.

Another case involving the reckless use of firearms and one tending to support the objective theory, although avoiding any direct discussion of it, is *Smith* v. *State*.[18] There an altercation arose on a dance floor as to who should be the partner of one of the women present. That woman, together with other women present, gathered in one corner of the room and began "fussing" about the matter. The defendant, allegedly in an effort to stop the altercation, shot into the group and thereby killed the deceased, who was sitting in a chair, apparently asleep at the time. Although it was not shown that the defendant had any desire to kill any person, a conviction of murder was sustained. Only the act itself, not the actor's awareness of the danger, was discussed in the court's opinion. It was held that if the defendant intentionally fired the pistol in the direction where many people were present, and did so recklessly and without regard to human life and thereby killed a person, the offense was murder. There was no indication that the court felt that in such a case it was necessary that the defendant actually have present in his mind an awareness of the danger involved in his act.

A similar case, *Brown* v. *Commonwealth*,[19] arose in Kentucky when the defendant, while at a dance, took a pistol from another by force and shot and killed the deceased. The exact circumstances were in dispute. The jury convicted the defendant of an intentional murder and the defendant appealed on the ground that the verdict was not supported by the evidence. The conviction was sustained, the court saying that even if there were no intent, the defendant's reckless disregard for the lives and safety of others would make him guilty of murder. Again in that case there was no discussion of any necessity of the defendant's having knowledge of the danger of his act.

In *People* v. *Jernatowski*,[20] the defendant shot into a house he knew to be occupied by human beings. It was shown that he knew the human beings were present but it was not shown, and there was no attempt to show, that there was in the defendant's mind an actual awareness that his act was dangerous. When it was shown that he had knowledge of the circumstances constituting the danger the court apparently believed there was no further problem. The

[18] 124 Ga. 213, 52 S. E. 329 (1905).
[19] 13 Ky. Law Rep. 372, 17 S.W. 220 (1891).
[20] 238 N. Y. 188, 144 N. E. 497 (1924).

court merely discussed whether or not actual intent was necessary. A conviction of first degree murder was sustained, the court stating, "We think that this defendant's barbarous and depraved conduct as found by the jury amply justified his conviction." This is one of the very few cases in which the unintentional taking of life has resulted in a conviction of first degree murder.[21]

Mayes v. *People*[22] is another good example of the negligent murder tending to support the objective view. In that case the defendant while angry and drunk and without provocation threw a beer glass at his wife. The glass struck an oil lamp the wife was carrying, breaking the lamp and causing the wife's clothing to take fire and fatally burn her. Knowledge of the danger was not discussed in the opinion of the court, but a murder conviction was sustained, the court stating that it was sufficient that the defendant "acted from general malicious recklessness, disregarding any and all consequences." The recklessness was established by proof of the nature of the act itself, and there was no effort to pry into the state of the defendant's mind other than as revealed by the act performed. Here, as in most of the reckless and wanton shooting cases cited above, there was no affirmative declaration that knowledge of the danger was unnecessary, but here, as in those cases, since the court sustained the conviction without discussing that element and without any showing that knowledge existed, it would seem reasonable to infer a holding that such an awareness of the danger was not required.

In *Commonwealth* v. *Chance*[23] there is *dictum* definitely stating that knowledge of the danger is not necessary to the establishment of the negligent murder. The defendant appealed because of alleged error in jury instructions and although the matter was not directly involved the court said, "Malice, in murder, means knowledge of such circumstances that according to common experience there is a plain and strong likelihood that death will follow the contemplated act . . . " Of a like nature is *People* v. *Camberis*,[24] in which, although the indictment charged only manslaughter, the court stated in its opinion that, "One doing an act of gross carelessness even in the performance of what is lawful, as the driving of an automobile, and *a fortiori*, of what is not lawful, or in negligently omitting a legal duty, whereby death ensues, is indictable for mur-

[21] This conviction was obtained under Section 1044 of the NEW YORK PENAL CODE which states in part as follows:

"The killing of a human being unless it is excusable or justifiable is murder in the first degree, when committed: . . .

"2. By an act imminently dangerous to others, and evincing a depraved mind, regardless of human life, although without premeditated design to effect the death of any individual."

[22] 106 Ill. 306, 46 Am. Rep. 698 (1883).

[23] 174 Mass. 245, 54 N. E. 551 (1899).

[24] 297 Ill. 455, 130 N. E. 712 (1921).

der or manslaughter." So much of that statement as pertains to murder is only dictum but it seems that in the opinion of the court murder is on the same footing as manslaughter in this particular.

The common element in all the cases cited above is that in each of them the courts have abstained from any effort to pry into the minds of the accused persons. The defendant's knowledge of the danger involved in his acts has not been an essential element.

The cases which tend to support the subjective standard and which have been cited as illustrative of that view are usually cases which have been considered by the courts as belonging in section "(a)," not section "(b)," of Stephen's analysis.[25] An example of such a case is *State* v. *Massey*.[26] In that case the defendant while drunk drove an automobile into a moving freight train, thereby killing one of the occupants of the automobile. The defendant was indicted for first degree murder and the case went before the Alabama Court of Appeals on an appeal by the state from an order allowing bail. The court ruled that bail was properly allowed and stated that a jury must find that the defendant "knowingly and consciously" committed the dangerous act before he could be convicted of the crime charged. From the court's discussion of the case, however, it is clear that in their opinion an intent to kill was necessary to a conviction. They were interpreting a "depraved mind" statute whose words do not appear to necessitate such construction,[27] but the court held that it was essential that there be a specific intent, not necessarily to kill a particular individual, but at least to kill a human being without caring who the victim might be. This position is well sustained in the cases cited in the court's opinion;[28] therefore, it readily appears that the holding in the *Massey* case was nothing more than that an intent to kill is essential in first degree murder. It would appear then that the case cannot be properly cited as requiring that the defendant have knowledge of the danger in negligent murder cases.

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[25] STEPHEN. *op. cit. supra* note 6.

[26] 20 Ala. App. 56, 100 So. 625 (1924).

[27] "Every homicide . . . perpetrated by any act greatly dangerous to the lives of others, and evidencing a depraved mind regardless of human life, although without any preconceived purpose to deprive any particular person of life, is murder in the first degree." ALABAMA CODE (1940) T. 14, Sec. 314.

[28] "We think the Legislature, in this clause, (the statute cited in note 27 above) intended to raise to the high degree of murder in the first degree those homicides which are the result of what is called 'universal malice.' By universal malice, we do not mean a malicious purpose to take the life of all persons. It means that depravity of the human heart, which determines to take life upon slight or insufficient provocation, without knowing or caring who may be the victim." Mitchel v. State, 60 Ala. 26 (1877). Johnson v. State, 203 Ala. 30, 81 So. 820 (1919) also cited in the Massey case, did nothing more than hold that an intent to kill a particular person is not necessary in first degree murder.

Another case tending to support the subjective theory is *Hyde* v. *State*.[29] In that case the defendant while drunk drove his automobile into the back of another moving vehicle, killing two occupants of the latter car. A conviction of second degree murder was affirmed, the court holding that the evidence was sufficient to support a finding of "conscious recklessness," thus avoiding a direct holding on whether or not such consciousness was actually essential. The language of the court supports the theory that knowledge of the peril is essential, but it cannot be said to make a direct holding to that effect.

In *Commonwealth* v. *Mayberry*[30] the defendant by his negligent operation of his automobile ran into another automobile and killed one of the occupants therein. The trial judge instructed the jury that the defendant was accused of the highest crime known to the law and could be convicted of first degree murder. The defendant was found guilty of voluntary manslaughter and appealed on the theory that the instruction given was prejudicial. The appellate court held that the instruction given was sufficiently prejudicial to be reversible error. In its opinion the court did indicate that an awareness of the peril was necessary to a conviction for murder, but then in a rather ambiguous attempt at rationalization the court seems to say that absence of awareness of the peril indicates absence of malice and that absence of malice is a result of absence of intent, at least absence of intent to do the act, thus getting back to the question of *intent* rather than *negligence*.

From the cases mentioned above and from others of a similar nature it can be seen that it is difficult to find cases that have specifically held that the test for the negligent murder is a subjective one. The courts leaning in that direction usually evade the issue by discussing *intent* rather than *negligence*. Even among the cases that have been cited as illustrative of the subjective view it is difficult to show that the decisions really turned on that specific point. In fact, the attention given to the question of intent in many of the opinions would lead one to doubt if the courts concerned even recognized the existence of the negligent murder. It must be admitted, however, that the cases representing the objective view have not succeeded in clarifying the situation. They tend to give more attention to a discussion of the fact that intent is not necessary than they do to a definition of just what they are using to replace that intent. It is this failure of the courts to make a clear statement of their position that has caused so much confusion among the commentators.[31] However, as we examine what the courts have done rather than what they have said it is not too difficult to find decisions holding that knowledge of the danger is not an essential element of the crime.

[29] 230 Ala. 243, 160 So. 237 (1935).
[30] 290 Pa. 195, 138 Atl. 686 (1927).
[31] MORELAND, *op. cit. supra* note 1 at 56, and authorities there cited.

When the arguments in support of the subjective view are carefully examined it appears that there is underlying all of them a desire to punish for an evil mind and to require an actual *mens rea* in every case. Such a method of attacking the problem seems to ignore the fact that the function of the law of murder is to protect individuals from being killed. Acts are not made crimes unless it is for the purpose of preventing those acts. In the prevention of the prohibited acts the law can do no better than to set up standards of conduct and require all members of society except those who are actually insane to conform to those standards. The law cannot recognize any favorites but must deal with all men equally. There might be a divine law which will take into account all the particular traits of each individual but our courts of justice have not gone that far.[32]

If it should be required that the defendant have knowledge of the peril, it would necessarily follow that he would be expected to make some use of that knowledge or else there would be no point to his having it. The entry of knowledge into the mind is a mental process. If use is made of the knowledge there must be a mental reaction. The supporters of the subjective view might well be asked what reaction they anticipate. They must anticipate something or else they could not place such an importance on possession of the knowledge. Why should one be required to have a thing if it is neither expected nor anticipated that he is to make any use of it? The only logical reaction that could reasonably be anticipated from the defendant's having knowledge of the danger would appear to be to enable him to form a blameworthy state of mind. If that should be required it would mean that mental blameworthiness is a *sine qua non* of the crime but it is doubted if such is the case.

The criminal law exists for the protection of society and society must, in its own defense, prevent certain types of acts regardless of the state of mind prompting them. The courts cannot be expected to examine the intelligence, education, and training of each individual who comes before them. Dealing with human beings in such an abstract manner might, on first impression, appear rather harsh and seem contrary to the Anglo-Saxon theory of fair play. However, the application of the objective test in negligent murder cases does not require punishment for any conduct which would not be wantonly blameworthy in the ordinary reasonable man of the community and it is believed that the moral sense of the average community would be shocked at any lower standard. The rule then is no

[32] "If, for instance, a man is born hasty and awkward, is always hurting himself or his neighbors, no doubt his congenital defects will be allowed for in the courts of Heaven, but his slips are no less troublesome to his neighbors than if they sprang from guilty neglect. His neighbors accordingly require him, at his peril, to come up to their standard, and the courts which they establish decline to take his personal equation into account." HOLMES, *op. cit. supra* note 8 at 108.

harsher than the broad principle on which it is based, namely, that the individual cannot be allowed to interfere with the general welfare.

Punishment without blameworthiness is by no means uncommon in the law. Probably the most common example of this fact is the accepted rule that ignorance of the law is no excuse for breaking it.[33] To impose upon everyone the obligation of conducting himself as if he had knowledge of the danger involved in his own acts is certainly no harsher than to require him to conduct himself as though he had knowledge of the law, and there appears to be no hesitation in requiring him, whether wise or stupid, to have knowledge of the latter. Society not only prescribes the minimum standard for the individual's conduct but requires him, at his peril, to acquaint himself with that prescription. It would be a poor defense indeed for one who had committed homicide to plead that he did not know there was a law against killing, and it is submitted that his defense is equally poor when he pleads that he had knowledge of all the circumstances surrounding him and yet did not have knowledge of the danger involved in his act.

In conclusion it is believed that the most positive declaration among legal writers that the proper test to apply in negligent murder cases is the subjective test is that of Judge Stephen, and that even his work is capable of being interpreted as meaning nothing more than that the actor must have present knowledge of all the existing circumstances which make his act dangerous. Among the cases and commentators there is substantial and respectable authority to the effect that the actor's conduct is measured, not by what he himself knew, but what a reasonably prudent man under the same or similar circumstances would have known. The bulk of the cases tending to support the subjective theory are written in terms of *intent* rather than in terms of *negligence,* thereby evading the real point in issue. It is the act, not the state of mind, that injures society. The law exists for the welfare of society, and society has never denied its right to prohibit individual acts for the sake of the general welfare. Utilizing the objective test in negligent murder is merely an application of this principle. There are other legal principles, such as the presumption that everyone knows the law, which are just as harsh as the objective test in the negligent murder and under which purity of mind is of no concern. For the above reasons it is submitted that the objective test is, and in principle ought to be, applied in negligent murder cases.

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[33] MCKELVEY, EVIDENCE (5th ed. 1944) 169.