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A Rationale of Criminal Negligence

Roy Mitchell Moreland

University of Kentucky

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A RATIONALE OF CRIMINAL NEGLIGENCE
(Continued from November issue)
ROY MORELAND*

2. METHODS OF DESCRIBING THE NEGLIGENCE REQUIRED FOR CRIMINAL LIABILITY.

The proposed formula for criminal negligence describes the higher degree of negligence required for criminal liability as "conduct creating such an unreasonable risk to life, safety, property, or other interest for the unintentional invasion of which the law prescribes punishment, as to be recklessly disregardful of such interest."

This formula, like all such machinery, is, of necessity, abstractly stated so as to apply to a multitude of cases. As in the case of all abstractions, it is difficult to understand without explanation and illumination. What devices can be used to make it intelligible to judges and juries in individual cases?

a. Describing criminal negligence by comparing it with civil

A favorite method employed in the cases to describe criminal negligence is to compare it with civil negligence. This is one of the devices adopted in the proposed formula. The fundamental question, what is negligence, is answered the same way in each case by saying that it is unreasonably dangerous conduct.153

* A.B., Transylvania College, 1920; LL.B., University of Kentucky College of Law, 1923; J.D., University of Chicago Law School, 1928; S.J.D., Harvard University, 1942. Professor of Law, University of Kentucky College of Law; contributor to various legal periodicals.

153 This principle has been fully accepted in the law of torts. Its acceptance in crimes has been hampered by the supposed requirement of some sort of mens rea. However, many decisions on the criminal side based upon negligence can be explained only on the basis of an objective standard. See the discussion, supra, pp. 34-41, "The Objectivity of Negligence." Recent writers, text and periodical, support the objective theory. For example, see May, op. cit. supra note 136, secs. 24-27. See Note (1940) 28 Ky. L. J. 237. Cf. Note (1939) 27 Ky. L. J. 225.
Despite the fact, however, that negligence in crimes and negligence in torts are the same in kind, they differ in degree.

The risk which such conduct entails must be greater for criminal liability than is required for civil. To illustrate, suppose that negligent conduct were measured on an ordinary yardstick. After the place on the yardstick corresponding to the amount of dangerous conduct required for civil liability is reached, it will be necessary to move an appreciable distance farther along the stick to mark the place where criminal liability begins.

Describing criminal negligence by comparing it with civil negligence is a very helpful device for getting the jury properly oriented and started on the right track. In using it, the judge will begin his instructions by explaining that all negligence is unreasonably dangerous conduct. He will be able to describe the type of such conduct which constitutes civil negligence with reasonable certainty. Thus, the quest for an understanding of criminal negligence starts on firm, familiar ground.

From this familiar beginning, the judge will chart the direction of the course which leads to criminal negligence. He will tell the jury that civil and criminal negligence differ only in degree. He will then present this difference graphically by means of the yardstick illustration, or some similar device.

It is true that these devices do not explain how much criminal negligence differs in degree. They do not locate on the yardstick the place where it begins. Additional aids must be provided for that purpose.

b. Using the phrase, "conduct recklessly disregardful of an interest of others," to indicate the "higher degree" of negligence required

The second device adopted by the English and American cases to describe criminal negligence is the use of vivid ad-

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354 See note 108, supra.
355 See note 109, supra.
356 "A charge under an indictment for culpable negligence should define negligence clearly, and then add that culpable negligence must be something more than that, consisting of aggravated facts and circumstances which, in the opinion of the jury, demand criminal punishment rather than mere civil liability." People v. Angelo, 221 N.Y.S. 47, 49 (1927).
jectives employed to qualify the word "negligence." There are several objections to the adjectives commonly employed. They are not sufficiently exact to be of material aid. Vague appendages like "gross," "criminal," "culpable," "clear," "complete," and "wicked," do not illuminate "negligence" because their own meaning is clouded. Using an ambiguous adjective to describe an uncertain noun adds nothing to its understanding. Two vague words do not add up to make a positive concept.

Another objection to these adjectives is that they are used interchangeably although they are not synonymous. One is as likely to be used as another in a particular decision, sometimes a number of them may be found in the course of a single opinion. This indicates that such adjectives are used loosely, with little attempt at exactness in expression.

The same objections may be offered to the picturesque phrases commonly used to describe the negligence requisite for criminal liability. They too are ambiguous. Likewise, as in the case of the adjectives, they are used interchangeably. Which ones will appear in a particular case depends upon the casual selection of the judge who writes the opinion.

In spite of these objections, it is believed that the use of a descriptive word or phrase which is reasonably clear in meaning would be of substantial value as an aid in the understanding of criminal negligence.

Does our language contain a word or phrase descriptive of the negligence requisite for criminal liability which satisfies this requirement? If not, would it be practicable to select a word, and subsequently a phrase embodying that word, most nearly expressive of the meaning desired, and having made the selection stop the loose use of other words and phrases which manifestly are not satisfactory? If the courts would consistently use this word or phrase, would they not in time build up a concept for it in the criminal law which would tend to stabilize and clarify the law? If such a concept were substantially the one raised by a definition of the word or phrase in the dictionary, would it not appear that the word or phrase had been well chosen?

157 See pp. 28-29, supra.
It was with an affirmative answer to these questions in mind that the portion of the proposed formula embodying the phrase, "conduct recklessly disregardful of an interest of others" was drawn. The key word is recklessness, whether the noun, adverb, or adjective is used. Here is a word which, though not the most precise in connotation, nevertheless is not nearly so ambiguous as those frequently found in the cases, and one which raises a concept that is fairly definite and uniform in the minds of most people. It is believed that the concept of reckless conduct most nearly coincides with the feelings of the ordinary judge or jury as to that negligence which merits punishment as a crime. The term recklessness has another advantage over its rivals in being the one most commonly employed by the courts.

The English cases have accepted this word as the one most nearly describing the type of conduct necessary for criminal liability through negligence. In a recent case, Andrews v. Director of Public Prosecutions, the court in discussing the degree of negligence requisite for manslaughter said, "Probably of all epithets that can be applied 'reckless' most nearly covers the case." Archbold's Criminal Pleading, Evidence, and Practice states "Where death results in consequence of a negligent act, it would seem that to create criminal responsibility the degree of negligence must be so gross as to amount to recklessness." This statement was cited with approbation in the Canadian case, Rex v. Greisman, where the court held that the negligence which merits punishment in the eye of the law may be found "where a general intention to disregard the law is shown or a reckless disregard of the rights of others."

The word is also used in many American cases as an aid in the description of criminal negligence. In Story v. United States, the owner of an automobile was convicted of involuntary manslaughter where he permitted a drunken driver to

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158 (1937) A.C. 576, 583.
159 Archbold's Pleading, Evidence, and Practice (30th ed. 1938) 903.
160 4 D.L.R. 738 (1926).
161 Id. at 743.
162 16 Fed. (2d) 342 (1926).
operate his automobile resulting in the death of another. The
court said. 163

"If the owner of a dangerous instrumentality like an automo-
bile knowingly puts that instrumentality in the immediate control of
a careless and reckless driver, sits by his side, and permits him with-
out protest so recklessly and negligently to operate the car as to
cause the death of another, he is as much responsible as the man
at the wheel."

The court, in the case of Commonwealth v. Gill,164 made a
careful attempt to clarify the kind of negligent conduct which
gives rise to criminal liability. The defendant was charged
with involuntary manslaughter occasioned by negligent driving.
The trial court instructed that the slightest negligence was suf-
ficient to sustain a conviction. The appellate court, in holding
that a higher degree of negligence is required, observed. "It is
impracticable to attempt to define the exact degree of negligence
that must be shown to sustain a conviction, but there should be
present some element of rash or reckless conduct, which approxi-
mates acting in an unlawful manner."165 The court went on to
say "If, one in reckless disregard (italics added) of the
rights of pedestrians leaves a deep trench across his sidewalk
unguarded, and a pedestrian falls into it and is killed, he might
be convicted of involuntary manslaughter, for he was not regard-
ful of his social duty nor free from guilt. Such negligence would
have in it an element of recklessness and might properly be called
culpable negligence."166

163 Id. at 344. "The accused has no occasion to complain of the
charge. It clearly required the jury, in order to convict, to find
beyond a reasonable doubt that the accused, with reckless disregard
for the safety of others, so negligently drove an automobile in a
public street as to cause the death of Mrs. Howe. One who does
such an act is not only liable civilly in damages, but is guilty of
criminal homicide." State v. Goertz, 83 Conn. 437, 76 Atl. 1000,
1002 (1910).

"Criminal negligence is the reckless disregard of conse-
quences, or a heedless indifference to the rights and safety of others,
and a reasonable foresight that injury would probably result." Croker

Stephen uses the phrase, "reckless disregard" in the statement
of a hypothetical case involving manslaughter by negligence.
Stephen, Digest of the Criminal Law (1877) 163, illustration 7.

164 Id. at 108-109. "This implies, as we read it, that carelessness
or negligence resulting in death in order to be indictable as involun-
tary manslaughter, must have present in it an element of reck-
lessness. The word 'reckless,' usually imports something more than
'careless' or 'negligent.' Id. at 108.

165 Id. at 108.
The leading decision in the state of North Carolina on criminal negligence is *State v. Cope*, decided in 1933. In that case the court undertook to consider carefully whether the trial court observed the difference between actionable and culpable negligence in charging the jury. Preliminary to answering this question, the court attempted to "plot again the line, somewhat shadowy, which separates the two." The court was careful to insist that culpable negligence in the law of crimes is something more than actionable negligence in the law of torts. Then followed the court's definition of criminal negligence:

"Culpable negligence is such recklessness or carelessness as imports a thoughtless disregard of consequences or a heedless indifference to the safety and rights of others."

The Kentucky cases utilize the word "reckless" repeatedly to describe the quality of act requisite for criminal negligence. More than thirty-five years ago the Court of Appeals in that state said:

"It may now be regarded as well settled in this state by numerous decisions of this court that when one intentionally does an act in such a reckless and careless manner as to endanger human life, and death ensues, he is guilty of manslaughter, although the death of the person killed may not have been intended."

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167 204 N.C. 28, 167 S.E. 456 (1933).
168 Id. at 458. In *State v Roundtree*, 181 N.C. 535, 106 S.E. 669, 671 (1921) the Supreme Court of North Carolina in attempting to point out the amount of negligence necessary to hold a defendant for manslaughter said:

"The degree of negligence necessary to be shown on an indictment for manslaughter, where an unintentional killing is established, is such recklessness or carelessness as is incompatible with a proper regard for human life. The negligence must be something more than is required on the trial of an issue in a civil action, but it is sufficient to carry the case to the jury in a criminal prosecution where it reasonably appears that death or great bodily harm was likely to occur. A want of due care or a failure to observe the rule of the prudent man, which proximately produces an injury, will render one liable for damages in a civil action, while culpable negligence, under the criminal law, is such recklessness or carelessness, resulting in injury or death, as imports a thoughtless disregard of consequences, or a heedless indifference to the safety and rights of others."

169 "Even if the jury believe from the evidence that the shooting and killing of Ott was accidental, yet, if they believe that said accidental shooting and killing was the result alone of the recklessly careless use of a loaded, deadly pistol by defendant, they should, notwithstanding the accident, find the defendant guilty of manslaughter." This extract is a part of the instructions in Chrystal v. Commonwealth, 72 Ky. 669, 671 (1873). The appellate court held the instructions were correct.
Leading texts have likewise chosen the word on a number of occasions as an aid in the description of negligence. Wharton, in his discussion of misadventure, employs it to distinguish an "accident" from criminally negligent conduct.\(^\text{171}\)

"Homicide by misadventure is the accidental killing of another when the slayer is doing a lawful act unaccompanied by any criminal carelessness or reckless conduct." (Italics are ours).

Berry, in considering the liability of one for a death resulting from the negligent use of an automobile, employs language very similar to that used in the suggested formula:\(^\text{172}\)

"One who with reckless disregard for the safety of others, so negligently drives an automobile in a public street as to cause the death of another, is guilty of criminal homicide."

But what is the meaning of recklessness? Assuming that this word most nearly describes the quality of the act requisite in criminal negligence, what meaning is to be ascribed to it? To be consistent one must say, "Recklessness is that negligence which, if resulting in injury, gives rise to criminal liability, it is the something more than want of reasonable care\(^\text{173}\) required for civil liability." A search for synonyms\(^\text{174}\) is likely to throw the concept back again into the realm of uncertainty. "Recklessness" is the one word chosen from a host of terms to identify an abstract idea.

However, other means must be found to illuminate the word. It will not do to let the jury have the case with no aid other

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\(^{171}\) Wharton, Homicide (3rd ed. 1907) sec. 353.

\(^{172}\) Berry, The Law of Automobiles (5th ed. 1926) 1293.


\(^{174}\) This action is founded upon recklessness, which means more than negligence. It means proceeding without heed of, or concern for, consequences. In order for conduct to be reckless within the meaning of the law, it must be such as to manifest a heedless disregard for or indifference to the rights of others." Neessen v. Armstrong, 213 Iowa 378, 239 N.W 56, 59 (1931)

\(^{175}\) If a synonym is to be chosen perhaps "rashness" is the most desirable. "Another sort of negligence consisted in rashness, where a person was not sufficiently skilled in dealing with dangerous medicines which should be carefully used, of the properties of which he was ignorant, or how to administer a proper dose. A person who with ignorant rashness, and without skill in his profession, used such a dangerous medicine acted with gross negligence." Regina v. Markus, 4 F & F 356, 358-359 (1884). See Commonwealth v. Gill, 120 Pa. Super. 22, 182 Atl. 103 (1935).
than their own understanding of the meaning of recklessness. Ways of supplementing their knowledge of the concept, of limiting the length to which they might be inclined to go in individual cases, must be worked out.

In all negligence cases, civil and criminal, liability is based upon the creation of an unreasonable risk which results in an unintentional injury. A factor in determining whether the risk is unreasonable in a particular case is the utility of the act which engenders the risk. When the danger to the interests of others outweighs the utility of the act the risk becomes unreasonable and civil liability for negligence occurs. When conduct is such that it involves a risk to others which is not merely in excess of its utility but is out of all proportion thereto, it becomes "recklessly disregardful of the interests of others" and criminal liability attaches, if an injury results therefrom.

Frequently, it is fairly easy to determine that the risk, when weighed against the social utility of the act, is so out of proportion thereto, and creates such a high degree of probability of substantial harm without legitimate benefit, as to constitute recklessness. Numerous cases, however, fall within a twilight zone where it is difficult to tell from the factual situation whether there is ordinary negligence or the "substantially higher degree" necessary for the act to merit punishment as a crime.

In such cases both judge and jury gain enlightenment by comparing the facts of the case at issue with somewhat similar circumstances in hypothetical situations.

The leading decision on criminal negligence, Fitzgerald v. State, employs the hypothetical case as a means of illustrating the type of conduct required to sustain a conviction of manslaughter. The testimony for the state tended to show that the deceased, while standing at the bar of a saloon, called attention to a revolver lying on the back bar, whereupon the barkeeper picked it up and shot him through the forehead. Evidence for the defendant, however, tended to show that he and the dead man were the best of friends and that the gun was accidentally discharged in handing it across the counter. The court in instructing the

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175 Restatement, Torts, op. cit. supra note 100, at 739.
176 Id. at sec. 500.
177 Perkins, supra note 108, at 913-915.
178 112 Ala. 34, 20 So. 966 (1896).
jury on negligence told them, in effect, that if they found the defendant guilty of carelessness in any degree in handing the gun across the counter, they would convict him of manslaughter. This was held to be error. The appellate court pointed out that criminal liability is predicated upon "that degree of negligence or carelessness which is denominated 'gross.'"

In order to illustrate the degree of negligence necessary for criminal liability, the court employed some of the circumstances involved in the case adding certain hypothetical conditions. If, said the court, the bartender had thrown the revolver down on the counter in front of the deceased and it was thereby discharged, killing him, it would be at least manslaughter in the second degree. "But if the defendant in passing the weapon to the deceased inadvertently held the muzzle towards him, and it was accidentally discharged with fatal results, the defendant would not be criminally responsible, for though that method of handing the weapon to the deceased involved, or may have involved, carelessness, it was of too slight a degree, too trivial for criminality to be affirmed of it."179

Suppose a case where the defendant set an unlabeled box of dynamite caps down in a school yard, without apparently appreciating the risk, while he went inside to use the telephone. Some children found the box and while playing with it caused the caps to explode killing one of them. Since children of tender years were wont to use the school yard for play, it will not be denied that the defendant was negligent. And since a reasonable man would consider such conduct as creating a high degree of probability of substantial harm, out of all proportion to its utility, it amounted to recklessness and the defendant is guilty of manslaughter.

By a slight variation of the circumstances in the foregoing case the dividing line between recklessness and ordinary negligence can be approached. Suppose the defendant is engaged in digging a well in one corner of the school yard and, familiar with study hours and playground rules, knows (1) that the children have been forbidden to play in that part of the school yard where the work is being done, and (2) that there will not be any play period for forty-five minutes. He sets the box

179 Id. at 967.
down in the restricted area at a time when there are no children around, knowing that he can be back in five minutes. However, in the interim the teacher of the third grade lets her pupils out to play as a reward for some task well done. Some of them violate the rule and play in the restricted part of the yard where they find the box of caps and one of them is killed.

The defendant in the second illustration may easily be found guilty of ordinary negligence. To leave an unlabeled box of dynamite caps in a public place, unless necessity demands it, probably creates an unreasonable risk to anyone who could be expected to come upon them there. Though it was unlikely from the point of view of anyone in the defendant's position that any child would be injured by the caps before he returned, still, the fact that schedules of work and play in public schools are generally known to be quite elastic, coupled with the fact that children are known to frequently violate playground regulations, plus the fact that the injury if any child did come in contact with the box might be very serious would almost certainly brand the defendant's conduct as negligent. However, it could hardly be said that his act involved such a high degree of probability of substantial harm as to create liability for manslaughter.

Although the reasoning in individual adjudications does not furnish much light as to the type of conduct necessary for criminal negligence, the reading of a large number of decisions basing criminal liability for assault and battery or manslaughter upon negligence indicates that there are certain typical situations which are almost certain to involve criminal responsibility if an injury occurs. Such examples of conduct which the courts have held repeatedly to constitute the recklessness requisite for criminal liability are invaluable to the judge and jury for the purpose of comparison with the facts of the case at issue.

Cases involving the use of dangerous agencies furnish numerous illustrations of this. Firearms, poisons, and automobiles hold great potentialities for causing death or serious bodily harm and must therefore be handled very carefully. Pointing a gun playfully at others or discharging it in the public streets or in a crowd or dwelling house, prescribing medi-
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eone known to be poisonous without proper caution, and driving an automobile upon the public streets with faulty brakes or at a dangerous rate of speed are examples. A defendant who becomes involved in such situations is very likely to incur criminal liability.

c. Describing Criminal Negligence as "Conduct Deserving Punishment"

The English decisions have utilized civil negligence in a striking way to describe criminal negligence. Civil negligence leads, of course, to compensation by the negligent party. The English cases, following the thought expressed in the text of Sir James Stephen, emphasize the fact that in order to establish criminal liability the negligence of the accused must be such as to go "beyond a mere matter of compensation between subjects." It must show "such disregard for the life and safety of others as to amount to a crime against the state and conduct deserving punishment." This test, standing alone, seems without merit. Apparently it simply leaves it to the jury as to whether the conduct of the accused in their opinion went so far beyond civil liability as to "deserve punishment." However, the test is not intended to stand alone. It is used to supplement other devices indicating the type of conduct required for conviction.

The jury have already been told about the kind of conduct requisite for civil liability and that a higher degree of negligence is necessary in a criminal case. This higher degree has been described as "conduct recklessly disregardful of the interests of others." Various tests for recklessness and phrases descriptive of "reckless disregard" have been proposed. Comparative situations in the decisions have been cited. This suggestion from the English cases comes to the jury as a final injunction. It is a sort of double check on their decision as to liability.

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183 Reg. v. Chamberlain, 10 Cox C.C. 486 (1867).
184 This is discussed in more detail, infra, pp. 182-185.
185 2 Stephen, op. cit. supra note 123, at 123. Rex v. Bateman, 19 Cr. App. Rep. 8, 11-12 (1925); Andrews v Director of Public Prosecutions (1937) A.C. 576, 582-583. Recent Canadian cases also use this device. See note 123, supra.
The average person has a strong aversion to holding anyone criminally for negligence unless his conduct is *clearly deserving of punishment*. Jurors realize that all men are negligent at times, even themselves, and that they may have an "accident" at any time and appear in court as defendants. Consequently, the phrase "conduct deserving punishment" will be interpreted by them advisedly and perhaps a trifle more conservatively than the popular conception of recklessness.
SECTION 6. THE CHARACTER OF NEGLIGENCE IN MURDER

Any attempt to identify and describe the negligence requisite for murder involves a consideration of two fundamental problems

A. The state of mind required.
B. The degree of risk necessary

A. The State of Mind Required.

Holmes takes it for granted that the state of mind is not material. In his book on The Common Law and in a series of cases in which he wrote the opinions he maintains that it is immaterial whether the accused knew the danger if he was aware of circumstances that would lead a "man of common understanding" to realize that the danger was very great.

There are valid arguments in support of the position of Justice Holmes. It is logical in that it is a continuation in the case of murder of the objective view of negligence which the law takes in manslaughter and in assault and battery. After all, the objective theory requires no more than that dangerous conduct be examined in the light of common experience. If a reasonable man in the community would not fear the consequence of an act he was about to commit, the prospective actor need have no hesi-

"It is enough that such circumstances were actually known as would have led a man of common understanding to infer from them the rest of the group making up the present state of things. For instance, if a workman on a house-top at mid-day knows that the space below him is a street in a great city, he knows facts from which a man of common understanding would infer that there were people passing below. He is therefore bound to draw that inference, or, in other words, is chargeable with knowledge of that fact also, whether he draws the inference or not. If then, he throws down a heavy beam into the street, he does an act which a person of ordinary prudence would foresee is likely to cause death, or grievous bodily harm, and he is dealt with as if he foresaw it, whether he does so in fact or not. If a death is caused by the act, he is guilty of murder." Holmes, op. cit. supra note 121, at 55-56.


188 Wechsler and Michael, supra note 76, at 710.
tancy about going ahead. Of course, he must gauge beforehand what a reasonable man (as determined by a jury) would do and he acts at his peril in making this estimate, but such restraint, while it tempers his conduct, operates in general to the social good. If his conduct is unreasonable considering the circumstances and an injury results, his liability is determined by the nature of the injury and the degree of the danger which he creates.

If his behavior is danger-creating in the highest degree, and if it results in the death of a human being (the greatest injury which is possible) should not the law make uniform the pattern of negligence by imposing the sanctions prescribed for unintentional murder? It is argued that it is not so much that the prisoner is "whipped of justice" as that society is justified in forcing its members at their peril to refrain from extremely dangerous conduct involving human life. Holmes' view of negligence is but one phase of a complete theory of " intent" in general. The theory is so persuasive that a competent writer has called it "the only one which has been put forward that will bring harmony out of the cases."

Stephen maintains, however, that in the case of murder the actor must have knowledge of the danger involved in the act.189

189. Sears, Note (1929) 23 Ill. L. Rev. 159. "It is submitted that the point of view of Mr. Justice Holmes is the only one that has been put forward that will bring harmony out of the cases. It is not argued that all of the decisions may be reconciled with this theory. After several centuries of dealing with the notion of criminal intent, general and specific, it is too much to expect that all of the results can be reconciled with any given formula. Nor is it to be expected that it will not receive many strata in its application to the innumerable complexities of life: It is thought, however, that, if generally adopted, it would prove to be a workable system." Id. at 166. See same writer, May, op. cit. supra note 136, at secs. 24-28.

Accord, Note (1939) 28 Ky. L. J. 53. "It is submitted that a respectable body of authority is contained in the cases here referred to, and that such authority sustains the conclusion that the law views objectively the behavior of the individual. Whenever a person's conduct is such that according to common experience there is a strong and obvious likelihood that death will result, if death is thereby caused, it will be murder. This will be true even though the person responsible intended no harm, expected no harm, and in fact was totally unaware of the probability of harm. Id. at 60. Contra, Note (1940) 28 Ky. L. J. 474.

190. "Malice aforethought means any one or more of the following states of mind:

(b) Knowledge that the act which causes death will probably cause the death of, or grievous bodily harm to, some person, whether
Under Holmes' theory a conviction would be possible if the accused had knowledge of circumstances which would lead a reasonable man to understand the danger.\textsuperscript{191}

The distinction between the two views is not as pronounced as it might appear to be. Where the actor has knowledge of all the circumstances, and the knowledge of such circumstances would cause a reasonable man to understand the great danger involved in doing the contemplated act, it will be a fact in most cases that he will have actual knowledge of the danger also.

If this were true in substantially all cases it would not result in injustice, except in rare instances, to infer that he has knowledge in each instance. Inferences of similar nature are found in the law where the facts cannot be proved directly.\textsuperscript{192}

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\textsuperscript{191} The question arises whether a person who is capable of being conscious of the circumstances will not also be conscious of the danger, even if he does take an attitude of indifference toward it. This is not necessarily true, it is believed.

This conclusion is premised on the fact that the mental capacity of an individual might permit him to be conscious of the presence of particular physical phenomena more readily than it could permit him to make a logical composition of these phenomena and derive therefrom an abstract conclusion.

For example, it seems feasible that a person may become intoxicated to the degree that he can be conscious of the presence before him of a series of numbers, 3-5-7-9, and yet be unable to add up the conclusion that they total 24. Thus, an intoxicated person may be conscious of the circumstances without it necessarily following that he can add them up and reach the conclusion that great danger must result.

\textsuperscript{192} One of the most striking instances of this occurs in the case of the deadly weapon doctrine. In order to secure a conviction of intentional murder an intent must, of course, be shown. Sometimes this may be done subjectively by presenting to the jury statements by the defendant at the time of the killing that the act was being done intentionally.

Often, however, the prosecution is unable to obtain such evidence and is forced to rely upon objective evidence that the killing was intentional. The deadly weapon doctrine has grown up in support of such practical need. Since the use of a deadly weapon in a deadly manner practically always indicates an actual intent to kill or to do grievous bodily harm such intent is inferred from the use of a deadly weapon. The accused may overcome such "inferred malice" by evidence showing a contrary intent but he faces a difficult task. Because of this difficulty, "inferred malice" is a dangerous doctrine and should be limited to situations where the inference is practically certain to be correct. See 9 Wigmore, Evidence (3rd ed. 1940) sec. 2491 and the discussion in Perkins, supra note 2, at 546-552.
However, too high a percentage of error would result from inferring that an actor who has knowledge of the circumstances has knowledge of the danger. Such an inference would be contrary to fact in many cases involving drunkenness and absent-mindedness and, perhaps, in some other instances. It is in these cases that the distinction between the views of Holmes and Stephen becomes of practical importance.

With regard to drunkenness, the law of England is settled that if the accused was so intoxicated as to be unaware that what he was doing was dangerous, the homicide is manslaughter, not murder.\(^{193}\)

Decisions in the United States are largely in accord,\(^{194}\) although there is a tendency to construe the facts so as to escape the application of the rule. Many of the opinions are so ambiguously written that there is a difference of opinion among commentators as to the law.\(^{195}\)

(State v Massey\(^{196}\)) is one of the clearer cases. The defendant, while drunk, drove his automobile, containing four passengers and himself, into the side of a freight train at a railroad crossing: The automobile was traveling forty miles an hour at the time of the collision and the impact was so great that the car was almost completely demolished. One passenger was killed and the others were injured. The defendant was indicted for murder in the first degree under a "depraved mind" statute and confined. The case went up on an appeal by the state from an order allowing bail.

The appellate court affirmed the ruling allowing bail. In

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\(^{195}\) Justin Miller takes the view that actual knowledge of the danger is unnecessary if a reasonable man under the circumstances would have known that the act was dangerous. Miller, op. cit. supra note 108, at 268. However, the cases cited do not support the statement. See also, Tincher, The Negligent Murder (1939) 28 Ky. L. J. 53; Sears, supra note 189, at 161, fn. 9. Contra, May, op. cit. supra note 136, at 278.

\(^{196}\) 20 Ala. App. 56, 100 So. 625 (1924).
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considering the effect of the accused’s intoxication upon his probable guilt, the court said that evidence of his voluntary drunkenness should be considered by the jury in order that they might decide whether he was too drunk to be capable of "knowingly and consciously" committing an act so dangerous as to indicate a "depraved mind regardless of human life."

State v. Trott, an ambiguously written opinion, is sometimes cited as supporting the view of Justice Holmes. The defendant and M, both highly intoxicated, were riding in defendant’s automobile. Trott relinquished the driver’s position to M telling him to "get on the wheel and get away." In breach of three statutes, and with reckless disregard of the public safety, M ran the car on a main street, after dark, at the rate of fifty or sixty miles an hour. He crashed into another machine killing one person and imperiling the lives of six or eight others.

The defendant contended that the fumes of the liquor had so stupefied his brain that he fell asleep and consequently was not directing the operation of the automobile when the accident occurred. He was convicted of second degree (common law) murder and appealed. The appellate court affirmed the judgment.

The lower court had charged that Trott would not be guilty "unless he turned the operation of the car over to M before he became incapable of knowing what he was doing." Since the jury found him guilty, it may be stated as a fact that he knew the danger at that time.

Another case indicating that conscious knowledge of the danger is required to constitute a depraved mind is Hyde v. State, 230 Ala. 243, 160 So. 237, 238 (1935), in which the court said:

"If the defendant intentionally ran the car into the Austin or acted with such conscious recklessness as defined above, then the defendant's acts were unlawful and done without just cause or legal excuse, which may constitute malice within the meaning of murder in the second degree, or at least the jury could reasonably draw such conclusions."

 Accord, Tarver v. State, 90 Tenn. 485, 16 S. W. 1041, 1044 (1891).

See also Commonwealth v. Mayberry, 290 Pa. 195, 138 Atl., 686-688 (1927), where the court stated:

"It is rarely that the facts in a motor vehicle accident will sustain a charge of murder. The element of malice is usually missing. "There must be a consciousness of peril or probable peril to human life imputed to the operator of a car before he can be held for murder."

190 N. C. 674, 130 S. E. 627 (1925).

190 Tincher, supra note 195, at 58; Turner, Note (1940) 28 Ky. L. J. 474, 476-477.
The *Trott Case* is illustrative of the reason for the ambiguity in so many of the cases where the defendant has been drinking. Courts and juries have a tendency, while rendering lip service to the rule that the defendant must have knowledge of the danger in order to be guilty of murder, to join in holding that an intoxicated man has such knowledge so long as he is conscious of what he is doing. The tenor of thought which runs through most of the opinions is found in such expressions as "although intoxicated, he was not irresponsible"\(^{200}\) and "though drunk, defendant was not oblivious to what was going on."\(^{201}\) It seems to be the attitude of the courts generally, that although drunkenness may make a man act with wanton disregard of the lives of others, it does not often deprive him completely of his power to think and act.\(^ {202}\) As a psychological fact, this is probably true.

What conclusion is to be drawn as to the necessity of knowledge of the danger in the case of the negligent murder? It is believed that Stephen's view is the better one. The following reasons are offered in support of this determination

\(^{200}\) State v. Trott, 190 N. C. 674, 130 S. E. 627, 630 (1925).

\(^{201}\) State v. Shepard, 171 Minn. 414, 214 N. W 280, 281 (1927).

\(^{202}\) In State v Weltz, 155 Minn. 143, 193 N. W 42 (1923), the defendant, a single man, aged 37, owned a Cadillac car. On the afternoon of the tragedy he drove around on several errands accompanied by a Mrs. Alma Walker. About dusk he stopped and went into a place to get a glass of "root beer", leaving the woman in the car. When he did not return in thirty minutes, she sent a police officer in to ask him to come out. When he came out he was so intoxicated that she refused to ride in the car with him and he drove off alone at a high rate of speed.

Later he ran through a group of four people who were crossing a street, killing one, a woman. He fled from the scene of the accident pursued by police officers on motorcycles. It was necessary for the police to club him in order to subdue him when he was finally captured. One police officer described him as so drunk that he did not know what he was doing; another described him as crazy drunk; and a third as "looking crazy."

Weltz was convicted of murder in the third degree and appealed. The court in affirming the conviction held that his acts evinced a depraved mind. In discussing the issue of drunkenness the court said:

"Intoxication may temporarily arouse passions and paralyze the will, without depriving its victim of the power to distinguish between right and wrong and to comprehend the nature of his acts. It would seem that the defendant was in that condition mentally when he ran over Mrs. Peabody."\(^{203}\) Id. at 44.
(1) His view is supported by precedent. The common law, modern English decisions and the great weight of authority in the United States are in accord with his position.

(2) Holmes' view is more severe than public opinion approves.

As Holmes himself says in another connection, "The first requirement of a sound body of law is, that it should correspond with the actual feelings and demands of the community, whether right or wrong." It is believed that the public conscience does not approve of carrying the objectivity of negligence to the point of inflicting the penalties for murder upon an actor who negligently kills another without knowledge of the danger in his act even though the amount of risk created is sufficiently great to raise the offense to that grade. Manslaughter is the highest penalty commonly inflicted upon such an individual.

Consider the case of the absent-minded professor. A typical absent-minded professor leaves his classroom after a particularly stimulating lecture. A student has raised an interesting and difficult question. The professor enters his automobile to drive home still engrossed in thought. He should keep his mind upon his driving but he continues to think of the problem.

Such conduct is frequent in the case of this professor. He often does this sort of thing when he is engrossed in a difficult question.

On the day in question he unintentionally kills a pedestrian while driving absent-mindedly and in a manner which a jury would consider as "evidencing a depraved mind" in the case of an attentive individual. He is liable criminally. But is he guilty of murder?

Of course not all absent-minded individuals who commit negligent homicides merit the forbearance which the average court and jury are likely to feel toward the professor who is in most respects a "good citizen," although he does not take cognizance of his infirmity.

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203 Holmes, op. cit. supra note 136, at 41.
204 Therefore he has knowledge of his propensity to be absent-minded.
Assume a situation in which the actor, a successful dental surgeon with a family, has become involved with a woman of low character. This Delilah is going to have a baby by him and threatens exposure unless he will divorce his wife and marry her. Either alternative, of course, means professional and social ruin for the man. Distracted by worry, he absent-mindedly administers a greatly excessive dose of anaesthetic, thereby killing a patient.  

Such a situation raises the question whether the actor’s fault in creating the condition which causes him to be unaware of the danger is a deciding factor. For example, it might be argued that the fact that it was the fault of the accused that he was drunk is a deciding factor in the cases which hold an intoxicated defendant guilty of murder. It is believed that it is not. This is indicated by the fact that most intoxicated defendants who commit negligent killings are convicted of manslaughter, not murder. And when the conviction is for murder, the great majority of cases hold that knowledge of the danger is required, the fact that the accused was voluntarily drunk will not substitute for that requirement.

However, the defendant’s drunkenness or other faults may assist the prosecution in convicting him of murder in another way. In order to convict a defendant of a negligent murder it is necessary to show that he is guilty of brute-like conduct. He must have “a depraved mind and a heart devoid of social duty.” These phrases represent a fairly accurate, though picturesque, statement of the law.

Drunkenness is often one of the “circumstances” contributing to the “depravity” of the accused. Ordinarily the defendant may be an individual who conforms reasonably well to the standards of the community but liquor may make a demon of him.

There are several stages of drunkenness. The conduct of

205 Or, suppose the same facts, except that the actor is a laboring man instead of a successful dentist. Beset by his worries, he absent-mindedly throws a heavy beam off the roof of a high building upon which he is working. The building is on a densely populated thoroughfare in a large city and a passerby is killed. See the discussion in Turner’s Note, supra note 199, at 475-477.

206 “Hence the familiar division into four successive stages—jocose, bellicose, lachrymose, comatose.” Kenny, op. cit. supra note 193, at 72, fn. 2.
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The belligerent drunk is apt to be outrageous. He seeks an opportunity to start a fight. If he is driving an automobile, he takes a savage pleasure in frightening everyone on the highway, including his own passengers. As a matter of fact such an individual has knowledge of the danger but cares nothing for the consequences. He has become depraved. His state of mind, as well as his conduct, is brutal. The test is partly subjective in the negligent murder.

*Mayes v People,* a leading case, presents the type of actor who should be convicted of murder under this analysis. The defendant came home intoxicated and in a belligerent mood but conscious of all that was taking place. He attempted to throw a loaf of bread at his wife and did hurl a tin cup at his child. When his wife attempted to leave the room to go to bed he hurled a large beer glass at her. She was carrying an oil lamp and the glass broke it scattering burning oil over her and causing her death. The trial court instructed that if all the circumstances showed an abandoned and malignant heart, the defendant would be guilty of murder, regardless of an actual intent to hit her with the beer glass. The appellate court held that there was no error in the instructions.

It may be concluded that it is necessary in most jurisdictions that the accused have knowledge of the danger, if he is to be convicted of a negligent murder. Cases involving drunkenness have satisfied the requirement by holding that the actor has such knowledge if he is conscious of what he is doing. Convictions of murder in such cases are not common, however, since the circumstances are usually not strong enough to indicate a "depraved mind and a heart devoid of social duty."

Cases involving absent-mindedness present a more difficult problem. If the absent-minded individual is so preoccupied as not to have present knowledge of the danger, it is believed that he cannot be guilty of murder.

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207 Assuming that he is still conscious of what he is doing.
208 106 Ill. 306 (1883).
209 See also State v. Weltz, 155 Minn. 143, 193 N. W. 42 (1923) and State v. Shepard, 171 Minn. 414, 214 N. W. 280 (1927).
210 106 Ill. 306, 310 (1883).
B. THE DEGREE OF RISK NECESSARY.

In all negligence cases, civil and criminal, liability is based primarily upon the unreasonableness of the risk involved in the act causing the injury. The magnitude of the risk required to create civil liability is based upon this factor, considering the utility of the act and the other "circumstances" of the particular case. To raise the risk involved to the magnitude required for assault and battery or manslaughter the situation must be such that a substantially greater amount of risk is involved than is necessary to create civil liability.211

The same ascending scale continues in the case of murder. A relatively higher degree of risk is required than is sufficient to sustain a conviction of manslaughter. In addition, in the case of murder, a subjective element is introduced by the requirement that the actor have knowledge of the danger.

This ascending scale may be illustrated by the following diagram showing the various divisions of the "carelessness-danger" line. The additional, subjective factor required in murder is also indicated in C, under (2), which appears below the line.

CARELESSNESS—DANGER LINE.

A. Ordinary or Civil Negligence
B. Negligence Required for Assault and Battery and Manslaughter
C. Negligence Required for Murder

Conduct creating danger which is unreasonable under the circumstances. Objective standard.
Conduct creating a substantially "higher degree" of danger. Objective standard.
(1) Conduct creating an extremely high degree of danger. Objective standard.
(2) Knowledge of the danger in the act. Subjective standard.

The degree of danger increases in this direction from X towards Y.

Various words and phrases have been used by legislatures, commentators, and judges to describe the extremely high degree of danger required in the case of the negligent murder. The phrase which appears most often in modern statutes and decisions describes the conduct required as "imminently dangerous to others."212 According to Stephen, the actor must have knowl-

211 Discussed supra, at pp. 127-139.
212 Wechsler and Michael, supra note 76, at 705, fn. 18.
edge that his act "will probably cause death or grievous bodily harm." It is the opinion of Michael and Wechsler that it is commonly thought that the accused must be guilty of conduct constituting "extremely gross recklessness."

Such phrases, like the ones used to describe the negligence required for assault and battery and for manslaughter, are helpful but not satisfying. All are ambiguous. While there is not the infinite variety of them that is found in the lower grade of criminal negligence, they are sufficient in number to cause confusion and uncertainty.

1. Describing the Negligence Required for Murder by Using the Phrase, "Conduct Wantonly Disregardful of the Lives and Safety of Others."

In the case of the lesser offenses grounded on criminal negligence, it has been suggested that the discontinuance of such ambiguous words and phrases and the selection of a descriptive word or phrase, reasonably clear in meaning and most nearly embodying the concept desired, would make for clarity and stability in the law.

It is with like considerations in mind that the phrase, "conduct wantonly disregardful of the lives and safety of others" is now proposed as descriptive of the type of behavior required in the case of the negligent murder. The key word is wantonness, whether the noun, adverb, or adjective is used.

The word, while not the most precise, is not nearly as ambiguous as others used to describe the conduct required and it raises a concept which is reasonably definite in most minds. It is believed, also, that the ordinary concept of wanton conduct is the one which most nearly coincides with the opinion of the average judge and jury as to the kind of behavior which is required to secure a conviction of murder.

There is a further advantage in selecting the word "wanton" in that it is already in use by the courts as one of the means used to describe the conduct requisite for the negligent murder. However, as in the case of other words and phrases

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213 3 Stephen, op. cit. supra note 3, at 22.
214 Wechsler and Michael, supra note 76, at 709.
215 See the discussion, supra, pp. 128-130.
employed to describe criminally dangerous conduct, it has not been used precisely by the courts.\textsuperscript{217}

What is the meaning of wantonness? Assuming that the word is selected as the one best describing the quality of mind and act necessary to secure a conviction of murder for the unintentional killing of a human being through negligence, what meaning is to be ascribed to it? Here again, as in the case of "recklessness,"\textsuperscript{218} too great a search for similar words, all of which are more or less dissimilar, is likely to lead to ambiguity instead of understanding.

One of the most satisfactory definitions of wantonness is found in the dictionary, where it is defined as "arrogant recklessness."\textsuperscript{219} Phrased in terms of recklessness, the word which has been selected as descriptive of the behavior required for the lower grade of criminal negligence,\textsuperscript{220} the addition of the adjective is indicative of the "still higher" degree of danger and the "depraved mind" required in the case of murder.

But neither the word "wanton" nor any formula\textsuperscript{221} employing it is sufficient to describe fully the negligence required for murder. Such descriptive words and formulae are but machinery used to reduce difficult legal problems so that they may be more easily grasped.\textsuperscript{222} Additional devices for interpreting them to courts and juries must be worked out.

\textsuperscript{217}The fact that the word is used loosely by the courts is indicated by the fact that it is usually linked with words which are not synonyms. Wanton and reckless are often coupled. Jones v. Com., 213 Ky. 356, 281 S. W 164, 167 (1926). The same court has used reckless, wanton, and gross as synonyms. Pelfrey v. Com., 247 Ky. 484, 57 S. W (2d) 474, 476 (1933). Reckless, mischievous, and wanton are used in State v. Shepard, 171 Minn. 414, 214 N. W 280, 282 (1927). Wantonly and wickedly are found in Com. v. Mayberry, 290 Pa. 195, 138 Atl. 686, 688 (1927). The courts often use the word "wanton" to describe the conduct required in the case of the negligent manslaughter. Barkley v. State, 165 Tenn. 309, 54 S. W (2d) 944 (1932), Curlette v. State, 25 Ala. App. 173, 142 So. 775 (1932).

\textsuperscript{218}See the discussion, supra, page 133.\textsuperscript{Webster's New Int. Dict. (2nd. ed. 1938) 2871.}

\textsuperscript{220}See the discussion, supra, at page 130.

\textsuperscript{221}The negligence required in murder is conduct creating such an unreasonable risk of harm to the lives and safety of others as to be wantonly disregardful of such interests. The actor must have knowledge of the danger. The standard of conduct to be applied is that of a reasonable man under like circumstances.

\textsuperscript{222}Green, supra note 97, at 1030-1031.
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2. Describing the negligence required for murder by comparing it with intentional misconduct.

In an attempt to secure a more definite conception of the meaning of wantonness as used in the negligent murder cases, it is of advantage to distinguish it from intentional wrongdoing. This distinction is indicated in the following negligence-intention outline which recognizes five distinct types of conduct:

(a) Conduct involving the "ordinary negligence" requisite for civil liability.

(b) Conduct constituting the "higher degree of negligence" called recklessness required for assault and battery and manslaughter.232

(c) Conduct embracing the "still higher degree of negligence" called wantonness and indicating the "abandoned and malignant heart" required for murder.

(d) Conduct involving consequences "substantially certain" to follow from the act. Such consequences are "intended" regardless of desire that they occur;234

(e) Conduct involving consequences desired by the actor.

This outline gives a "working distinction" between negligence and intent. The different classes of negligence are found in divisions (a), (b), and (c), the kinds of "intent" in divisions (d) and (e). Thus, in border-line cases the difference between wanton misconduct and intentional wrongdoing is the difference between the doing of an act which is "substantially certain" to result in injury (intentional) and the doing of one which is "extremely dangerous," evincing a depraved mind (wantonly negligent). When the degree of known danger reaches the point where injury is substantially certain to occur the act is no longer wantonly negligent, it becomes intentional, as a matter of law.

3. Acts which the courts have held to be wanton.

Another helpful device for interpreting the meaning of wantonness is the tabulation of the kinds of acts which the courts have considered to be extremely dangerous and to evince a depraved mind. The following is a list of typical situations where the act is likely to be wantonly negligent.

232 "In Pennsylvania, a greater degree of recklessness is required for battery than for manslaughter. Com. v. Bergen, 134 Pa. Super. 62, 4 Atl. (2d) 164 (1939). Ordinarily there is no difference between these two crimes in this respect." Hall, Assault and Battery by the Reckless Motorist (1940) 31 J. Crim. L. 133, 134.

(a) **Shooting into a train.**

To fire into a train, passenger or freight, is an act of wanton negligence. The leading case is *Banks v. State*, where the defendant, a negro, while walking along a dirt road near a railroad track with a party of colored companions, fired into a moving freight train and killed a negro brakeman. It does not appear that either the defendant or any member of his party was acquainted with any of the persons on the train. His confession, introduced in evidence, indicates his mental state. He deposed:

"Davis said, 'Less shoot into that train,' and I said, 'No, Less don't do that.'"

His own statement indicates that he fully appreciated the extreme danger of such an act. It was wholly wanton, "arrogantly reckless." As the court said, "That man who can coolly shoot into a moving train, or automobile, or other vehicle in which are persons guiltless of any wrongdoing toward him or provocation for such attack, is, if possible, worse than the man who endures insult and broods over a wrong, real or fancied, and then waylays and kills his personal enemy" He was held guilty of murder.

(b) **Firing into a crowd.**

It is well settled that where a person shoots into a crowd of people in disregard of consequences and a death results therefrom, he is guilty of murder.

(c) **Firing into a dwelling house.**

If a person intentionally discharges a firearm into a dwelling in which he has reason to believe persons are living, thereby killing someone, he is guilty of murder.

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226 Id. at 218.
227 The confession of Davis, one of Bank's companions, is still more indicative of the wantonness of the act. See Davis v. State, 85 Tex. Crim. Rep. 163, 211 S. W. 589, 590 (1919).
(d) Other instances of wantonness.

There are a number of other instances where the act is likely to be wanton. It is extremely dangerous to fire into an automobile which is occupied. There are a number of cases where peace officers have done so when drivers refused to halt at their commands.230

Watchmen for railroads and private concerns having coal, flour, lumber, or other commodities on cars or stored in yards or buildings are notoriously wanton in their use of firearms against trespassers. It is true that the problem is a difficult one but life is more valuable than property, and generally, relief can be obtained by other means than by the wanton shooting of the trespasser.

There are numerous isolated instances where the act is arrogantly reckless because of its potential danger. In such cases one can usually read the facts, visualize the situation and immediately perceive the wantonness of the conduct. Studstill v. State231 is illustrative of this type of situation, although there are many variations. In that case the defendant, his brother, and another boy were together when the deceased, a neighbor boy about fifteen years of age, appeared some two hundred yards away. The defendant's brother had an old gun which he gave to the third person, both brothers stating that the gun would not hit a beef at fifteen steps. The gun was fired, causing the boy's death. The court, on appeal from a judgment of murder in the second degree, held that the act to which the defendant was an accomplice was one naturally tending to destroy life and affirmed the judgment.

By way of summary, it may be concluded that liability in the case of the negligent murder, as in all negligence, rests primarily upon the unreasonableness of the risk taken considering the social utility of the act. The negligent murder differs from other negligence, however, in that actual knowledge of the danger is necessary,—a subjective requirement.

The kind of negligent conduct requisite for murder is best described as "wanton." Wanton conduct is behavior involving known danger of such extremely high degree as to indicate that the actor is arrogantly reckless towards the lives and safety of others—that he has a "depraved mind." Such behavior is to be distinguished from intentional misconduct, but when the degree of known danger reaches the point where injury is substantially certain to occur the act becomes intentional as a matter of law.

Acts which have been held sufficiently wanton to merit a conviction of murder include shooting into a tram, into a crowd, into a dwelling house, or into an automobile containing passengers. In such cases the risk is very great. From the standpoint of societal harm, some of them contain as much danger as though the misconduct were intentional. In addition, the mental attitude of the defendant is reprehensible. There is little difference between a positive design to kill and the commission of an act so wanton as to indicate that the actor does not care whether or not he kills. Society is justified in holding such an individual guilty of murder, if a killing occurs as a result of such reprehensible misconduct.
SECTION 7 THE IMPORTANCE OF THE "CIRCUMSTANCES OF THE CASE" IN THE DETERMINATION OF CRIMINAL NEGLIGENCE

Formulas for negligence, civil and criminal, provide, "The standard of conduct to be applied is that of a reasonable man under like circumstances." Thus, while an objective standard is adopted in the selection of the "reasonable man" as the norm in the determination of whether a defendant is negligent, it is made concrete and capable of being applied to the particular facts of the specific case by placing this fictitious person under the same circumstances as the actor. Consequently, the "circumstances of the case" have a direct bearing upon the determination of negligence.

There are numerous variations in the "circumstances" in negligence cases. Defendants are blind, crippled, stupid, or nervous. They are infants, afflicted with insanity, or possessed of expert knowledge. The weather is cloudy, clear, hot, cold, or rainy. Injuries result from the use of such divergent instrumentalities as swords, poison, dynamite, firearms, or automobiles. These varied factors may be classified as subjective circumstances (characteristics of the actor) and objective circumstances (characteristics of the environment).

A. Subjective Circumstances (Characteristics of the Actor)

Ordinarily, the law does not excuse or make special provisions for the actor who does not come up to the standard of the "reasonable man" in his personal characteristics, mental and physical. Conversely, it does not force him to measure up to a higher standard if his capacities are greater than those of the norm. The standard of conduct is an objective one and the law takes no account of the variations of the individual from the standard.

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\[2\] See supra pp. 32-34; page 32, fn. 129; page 150, fn. 221.

\[3\] As Professor Edgerton points out, the adoption of an objective standard in the selection of the "reasonable man" as the norm in the determination of negligent conduct must not be confused with the adoption of an objective standard in the determination that negligence is conduct, not a state of mind. Edgerton, supra note 134, at 849-850. The second question has been discussed, supra, at pp. 34-41.

\[4\] Wechsler and Michael, supra note 76, at 746.
The most satisfactory explanation of this is that it is one of the prices men pay for living together in a compact society. Individual idiosyncrasies and peculiarities must be accommodated to the common mold. A sacrifice of individual characteristics which go beyond a certain point is necessary in a well-ordered community. "If, for instance," as Justice Holmes points out, "a man is born hasty and awkward, is always having accidents and 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."\textsuperscript{1235}

There are, however, certain classes of "extreme abnormals"\textsuperscript{1236} to whom it would be manifestly unfair to apply the usual objective test. This has resulted in several exceptions to the rule that every actor is forced at his peril to conform to the standard of the ordinary prudent man under the circumstances. In two instances such exceptions are occasioned by the fact that individuals in the class fall so far below the norm that a separate standard is employed. In one instance the exception is caused by the fact that the capacity of persons in the class is so much greater than the "average" that a separate standard is justifiable. Infants and, perhaps, insane persons fall into the first classification, experts into the second.

1. \textit{Infants}

The law does not hold infants to the same standard of care that it demands of adults. Lemency toward children, occasioned by their physical and mental immaturity and lack of experience, is common in both the civil and criminal law.

There are very few cases where children are made defendants in civil actions for negligence.\textsuperscript{287} Although it is well estab-

\begin{footnotes}
\item[\textsuperscript{1235}] Holmes, op. cit. supra note 131, at 108.
\item[\textsuperscript{1236}] Green, supra note 97, at 1039.
\item[\textsuperscript{287}] Briese v. Maechtle, 146 Wis. 89, 130 N. W. 893 (1911), is a leading case dealing with an infant's civil liability for harm negligently done by him. The plaintiff, a boy about ten years old, and the defendant, a boy of the same age, attended the same school, and were friends. The plaintiff was playing the time-honored game of marbles in the school yard at recess. Just as he was kneeling to
\end{footnotes}
lished that a minor is responsible for compensatory damages resulting from his torts, those who have claims against children realize that a judgment against a child is generally valueless. Most of the discussions as to the standard of care required of children are to be found in cases where the plea of contributory negligence was interposed where children or their parents or representatives were seeking recovery for injuries alleged to be caused by the negligence of an adult. Consequently, if a rule is to be deduced from a reasonable number of decisions, it is necessary to state the standard of conduct required of infants as it is indicated by the analogy of contributory negligence in these cases.

For the purpose of determining liability in torts, children are placed in categories, depending upon their age, intelligence, and experience. The particular child is held, objectively, shoot, the defendant came running around the schoolhouse, being chased by another boy and inadvertently ran into the plaintiff, knocking him over and injuring his eyes so badly that the sight was destroyed. The appellate court held that the defendant was only required to exercise the care which the "great mass of children of the same age ordinarily exercise under the same circumstances, taking into account the experience, capacity, and understanding of the child." See Charbonnau v. MacRury et al., 84 N. H. 501 (1931); Bullock v. Babcock, 3 Wend. (N. Y.) 391 (1829), Note (1931) 79 U. of Pa. L. Rev. 1153.

There may be some doubt as to whether it is correct to regard contributory negligence and negligence as sufficiently analogous to make one a safe basis for statements in regard to the other. It may be that children should not be required to conform to a particular standard in order to relieve an admittedly negligent defendant from liability to them. It does not necessarily follow that a child should not be required to conform to a higher standard of behaviour where it is necessary for the protection of innocent members of the public. On the whole, however, the contributory negligence cases do not seem to show an undue regard for the inevitable inferiorities of children and therefore it is probably safe to accept the standard to which a child must conform to avoid liability for harm caused to innocent outsiders as substantially the same as that to which he must conform to be free from contributory negligence." Restatement, Torts (Tent. Draft No. 4, 1929), sec. 167, special note.

“If the child is of sufficient age, intelligence, and experience to realize the harmful potentialities of a given situation, he is required to exercise such prudence in caring for himself and such consideration for the safety of others as is common to children of like age, intelligence and experience. The fact that a child is habitually reckless of the safety of himself and others to a degree unusual in similar children, does not excuse him.” Restatement, Torts, op. cit. supra note 100, at sec. 283, comment e.

Although the standard for children has been stated with certainty as to the factors to be considered in determining whether a
to the standard demanded of one of his class. The usual statement is that a child is to be judged by the conduct reasonably to be expected from one of his age, intelligence, and experience, considering the circumstances.241

It is impossible to fix a definite age at which children are capable of being negligent.242 This is largely because children of particular child is or is not negligent, there is considerable confusion in the cases on the question. The courts, rather loosely, use quite a number of factors, such as ability, age, capacity, discretion, experience, intelligence, judgment, knowledge, maturity, sex, and understanding. See the cases collected in annotation, L.R.A. 1917 F 10, 13-41; Shulman, The Standard of Care Required of Children (1928) 37 Yale L. J. 618, 620-621. The combination selected is, it is submitted, not only the most frequent one, it is also the most logical.

"The mental capacity, the knowledge and experience of the particular child, are to be taken into consideration in each case. These qualities are individualized—subjective—but only for the purpose of determining whether or not the child was capable of perceiving the risk of injury to himself and of avoiding the danger. Beyond that, there is an objective standard. In determining whether or not his conduct was proper in view of his intelligence, knowledge and experience, his conduct is to be compared with that of the careful and prudent child of similar qualities. Just as in the case of adults, one of the qualities of the standard 'reasonable man' is consistent carefulness or prudence, so in the case of infants, the element of prudence is standardized." Shulman, op. cit. supra note 239, at 625. But see Green, op. cit. supra note 97, at 1039, n. 25.240


"Of course, a child may be so young as to be clearly incapable of the requisite intelligence and experience necessary to enable him to perceive the dangers inherent in a particular situation. But what age marks the dividing line between capacity and incapacity? Assume that a child of three is too young to have the requisite capacity. What about a child four years old? Or five? Since it is impossible to name a dividing line which might apply reasonably well to all children it is better not to attempt to name an arbitrary age below which a child is incapable of negligence.

However, this has been done in numerous cases. The general rule is well settled that a child under three years of age is conclusively presumed not to have the requisite capacity. As regards children between three and five, the weight of authority remains the same, but a number of courts have taken the position that the question of capacity is for the jury. The number of cases adopting that position increases as the child grows older. There are a number of states that draw an analogy to crimes to aid them in setting an arbitrary age limit of seven years. Wilderman, Presumptions Existing in Favor of the Infant in Re: The Question of an Infant's Ability to be Guilty of Contributory Negligence (1935) 10 Ind. L. Rev., 427; Annotation, L.R.A. 1917 F 10, 54-73; (1928) 26
the same age vary greatly in the other two decisive factors, intelligence and experience. A child of six may have more intelligence and perception than one of eight, one of seven more experience with the dangers of a particular situation than one of twelve. Indeed, a particular child of nine may have the intelligence or experience or both to appreciate the dangers of one situation but not of another. In the first situation he would be liable for the resulting injury, in the second he would not be liable.\textsuperscript{243}

However, age is the decisive factor in the determination of liability in criminal cases, where the defendant, a minor, is accused of negligence. Here, as elsewhere in the criminal law, the capacity of infants for the commission of crime is determined according to three well-recognized age groups.

At common law there is a conclusive presumption that a child under seven years does not have the capacity to commit crime.\textsuperscript{244} In some states statutes have changed the common law rule.\textsuperscript{245}

Between the ages of seven and fourteen there is a presumption that an infant lacks criminal capacity.\textsuperscript{246} The accused

\textsuperscript{243} Restatement, Torts, op. cit. supra note 100 at sec. 263, comment e.

\textsuperscript{244} Heilman v. Com., 84 Ky. 457, 1 S. W 731 (1886); Com. v. Mead, 10 Allen (Mass.) 398 (1865), State v. Guild, 10 N.J.L. 163 (1828). 2 Stephen, op. cit. supra note 123 at 97-99; 1 Wharton, Criminal Law (11th ed. 1912) Sec. 85; Annotation (1905) 36 L.R.A. 196; Note (1932) 7 St. John's Law Rev. 82.


\textsuperscript{246} Godfrey v. State, 31 Ala. 323 (1858), Willett v. Com., 13 Bush (Ky.) 230 (1877); Com. v. Mead, 10 Allen (Mass.) 398 (1865). Cf. State v. Learnard, 41 Vt. 585 (1889) (no presumption), Reg. v. Smith, 1 Cox C. C. 260 (1845) (no presumption) For statutory modification, see Note (1933) 3 Brooklyn L. Rev. 293.
must first make a showing that he is within the age limits. Then, the burden of going forward with evidence to show that he has capacity is upon the prosecution.247

At common law children over fourteen years of age are in substantially the same position as adults as regards their capacity to commit crime.248 The rule is as harsh as it sounds.249 It appears that any abnormalities having to do with lack of capacity are appropriately made under the defense of insanity.250

Cases on criminal negligence follow these age groupings in determining whether those accused of negligence have the capacity to commit the crime alleged. A leading case is People v. Squazza,251 holding that a boy of eleven cannot be convicted of manslaughter in the second degree for having thrown a brick from a roof, killing a person below, without affirmative proof that he had capacity to understand the nature and quality of the act and knew that it was wrong.

It is apparent that there is a great deal of difference in the way the problem of infancy is handled in the civil and criminal cases.

One is impressed by the harshness manifested in the age groupings in the criminal law. It is altogether possible that the age of complete irresponsibility should be raised appreciably

“Between the ages of seven and fourteen no presumption of law arises at all, and that which is termed a malicious intent—a guilty knowledge that he was doing wrong,—must be proved by the evidence, and cannot be presumed from the mere commission of the act.” Reg. v. Smith, supra.

247 May, op. cit. supra note 136, at Sec. 34.
248 State v. Gon, 9 Humph. (Tenn.) 175 (1848), Com. v. Cavalier, 284 Pa. 311, 311 Atl. 229 (1925)
249 “Our compassion and sympathy have been greatly excited in favor of the accused. He is, although of sufficient age to be legally responsible for violations of the law (infant of fourteen accused of murder, convicted of voluntary manslaughter, ed.) yet but a mere child and the homicide committed by him was done in defense of his father. These facts induced us to look closely into the record, with the hope that we might find something that would justify us in sending the case back, so that he might have another chance before the country. But with all our prepossessions and anxiety in his favor we have been unable to do so.” Irby v. State, 32 Ga. 496, 498 (1861) State v. Smith, 213 N. C. 299, 195 S. E. 819 (1938), 1 Wharton, op. cit. supra note 244, at 121.
250 May, op. cit. supra note 136, at 38.
It was the opinion of Judge Stephen that it should be advanced to twelve years.252

The Juvenile Court has relieved the situation somewhat in cases coming within its jurisdiction. But there is a hiatus of several years between the upper age limits of Juvenile Court jurisdiction and a youth's majority at twenty one.253 Should a seventeen or eighteen year old boy be in the same position as an adult as regards his capacity to commit crime? Is it consistent to hold such a lad to the standard of members of his class, determined by age, intelligence and experience in torts, to give him the right to affirm or disaffirm in contracts, but to place him in a class with adults in the determination of capacity for criminal liability?

It may be argued that society is impressed by the apparent propensity of youth for crime and must protect itself. Without discussing whether such propensity is a natural one, it may be suggested that youth seems to have a like propensity for the commission of torts. The problem is a difficult one with many ramifications, but it is believed that the tort rule on the capacity of infants is the more satisfactory 254

2. Insane persons

The Restatement of Torts contains a caveat that the Institute expresses no opinion as to whether the standard of care in the case of the insane is that of a reasonable man under like circumstances.255

There is authority for the position that an insane person was responsible for his torts in the same way as an ordinary person in the early law.256 The principle was apparently based

2 Stephen, op. cit. supra note 123, at 98.
253 "It is the opinion of the writer that the criminal rule is too harsh in applying an adult standard after the infant reaches the age of fourteen. The infant may be able to distinguish good from evil at an earlier age than he is able to distinguish the wise from the unwise, but, it remains, an infant of fourteen is immature as to moral perception as well as to discretion. Especially in crimes involving negligence, this rule works a hardship upon the infant for in these instances he has no intention of accomplishing the wrongful act but does so by his failure to exercise the proper discretion." Note, supra note 251, at 476.
254 Restatement, Torts, op. cit. supra note 100, at sec. 283, caveat.
255 Wigmore, supra note 5, at 446. Cf Hornblower, Insanity and the Law of Negligence (1905) 5 Col. L. Rev. 278.
upon the doctrine of liability without fault. The law looked to the damage to the one injured and not to the fault of the defendant. Where fault was not an element in the determination of liability, one who was insane could be responsible as well as one who was *compos mentis*.

However, the doctrine of strict liability has long ago given way to a rule of liability based upon culpability of some sort. This principle, enunciated in 1616 in *Weaver v. Ward*, is now firmly entrenched in the law of England. Massachusetts accepted the doctrine in 1850 and other states have followed.

It would seem logical that in a legal system where liability is based upon some sort of wrongful conduct an insane person would not be liable for his torts. Insanity should destroy his capacity for fault.

But the prevailing rule is otherwise. The leading American case which involves the liability of an insane person for damages caused by his negligence is *Williams v. Hays*, where

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258 Hobart 124 (1616).
259 *Stanley v. Powell*, 1 Q.B. 36 (1891)
261 There remain, of course, a number of recognized exceptions to the general rule that there can be no liability without fault. Harper, op. cit. supra note 33, at secs. 155-216.
262 Dean Ames considered that an insane person should escape liability. The relation of the doctrine of liability without fault to this problem is discussed by him at some length in an article in the *Harvard Law Review* "So that today we may say that the old law has been radically transformed. The early law asked simply, 'Did the defendant do the physical act which damaged the plaintiff?' The law of today, except in certain cases based upon public policy, asks the further question, 'Was the act blameworthy?' The ethical standard of reasonable conduct has replaced the unmoral standard of acting at one's peril. Nor is the modern ethical standard applied even now to all cases logically within its scope. Under this doctrine a lunatic unable to appreciate the nature or consequences of his act ought not to be responsible for the damage he has inflicted upon another. These decisions must be regarded as survivals of the ancient rule that where a loss must be borne by one of two innocent persons, it shall be borne by him who acted. Inasmuch as nearly all the English writers upon torts, and many of the American writers also, express the opinion that the lunatic not being culpable, should not be held responsible, it is not unreasonable to anticipate that the English courts and the American courts, not already committed to the contrary doctrine, will sooner or later apply to the lunatic the ethical principle of no liability without fault." Ames, *Law and Morals* (1908) 22 Harv. L. Rev. 97, 99-100.
THE IMPORTANCE OF THE "CIRCUMSTANCES OF THE CASE" 163

the rule is expressed as follows, "The general rule is that an insane person is just as responsible for his torts as a sane person, and the rule applies to all torts, except perhaps those in which malice and, therefore, intention, actual or imputed, is a necessary ingredient, like libel, slander and malicious prosecution." A number of states have made insane persons liable for their torts by statute.264

It would seem clear that where a definite mental state is required, as for example, in fraud,265 malicious prosecution,266 and in defamation on a privileged occasion267 the defendant's insanity must of necessity be a complete bar to the action. It has been doubted, however, whether slander and libel generally, should be included in the exceptions to the rule268 but the courts have made no distinction between "legal malice" and genuine malice.269

How are the courts able to rationalize the general rule making an insane person liable for his torts? They have given a number of explanations. Numerous decisions repeat the maxim, "Where one of two innocent persons must suffer a loss, it should be borne by the one who occasioned it."270 Professor Bohlen has pointed out that this is merely a restatement of the old concept of liability without fault, dressed up in a new form.271 Admitting this, the argument remains a persuasive one. There is no reason of social interest why the estate of a lunatic should not be taken as compensation for the harm he has done by conduct falling below that which the group requires of its members, except insofar as his private assets insure the public against his

266 Beufeuf v. Reed, 4 La. App. 344 (1926).
268 Note (1938) 22 Minn. L. Rev. 853, 859-860.
271 Bohlen, op. cit. supra note 257, at 17.
care and support. Although it creates an exception to the doctrine that there can be no liability without fault, the rule has in it a great deal of practical expediency

Other cases suggest that public policy requires the enforcement of such liability in order that relatives of the insane person shall be led to restrain him properly. A number of decisions point out that if lunacy were a defense, tort feasors would be tempted to simulate or pretend insanity, thus introducing into civil trials all the uncertainty and confusion, which the plea of insanity has occasioned in the criminal law.

It is undoubtedly true that the plea of insanity has occasioned uncertainty and confusion in the criminal law.

\[272\] Restatement, Torts (Tent. Draft No. 4, 1929) sec. 167, Special Note.

"The problem of insane persons is somewhat different from that of infants. Children are the future adults of the world, and it may be socially undesirable to handicap them at the very beginning of their careers by the burden of judgments which they must discharge before they can attain economic independence." Ibd.


"If an insane person is not held liable for his torts, those interested in his estate, as relatives or otherwise, might not have a sufficient motive to so take care of him as to deprive him of opportunities for inflicting injuries upon others. There is more injustice in denying to the injured party the recovery of damages for the wrong suffered by him, than there is in calling upon the relatives or friends of the lunatic to pay the expenses of his confinement, if he has estate ample enough for that purpose. The liability of lunatics for their torts tends to secure a more efficient custody and guardianship of their persons." McIntyre v. Sholty, supra.


1 Cooley on Torts (3rd ed. 1906) 173.

\[275\] "The gradations of mental disease are exceedingly difficult to distinguish the one from the other. The problem of insanity as a defense to criminal responsibility has not been satisfactorily solved. There is much to be said against introducing into the law of Torts questions upon which the scientific world is so divided in opinion and which must be established by expert testimony, itself a notoriously uncertain and unreliable means of proof." Restatement, Torts (Tent. Draft No. 4, 1929) 30.

"Another important consideration is derived from the fact that the distinction between insanity and the cunning of malice is not always sufficiently clear for ready detection, and a rule of irresponsibility in respect to such persons would be likely to result in similar difficulties in civil cases to those which have brought the administration of criminal law into disrepute wherever the plea of insanity is interposed. It is generally believed, and with abundant reason, that sometimes in the administration of the criminal law, persons who are abnormal only in ungovernable passion and depravity escape the proper consequences of their criminal conduct on a plea of mental disease; and on the other hand a care-
The rule itself is clear enough. Insanity is a defense to a criminal action, including one based upon negligence. The difficulty lies in defining insanity. Various tests have been proposed by the courts for determining whether a person accused of crime is legally insane but none of them are satisfactory to either the legal or medical profession. The problem is complicated by the fact that experts appear for both the state and the accused in most jurisdictions and feel obligated to champion the side which calls them.

The fact that the law takes such divergent positions on the question of insanity, allowing it to be used as a defense to a criminal prosecution but refusing, subject to exceptions, to permit the defendant to avail himself of it as a means of escape from liability in tort, causes one to inquire whether both rules are correct. The fact that the Restatement of Torts issues a caveat on the question is an indication of the difficulty of the problem.

It is submitted that the whole matter, civil and criminal, is a question of policy and social expediency. Either rule is possible in either field under recognized principles. The law, civil and criminal, is adverse to liability without fault. But there are a few examples of it in each field.

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All things considered, it is believed that the existing rule is the proper one in each instance. The object of an action in tort is compensation to the party injured. In a criminal prosecution, however, the law is interested, primarily, in deterrence. This wholesome purpose would not be furthered by the "punishment" of an insane individual since neither he nor other insane persons in the community would be deterred thereby to any great extent from the commission of similar offenses. While it is socially desirable to remove such potentially dangerous individuals from the community, it would be better to do so in a civil rather than in a criminal proceeding.


Physicians and surgeons are not judged by the standard of the ordinary prudent man. Their special training and experience qualify them as persons who, in their fields, possess a type of judgment and knowledge so superior to that reasonably to be expected of average men that the law is justified in creating a separate standard to be used in judging their professional acts. 

The standard used in the tort cases for judging the conduct of a physician or surgeon is the skill and care that an ordinary physician or surgeon practicing in the same or a similar locality and under the same or similar circumstances would use.

It may be argued that this is only another way of saying that a physician or surgeon is held to the usual standard of "the

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280 Experts, other than physicians and surgeons, having a capacity so much greater than the usual norm as to justify their classification as "extreme abnormals" should also be included in this category. The list would then include, for example, such persons as trained engineers. It is doubtful, however, if the cases support such additions at this time. A tendency toward the larger category appears in recent discussions by writers on the subject. Green, supra note 97, at 1039; Harper, op. cit. supra note 33, at sec. 71; Restatement, Torts, op. cit. supra note 100, sec. 299, comment d.

reasonable man under the circumstances” and the fact that the defendant is a physician or surgeon is one of the “circumstances.” This is not quite true as a matter of fact. Of course, the same result could be reached under either rule. But the creation of a separate rule for physicians makes the ordinary physician in the community, not the reasonable man in the community, the norm. This centers the attention of the judge or jury upon the ordinary physician rather than upon the ordinary prudent man in the community as the standard and it results in holding physicians to a higher degree of care than the application of the other standard. Courts realize this and it has resulted in the enunciation of the separate standard in numerous cases.

A number of cases state that the standard is the ordinary physician or surgeon in good standing practicing in the same or a similar locality and under the same or similar circumstances. The phrase, “in good standing,” should be included, it is suggested, to exclude quacks and pretenders from consideration. If such incompetent individuals were considered as a part of the group, the norm would be below the standard reasonably to be expected of physicians practicing in the community.

The suggestion is well taken, if the omission of the phrase results in the inclusion of such persons in the determination of the standard. In former times, it might have had this effect. It is believed, however, that the present minimum requirements which the various states have prescribed for practice largely obviate this danger. Although the fact that the physician was

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282 “In the case of physicians and surgeons, the courts have gone one step further than in ordinary negligence cases and have made the standard not that of a reasonably prudent man under the circumstances, but that of an average physician in good standing in the same or similar locality. The reasonably prudent man standard does not adequately emphasize the professional capacity of the physician.” Note (1941) 29 Ky. L. J. 476, 479.

283 See Dunman v. Raney, supra note 281, at 342.

284 There are distinct and differing schools of practice. Consequently, most states provide for more than one type of examination. For example, the chiropractor and the ordinary practitioner of “medicine” take different state examinations.

The treatment given by a physician is to be tested by the principles and practices of his particular school. Patten v. Wiggam, 51 Me. 594 (1862), Floyd v. Michie, — Tex. Civ. App. —, 11 S. W. (2d) 657 (1928). However, the school must be one which is recognized. See Hansen v. Pock, 57 Mont. 51, 187 Pac. 282 (1920), (Chinese herb doctor), Nelson v. Harrington, 72 Wis. 591, 40 N. W.
practicing without a license is generally held to be irrelevant in an action based on negligence, civil or criminal, unless the violation of the statute was the proximate cause of the injury, the uniform enforcement of license requirements has removed most mountebanks from the profession. While a few individuals who obtained their licenses a number of years ago may not be as competent as some of the younger men, so long as they are legally entitled to practice, it would appear that they are a recognized part of their profession and should be considered in determining its standards.

The criminal cases are not clear as to the standard used in determining whether a physician is negligent in the care and skill with which he treats a patient. Cases have held that he is liable when he exhibits gross lack of competency or gross matten- tion or criminal indifference to the patient’s safety. This is another way of saying that he is liable for gross negligence. However, the courts do not state the standard by which this gross negligence is measured. Is it measured by the conduct of the “reasonable man,” the usual standard for the measurement of negligent conduct in both civil and criminal cases? Or do the courts use the conduct of “an ordinary physician practicing in the same or a similar locality,” the standard by which the acts of physicians are measured in civil cases as the measure?

This question cannot be answered by reading the cases. It is submitted, however, that the standard of care by which the negligence of physicians is measured is identical in civil and criminal cases. When the courts refer to the gross negligence requisite for conviction in a criminal prosecution, they refer to negligence as measured by the standard of “an ordinary physician or surgeon practicing in the same or a similar locality and under the same or similar circumstances.” This conclusion is based upon the fundamental proposition that civil and


See Note (1929) 29 Col. L. Rev. 985, 987; Note (1929) 78 U. of Pa. L. Rev. 91, 98.


286 “The jury have found that it was applied as the result of foolhardy presumption or gross negligence, and that is enough.” Holmes, J., in Com. v. Pierce, 138 Mass. 165, 180. State v. Hardister, 38 Ark. 605 (1882).
criminal negligence are the same in kind differing only in degree. Ordinarily, the standard for measuring each is the "reasonable man." There are good reasons for the creation of a separate standard for determining the negligence of a physician in a civil case. If all negligence is the same in kind, then the same reasons should exist for the creation of this new standard to measure the negligence of a physician in a criminal case. This is especially true when, as here, there have been advanced no reasons why this new standard does not apply just as well to criminal as to civil cases.

This standard is, of course, an objective one. A subjective standard was employed in the criminal cases in judging the conduct of physicians until the latter part of the nineteenth century. A number of early American cases hold that if a person assumes to act as a physician and prescribes treatment with an honest intention of curing the patient, he is not guilty of manslaughter if the patient dies, no matter how ignorant he is of medical science.

Such a rule led to very unsatisfactory results. The early case of Commonwealth v. Thompson will illustrate. From the evidence it appears that the defendant was a grossly ignorant quack. He had three remedies which he called coffee, well-my-gristle, and rameats. Powerful emetics were administered to the deceased until he died, to all appearances from the effects of the treatment. The appellate court held that if a person assuming to act as a physician prescribes treatment for a patient with an honest intention of curing him but through ignorance of the quality of the medicine or the nature of the disease, or both, the treatment proves fatal, the person prescribing is not guilty of murder or manslaughter.

The decision is vigorously criticized by Holmes, J., in the subsequent, leading case of Commonwealth v. Pierce. There was evidence that the defendant, who practiced as a physician,

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288 Note, supra note 282, at 477.
289 Honnard v. People, 77 Ill. 481 (1875), State v. Schultz, 55 Iowa 628, 8 N. W. 469 (1881), Rice v. State, 8 Mo. 561 (1844).
290 6 Mass. 134 (1809).
291 138 Mass. 165 (1892).
on being called to attend a sick woman, prescribed that she be kept in flannels saturated with kerosene, and that this course of treatment caused her death. The court instructed that if the death were caused by "gross and reckless negligence" he would be guilty of culpable homicide. It further instructed that the defendant was to be tried by no other or higher standard of skill or learning than that which he necessarily assumed in treating her. The jury found that the treatment was applied as the result of gross negligence and held the physician guilty of manslaughter.

In affirming the judgment the appellate court repudiated Commonwealth v. Thompson. Judge Holmes pointed out that liability for reckless, grossly negligent conduct is an old and firmly recognized principle in the law of homicide. He considered that a physician may be guilty of such conduct regardless of his good intentions. The standard to be applied is an objective one, and the physician will not be permitted to hide behind the veil of his own ignorance. This is the modern view, supported by numerous cases.

The limitation in the Pierce Case that the defendant is to be tried by no other or higher standard of skill or learning than that which he necessarily assumed in treating the patient raises several questions. Suppose A has a pain in his stomach and asks B, a friend but a man of no special training, what to do about it. B suggests that he take a dose of castor oil. In fact A has an attack of appendicitis and this may be very bad advice. It does not follow, however, if A dies, that B is guilty of criminal negligence in prescribing the wrong remedy B did not hold out that he was a physician and he did not in fact possess special knowledge. He is to be judged by the standard of the reasonable man under the circumstances. However, if a physician had

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192 Id. at 177-178; Annotation (1920) 9 A. L. R. 211, 213. Contra, Keedy, supra note 143, at 85, n. 2.
193 State v. Gile, 8 Wash. 12, 35 Pac. 417 (1894); Hampton v. State; 50 Fla. 55, 39 So. 421 (1905), Com. v Pierce, 138 Mass. 165 (1884), State v. Wagner, 78 Mo. 644 (1883), Wharton, op. cit. supra note 64, at 713.
194 "In dealing with a man who had no special training, the question whether his act would be reckless in a man of ordinary prudence is evidently equivalent to an inquiry into the degree of danger which common experience shows to attend the act under the circumstances known to the actor." Commonwealth v. Pierce, supra note 293, at 178.
volunteered advice gratuitously under similar circumstances, he would be required to exercise the skill of the ordinarily competent physician practicing in that or a similar locality.\(^2\)

A more difficult problem is raised by the question, do country and city doctors ordinarily assume different standards of skill and learning in the treatment of patients? Let us suppose that A is a mountain doctor practicing his profession in a remote section of the state of Kentucky. Thirty-five years ago he satisfied the minimum requirements of the state board of examiners, they were not very high. He has found a place for himself in the community, prescribes simple remedies. He drives an ancient car but often is forced to ride mule-back to reach a patient in an inaccessible section. Charges for his services are small. Many never pay him, others pay in coal and potatoes.

On the other hand, B is a city doctor practicing in Lexington, Kentucky, a cultured and wealthy community. He graduated from a large university, at the head of his class. Since that time he has had several graduate courses, has studied abroad, and makes every effort to keep up with advancing knowledge in his profession. He drives a large car, takes no cases outside of the city limits, and his fees are large.

The same formula\(^2\) will be used in determining whether the conduct of either of these men is criminally negligent in the treatment of a patient. The test will be, did he use the care and skill that an ordinary physician practicing in the same or a similar locality and under the same or similar circumstances would have used? But there may be enough difference in the two localities and in the other circumstances in the cases to cause a difference in the verdicts as to guilt or innocence, although the two physicians gave their patients treatments which were identical.

\(^2\)"If a practicing surgeon were to offer his services gratuitously in a similar situation, he would be required to exercise the skill of the ordinarily competent surgeon." Restatement, Torts, op. cit. supra note 100, at sec. 299, comment e.

\(^2\)"If the defendant ... were a poor ignorant 'Brazos bottom' negro farmer on the one hand, or a prosperous agricultural chemist on the other, such would be a most vital factor in the case, although the judge would give the same formula in each instance." Green, supra note 97, at 1037, fn. 23. See Regina v. Nicholas, 13 Cox, C. C. 75 (1875) (failure of poor, ignorant grandmother to supply illegitimate child of her daughter with proper nourishment).
This results in the city doctor having to exercise a higher degree of skill and care in much of his practice than the country doctor. The emphasis upon locality in the formula is largely responsible for this. That was intended. The courts by emphasizing the locality factor in physician cases have gone a long way toward creating separate levels of skill and care for country and city doctors.

But that is as it should be. A cannot be expected to know as much as B about appendicitis, cancer, heart disease, and many other human ailments, he does not hold himself out to know as much. His rewards are not as great in his remote section of the state. Nevertheless, the people of his section must have some medical attention. Gradually, legislatures raise the standards for admission to the practice of the profession, but, wisely, these are not advanced too rapidly. If they are, remote regions are left without any service. All of these problems must be kept in mind by legislatures, by judges, and by juries.

4. **Unusual physical and mental characteristics in individuals who are not “extreme abnormals.”**

Considerable allowance is made for the mental deficiencies of infants and of insane persons by the separate standards which the law has evolved for the measurement of the conduct of individuals who fall into these categories. Similarly, the separate standard devised for judging the professional acts of physicians and surgeons takes into account their superior training and skill. The question arises, whether the law makes any allowance for unusual physical or mental characteristics in those individuals who are not members of any of the above classes of “extreme abnormals”?

Since a separate standard has not been created for such persons, they are all judged in civil actions by the objective standard of “the reasonable man under the same or similar circumstance.” A certain amount of subjectivity is introduced, however, by considering physical defects as a part of the circumstances.

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297 See the discussion, supra, pp. 156-166.

298 See the discussion, supra, pp. 166-172.

299 “Unless the actor is a child or an insane person, the standard of conduct to which he must conform to avoid being negligent is that of a reasonable man under like circumstances.” Restatement, Torts, op. cit. supra note 100, at sec. 283.
Thus, the man who is blind is required to do what a reasonable man would do "under the circumstances." He must take cognizance of the risks which his infirmity entails and govern himself accordingly. Since a reasonable man would do so, one who is blind is required to use his remaining faculties with greater diligence in order to compensate as far as possible for his inability to see. A similar rule applies to those having other forms of physical disability, where the defect is substantial and capable of being proved with reasonable certainty. Nearsightedness, deafness, the disablement resulting from the loss of an arm or leg, and the physical infirmities incident to old age come within the category.

However, there are limits to the ability of such persons to compensate for their defects. They are constantly a hazard to themselves and to others, although their other faculties are alert. Nevertheless, it is not feasible to eliminate such individuals from daily contact with life entirely. This consideration finds expression in the civil cases in such statements as, "the streets are for the use of the general public— for the weak, the lame, the halt, and the blind, as well as for those possessing perfect health." Consequently, it is not negligence, as a matter of law, for such persons to walk on a public street unattended.

Thus, where a blind man fell into an open ditch in a street, it was not error to refuse an instruction that it was negligence for him to use the streets without an attendant, or unless he constantly felt his way with his staff.

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301 Restatement, Torts, supra note 100, at sec. 238, comment h.
303 Hill v. Glenwood, 124 Ia. 479, 100 N.W. 522, 523 (1904).
305 Foy v. City of Winston, 126 N.C. 381, 55 S.E. 609 (1906).
It is apparent that the use of the streets and other public places by those with physical defects puts a burden of additional care upon the general public. Those who contemplate action must keep in mind that abnormal individuals may be affected.\textsuperscript{306} This is limited, however, by the fact that the care required is never greater than a reasonable man would use under the circumstances. Since the conduct of those physically defective is judged by the same standard, the determination of the amount of care which should be exercised, in a particular case, which involves both normal and physically defective persons, depends upon a balancing of the interests of the parties concerned and a conclusion based upon community standards of what is reasonable.

It may be concluded that while a physical defect is not an excuse for carelessness, a certain amount of allowance is made for those who are so afflicted. The question such a person should ask himself before acting is, What would a reasonable man, if he were similarly afflicted, do under the circumstances? A reasonable man who was blind might use the sidewalk but he would not cross a crowded street unattended nor attempt to drive an automobile.\textsuperscript{307}

The effect of physical defects is not as clear in criminal as civil cases. The decisions on the question are rare and only two

\begin{quote}
It is impossible for an individual having substantial physical defects to make up for his infirmities by the increased use of his other faculties. For example, assume, that X, blind, deaf, and seventy years of age, has lived in a small town all of his life. He knows the town like a book and can find his way to any street. The one bright spot in his day occurs at 4 P.M. when he totters to the depot to get the evening paper which is thrown from the fast express which goes through without stopping. He does this and looks forward to it eagerly because he likes to feel that he is helping. One day he loses his sense of direction, walks in front of the train and is killed. He is guilty of contributory negligence.
\end{quote}

\textsuperscript{306} Restatement, Torts, op. cit. supra note 100, at sec. 289, comment h, illustration 5.

have been found. In *Rex v Grout*, a pedestrian was walking on a public highway at dusk when the defendant, who was proved to be near-sighted, ran over him with a cart, causing his death. The judge, in summing up, told the jury (inter alia) that the question for their consideration would be "whether the prisoner, having the care of the cart, and being a near-sighted man, conducted himself in such a way as not to put in jeopardy the limbs and lives of his Majesty's subjects. If they thought he acted carelessly and negligently, they would pronounce him guilty of manslaughter." He was convicted.

In *Tift v State*, a later case decided in this country, it was held that it was for the jury to determine whether the act of driving an automobile by one who knew he was subject to sudden attacks of vertigo, which rendered him wholly unable to steer such a machine or to control its movements, constituted criminal negligence, where a collision occurred because of such an attack.

In each of these cases the court considers the physical defect of the defendant as a circumstance to be taken into consideration in determining whether he is criminally negligent, but neither decision states the effect of such defect upon the degree of care which the accused is required to exercise. Could the defendant in a criminal case plead that due to defective hearing or poor eyesight he should be permitted to exercise less care than the normal individual? Lacking decisions in the criminal law upon the question, it is necessary to draw an analogy from the civil cases.

Such an analogy would appear to be sound. Negligence, civil and criminal, are the same in kind. Both are grounded fundamentally on the proposition that lack of reasonable care under the circumstances is negligence. However, a higher degree of carelessness is necessary to secure a conviction in a criminal case than is required in a civil action. In the case of murder, in addition to a still higher degree of carelessness, there is the added requirement that there must be actual knowledge of the danger on the part of the defendant.

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See note 287, supra.
Discussed, supra, at pp. 127-139.
Discussed, supra, at pp. 139-155.
It would appear, then, that physical defects are a part of the circumstances to be considered in the determination of criminal negligence, as in civil, and that the standard of care is the same in each instance, except that in order to impose criminal liability the conduct of the accused must show such a high degree of carelessness as to constitute the "reckless or wanton disregard" required in criminal cases.

While some allowance is made for physical defects in both civil and criminal cases in that they are considered by the judge and jury as part of the "circumstances," a different rule obtains generally in the case of mental defects. Although the law takes into account superior mental characteristics in judging the professional acts of physicians and surgeons, no allowance is made for those adult individuals who possess less than normal intelligence, unless they are "insane."313

Worthington v Mencer 314 is the leading civil case. The plaintiff, a person of low mentality, was injured while employed as a track hand in the mine of the defendants. A judgment in his favor was reversed by the appellate court. On the question of contributory negligence as affected by his mental condition, the court stated the following rules as a guide in the new trial, which was ordered:315

"If he was merely a person of dull mind, who could labor for his own livelihood, and there was no apparent necessity of putting

312 Of course, even the insane person is responsible for his torts under the majority rule. See the discussion, supra, pp. 161-166.
314 96 Ala. 310, 11 So. 72 (1897). Accord, Georgia Cotton Oil Co. v. Jackson, 112 Ga. 620, 37 S.E. 873 (1901), Johnson v. Texas & P Ry Co., 16 La. App. 464, 135 So. 114 denying rehearing to 16 La. App. 464, 133 So. 517 (1931) The rule is the same as to other mental defects: Bessemer v. Campbell, 121 Ala. 50, 25 So. 793 (1898) and Taylor v. Richmond & D. R. Co., 109 N.C. 233, 13 S.E. 736 (1891) (excitability), Vaughan v. Menlove, 3 Bing. New Cas. 468 (1837) (bad judgment). It has been stated that there is a conflict of authority as to whether forgetfulness of a known fact is negligence. Reynolds v Los Angeles Gas & Electric Co., 162 Cal. 327, 122 Pac. 982 (1912). Perhaps the cases can be reconciled by the statement that forgetfulness is excusable only when the actor's attention is diverted by such cause or causes as would ordinarily induce such forgetfulness in an ordinarily prudent or careful person in the same or in a similar situation. Buckley v. Westchester Lighting Co., 93 App. Div 438, 87 N.Y.S. 763 (1904), aff'd. 183 N.Y.S. 506, 76 N.E. 1090 (1905), City of Charlottesville v. Jones, 123 Va. 682, 97 S.E. 316 (1918) Annotation, 39 L.R.A. (N.S) 896. See Pound, op. cit. supra note 147, at 178-179. Restatement, Torts, op. cit. supra note 100, at secs. 289(h), 289(o), 290(d).
315 Id. at 315, 73.
him under the protection of a guardian to keep him out of harm's way, he is chargeable with the same degree of care for his personal safety as one of brighter intellect, as any attempt to frame and adapt varying rules of responsibility to varying degrees of intelligence would necessarily involve confusion and uncertainty in the law."

Professor Edgerton has stated the rule in the following positive language.316

"The individual's actual mental characteristics and qualities, capacities and habits, reactions and processes, are not, then, among the 'circumstances' which the law considers in determining whether his conduct was, under the circumstances, reasonably safe. He must behave as well (as safely) as if he were in all mental respects normal, although he may be in some respect subnormal; he need behave no better, though he may be in some respect super-normal. In fact, the broad proposition that no merely mental fact about the (sane) individual is material, would seem to require only one substantial qualification; his special knowledge is highly material."

Dean Green agrees with this positive enunciation of the rule for the purpose of statement but considers that as a matter of fact the jury does take into consideration the mental characteristics of the defendant along with his numerous other qualities.317 "The difference lies between law in statement and law in operation. between jural postulates and jury judgments."318

Of course, Dean Green is right to a certain extent. It is impossible to keep the jury from considering such personal characteristics of the defendant as are manifested by his conduct during the trial, especially, while he is on the stand, and as may be deduced from a recital of the evidence pertinent to the case.

But Dean Green is over-emphasizing the opportunity which the jury has to consider the mental characteristics of the defendant because, if Professor Edgerton has stated the rule correctly, these are not part of the circumstances of the case and, consequently, will not be presented to the jury; except in the indirect ways mentioned in the last paragraph. The defendant would desire a more adequate presentation, if it were possible.

A hypothetical case will show more clearly the difficulties encountered by the defendant in getting before the jury his mental defects and their relation to the injury of which he complains. Suppose that Flutterbuss is one of those individuals

316 Edgerton, supra note 134, at 857.
317 Green, supra note 97, at 1042.
318 Id. at 1043.
who is easily "rattled." While driving his car to the office, he collides with A's automobile badly damaging the machine and seriously injuring the driver. Assume, further, that the accident is caused largely by the fact that Flutterbuss became excited, something that a normal man would not have done under the circumstances, and stepped on the accelerator instead of the foot-brake.

Although Flutterbuss' excitability contributed materially to the accident, it is not one of the "circumstances of the case." Consequently, he will not have the opportunity to present evidence of his excitability to the jury as a defense or to show its bearing upon the other factors in the case. The practical effect of the law, as it now is, is to limit the "circumstances of the case" to those circumstances relating to the environment and to the defendant's physical defects. Mental defects, less than insanity, are not to be taken into consideration.

It is true that the jury may learn something of his excitable nature from his demeanor in the courtroom and upon the stand but the effect of this is qualified by the judge's instruction that he is to be judged by the conduct of the reasonable man. It therefore becomes apparent that a defendant having mental defects is at a greater disadvantage before the jury than one having physical defects since the latter are a part of the "circumstances" and may be openly presented to the jury under existing rules of law and some allowance made for them.

Several reasons may be suggested for the fact that the law does not, as yet, make any allowance for mental defects not amounting to legal insanity in civil actions involving negligence. One is that this part of negligence, like some others, is so un-

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319 The excitability of the defendant is not one of the "circumstances" in a suit involving negligence. Such an individual is held to the standard of conduct of a "reasonable" man. Bessemer Land Co. v. Campbell, 121 Ala. 50, 25 So. 793 (1898), Taylor v. Richmond & D. R. Co., 109 N.C. 233, 13 S.E. 736 (1891).

"We do not understand that an employer's liability for the negligent act of his superintendent can be measured by the latter's poise of temperament, nor that the character of a given act of the superintendent in respect to negligence can be made to depend upon his excitability or the reverse. It is the duty of a superintendent to do what an ordinarily careful and prudent man would do under the same circumstances, and the employer is liable if he fail to do this, and injury results to an employe." Bessemer Land Co. v. Campbell, supra, at 799.
crystallized that it cannot be subjected to statement. A more fundamental explanation is that mental conditions in this instance, as in others, are so difficult of proof that the law hesitates to take them into consideration unless they are so clear as to be readily apparent, because of the danger of fraud.321

In the criminal law, the rule is well settled that a mental defect is not a defense to a criminal action unless it is sufficient to constitute what amounts to legal insanity322 in the particular

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320 "It may well be that the 'law of negligence' is so uncrystallized (except for an inconsequential part) that it cannot be subjected to statement other than in terms of an analysis through which the cases must be run as they arise." Green, op. cit. supra note 97, at 1047, n. 37.

321 However, the law does consider mental conditions where insanity is not involved in some other cases in spite of this objection. Recovery in tort for mental injuries in the absence of physical impact is now allowed in most instances. The progress of the law may be traced through the following series of articles: Bohlen, Right to Recover for Injury from Negligence Without Impact (1902) 41 Am. L. Reg. (N.S.) 141, Throckmorton, Damages for Fright (1921) 34 Harv. L. Rev. 260; Goodrich, Emotional Disturbance as Legal Damage (1922) 20 Mich. L. Rev. 497; Bohlen and Polikoff, Liability in Pennsylvania for Physical Effects of Fright (1932) 80 Univ. Pa. L. Rev. 627; Green, 'Fright' Cases (1933) 27 Ill. L. Rev. 761, 873; Magruder, Mental and Emotional Disturbance in the Law of Torts (1936) 49 Harv. L. Rev. 1033; Harper and McNeely, A Re-examination of the Basis for Liability for Emotional Distress (1938) Wis. L. Rev 426; Vold, Tort Recovery for Intentional Infliction of Emotional Distress (1939) 18 Neb. L. B. 222; Seitz, Insults—Practical Jokes—Threats of Future Harm—How New as Torts? (1940) 28 Ky. L. J. 411.

The present slight tendency in the law to consider mental conditions is reflected in the problem under discussion by a few cases which, either by decision or dictum, are contra to the general rule that no allowance is made for mental defects not amounting to legal insanity in civil actions involving negligence. See the cases and materials cited by Edgerton, supra note 134, at 855-856, fn. 29, (2) and (3). Seattle Elec. Co. v. Hovden, 190 Fed. 7 (1911), cited by Professor Edgerton has been called a sport. Seavey, supra note 150, at 12, fn. 12. See Johnson v. St. Paul City Ry. Co., 67 Minn. 260, 69 N.W 260 (1897) (Suggesting that the law apply the same standard to old people whose mental faculties are impaired by age that is employed in the case of infants.)


The law does not undertake to measure the intellectual capacities of men. Imbecility of mind may be of such a degree as to constitute insanity in the eye of the law, but mere mental weakness, the subject being of sound mind, is not insanity, and does not constitute a defense to crime. The law recognizes no standard of exemption from crime less than some degree of insanity or mental unsound-
Consequently, a showing of ignorance, stupidity, or similar form of mental deficiency does not establish an incapacity to commit crime. Neither is it sufficient to show that the accused is more passionate than ordinary men that he has a terrible temper and excitable disposition, or that he is suffering from shell-shock.

The rule that a mental defect is no defense to a criminal action applies to negligent as well as to intentional crimes. An individual who is mentally defective, but legally sane, is capable of the kind of blameworthy conduct requisite for criminal negligence, since he has sufficient capacity to have knowledge of the circumstances of the case.

It might, however, be questioned whether one who is mentally dull or ignorant would be intelligent enough to have knowledge of the danger (although aware of the circumstances) in a number of situations where a normal person would recognize the peril. This raises the question whether such an individual should be convicted of murder under such circumstances.
Although the law, as yet, has given no relief to such persons in the case of the negligent murder, a slight tendency in that direction is indicated, perhaps, by the rule now recognized in some jurisdictions that feeble-mindedness may be considered in determining whether a homicide has been committed with a deliberate and premeditated design to kill, and thus may be effective to reduce the grade of the offense.\textsuperscript{331}

Indeed, considerable criticism of the prevailing rule, in its entirety, is developing.\textsuperscript{332} It is urged that the doctrine that a mentally defective person must either be held criminally to a full degree of responsibility for his acts or else entirely acquitted should be modified. A middle course of responsibility is suggested to be attained by applying the presumptions now reserved only for children to such mental children, where the mental defect is one of sub-normality. The "mental age" of a subnormal adult accused of crime would be determined by the use of intelligence tests and such other means as modern psychologists might be able to devise, plus available corroborative evidence, and if this was found to be less than fourteen years, the usual presumption applicable to children of like age would be applied.


Cf. Perkins:

"The effort of the Classical School to establish in advance an exact measure of punishment for each transgression, by the creation of new offenses, and the division of others into degrees, etc., has been found to be inadequate. The modern trend is toward individualization of treatment as evidenced by such techniques as indeterminate sentence, probation and parole. Unsoundness of mind of every kind and degree would seem to require consideration in a fully developed scheme of individualized socio-penal treatment; but it would seem wiser to leave most of this field to the part of the machinery which functions after conviction, than to inject an increasing amount of it into the jury trial itself. Probably the social interests in the general security and the social interests in the individual life would both be promoted by keeping within rather narrow limits the kind and degree of mental disorder which entitles the defendant to a verdict of not guilty, while at the same time readjusting the machinery after the point of conviction in such a manner as to keep abreast of every contribution of science in the field of disorders of the mind." Perkins, \textit{Partial Insanity} (1934) 25 Jr. Crim. L. 175, 185.
While courts in the past have looked with disfavor upon applying this presumption of law designed for children to adults having a mental age of fourteen years or less, the suggestion is the most persuasive yet offered as a solution to the problem of mental deficiency, and a new generation of jurists may give it credence.

B. Objective Circumstances (Characteristics of the Environment)

The tort as well as the criminal cases have been considered in the discussion of the effect of the subjective circumstances (characteristics of the actor) upon the determination of negligence. This was done because the criminal law upon this phase of negligence has not developed as much as the civil, or it has developed along different lines, and it was thought helpful to examine the tort cases for the purpose of comparison and analogy. This procedure will not be followed, however, in the discussion of the relation of the objective circumstances (characteristics of the environment) to the question of negligence because there are numerous criminal cases on the subject and no important differences in the development of the law in the two fields.

1. Dangerous Instrumentalities.

The nature of the instrumentality being used by the defend-

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333 "There is a vast difference between (the intellect of) a child at the age of eleven years and that of a man of twenty-eight, and while perhaps there is a presumption that an infant of tender years is incapable of committing a crime, that presumption does not extend to one of advanced years, requiring the state to rebut it. When a man reaches manhood the presumption is that he possesses the ordinary mental capacity normally pertaining to his age. The presumption of the lack of power of thought and capacity in favor of a child is due more to the number of years he has lived than to the character of the development of his mind, and it is a merciful rule established by the courts due to his tender years, but that reason does not apply when he comes to manhood. Deficiency of intellect is a species of insanity, and when that is set up as a defense for crime the burden is on the accused to prove it, the presumption being that he is sane." State v. Schilling, 95 N.J.L. 145, 112 Atl. 400, 402 (1920).

334 "While it is recognized that psychologists and psychiatrists are not in accord as to the accuracy of the results when mental tests are administered to adults and the results given in mental ages, the courts should not in the less make greater use of them, coupled with other information that case-workers and physicians could supply, in determining the criminal capacity of defendants." Woodbridge, supra note 332, at 454.

35 See supra, pp. 155-182.
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ant when the injury occurred is one of the most important objective circumstances to be taken into consideration in the determination of criminal negligence.

This is because the kind of instrumentality used by the actor generally has a great deal to do with the degree of danger which his conduct creates. X handles a cane negligently in a crowded room. There is little danger to human life and safety. But if he had handled a loaded pistol negligently in the same room the risk of harm would have been increased many times. Since the care required in a particular case is proportional to the danger, the actor must exercise a high degree of care, if he is using a dangerous agency

In the past firearms were regarded as the most dangerous agency because of their extensive use and their great potential harm. In the interest of the preservation of human life and safety, a high degree of care is demanded of those who use them. Poison, too, is a highly dangerous agency capable of serious harm to human life. Consequently, anyone who handles poison in such a way that, as a proximate result of his action, it produces death or bodily injury is criminally responsible if his conduct is reckless under the circumstances. Thus, it has been held to be manslaughter where a nurse negligently administered laudanum to a child with the intention of quieting it, and for a druggist to label negligently a package "paregoric" for "laudanum," thereby causing the death of a child.

Although there are some early decisions which seem to hold that life may be taken in certain instances by spring guns set to

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236 1 Wharton, op. cit. supra note 244, at 664. "The law regards the circumstances surrounding each case, and the nature of the animal or machinery under control. Greater care is required to be taken of a stallion than of a mare; so in the management of a steam engine, greater care is necessary than in the use of a plow. The degree of care is always in proportion to the danger to be apprehended. Meredith v. Reed, 26 Ind. 334 (1866).


"The law exacts of all persons the duty of being exceedingly cautious and careful in the use of or in the handling of firearms or other dangerous agencies." Potter v. State, 162 Ind. 213, 70 N.E. 129 (1904).


239 Tessymond's Case, 1 Lewin, C.C. 169 (1838).
defend property, modern authority is strongly opposed to this view. Such devices are extremely dangerous, and when a law breaker is killed or badly maimed by one of them the injury is out of all proportion to the crime.

In Commonwealth v. Beckham, the defendant, owner of a small chili stand, placed a gun inside the building in such a position that it would fire when a window was raised from outside. The deceased, a "drifter," apparently tried to get into the building and was shot. It appeared from the evidence that the defendant had merely intended to frighten intruders away and not to kill them. Nevertheless, the jury found him guilty of criminal negligence in placing "so dangerous an agency" in so perilous a position.

In addition to the fact that set guns are highly dangerous agencies capable of inflicting serious injuries or death upon those whom they are set to catch, it must be kept in mind that they constitute a menace to everyone who may, by chance, come in contact with them. Children, visitors, even officers of the law upon their official business are all possible victims.

In Pierce v. Commonwealth the accused, keeper of a small store, had been troubled by burglars for several years. He set a spring gun, aimed so as to fire into the body of any person who opened the door from outside. One night he failed to lock the door. A policeman upon his official duties tried the door, found it unlocked, pushed it open, and was killed. The appellate court held that a conviction of murder in the second degree would have been affirmed if there had not been error upon another point.

U. S. v. Gilliam, 1 Hayw. & H. 109, Fed. Cas. No. 15, 205a (1882) (in a dwelling house or the curtilage surrounding it); State v. Moore, 31 Conn. 479 (1863) (dictum), Gray v. Combs, 7 J. J. Marsh. 478 (Ky. 1832).


Life is more valuable than property. Simpson v. State, 59 Ala. 1 (1877). Owners of property are not disposed to be lenient with trespassers and thieves but they must find other means to deal with them. The law has provided its own punishments for such offenders. These are not only orderly, they are less severe than the taking of life or serious mutilation, which is always a possibility when such devices are used.

306 Mo. 566, 267 S.W. 817 (1924).

135 Va. 635, 115 S.E. 686 (1923).
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The right to use a set gun even in the protection of life is limited. One may justify a killing by such a device when he, himself, would have been justified in taking life. Thus, a defendant could justifiably take life by a set gun in order to prevent an atrocious and violent felony. This is really not a limitation, one could use a pistol, recognized as a dangerous agency, under like circumstances.

An automobile is not a dangerous instrumentality per se, but it may become a dangerous instrumentality, if used negligently, because of its size, weight, and the tremendous speed which it is capable of attaining.

The Georgia jurist who said, "It is not the ferocity of automobiles that is to be feared, but the ferocity of those who drive them," uttered a half-truth. It is the combination of the driver and the automobile that is to be feared. Reckless persons operate instrumentalities other than automobiles. But the combination of such an individual and a motor car is more dangerous than it would be if he were operating a different agency. An automobile alone and of itself will not move, explode, or do injury to anyone, but the turning of a key or a button and the pressure of a pedal release energy which is capable of great harm. In dealing with such an instrumentality "reasonable care" is a high degree of care.

2. Other Objective Circumstances.

The condition of the weather at the time and place of the act is an important element in the determination of negligence.

346 State v. Marfaudille, 48 Wash. 117, 92 Pac. 939 (1907), State v. Barr, 11 Wash. 481, 39 Pac. 1080 (1895)
350 In 1939, 1,210,200 persons were injured in automobile accidents; 32,100 were killed. The World Almanac (1941) 588.
351 The category of dangerous instrumentalities includes a number of other agencies. For example, see Mattson v. Minnesota & N.W. R. Co., 95 Minn. 477, 104 N.W. 443 (1905) (dynamite), Wood v. McCabe & Co., 151 N.C. 457, 66 S.E. 433 (1909) (dynamite), Morrison v. Appalachian Power Co., 75 W Va. 608, 84 S.E. 506 (1915) (electricity).
Since an actor is required to take cognizance of the ordinary operation of the forces of nature, he must have due regard for such factors as rain, snow, sleet, smoke and darkness. Thus, one who is driving an automobile along a highway on a rainy night must exercise a higher degree of care and operate his car at a lower speed than if he were driving on a clear night and under a full moon.

Those who act in populous communities must exercise a higher degree of care than would otherwise be necessary in order to prevent their conduct from becoming reckless under the circumstances. An act may be practically harmless when committed in the country and yet exceedingly dangerous to human life and safety if performed in the heart of a town or city. As pointed out in Hull’s Case, a timber tossed from...

Restatement, Torts, op. cit. supra note 100, at sec. 290, comment d.

"A person is charged with ordinary knowledge of the workings of the forces of nature, and his conduct, if it is to escape being stigmatized as wanton in care, must conform to the normal workings of these forces. For example when he leaves his automobile on a grade, with the brakes not effectively set and without turning the front wheels to the curb, he is chargeable with knowledge of the fact that gravity is likely to cause the vehicle to move down grade and injure persons in its path." Pope v Reading Co., 304 Pa. 326, 156 Atl. 106, 109 (1931).


In People v Clements, 130 N.Y.S. 612, affirmed, 207 N.Y. 682, 101 N.E. 1114 (1911), the defendant was a licensed blaster and, for a period of about two months had been engaged in blasting on premises at the corner of two streets in the city of New York. On the day in question an unusually violent explosion occurred, the results of which were so extensive as to scatter rocks over a wide territory. The deceased, a boy, was standing on the stairway of an elevated station from 125 to 140 feet distant. A piece of rock projected by the explosion struck him with such violence as to crush his skull. Two other persons were also injured by flying rock. Defendant claimed that he had been working in soft rock and placed the same amount of powder he had been using in this particular charge, but, unknown to him, he had reached hard rock, which occasioned the difference in the results of the blast. Experts agreed, however, that the defendant was using twice as much powder in
the top of a building in the country is not fraught with much
danger,—to cry out is enough warning to anyone who might be
near. The same timber tossed from a building in the city, how-
ever, is charged with potential harm to hundreds. The owner
may break a colt to the saddle with little thought of danger
in the country, but he will be guilty of manslaughter, if a death
occurs while he is attempting to bend the unruly animal to his
will upon a crowded thoroughfare.355

Numerous other objective circumstances could be given but
it is impossible to discuss in detail the infinite variety of ob-
jective factors found in negligence cases.

In closing the discussion, it is well to emphasize that each
of these varied factors is but one of the circumstances in a par-
ticular case. Each factor must be taken into consideration for
they are interrelated. One cannot seize upon a single circum-
stance, whether it be subjective or objective, and base his de-
cision upon that alone.356 A bull is generally classed as a
dangerous agency Nevertheless, the mere fact that an owner
has placed a bull in an enclosure does not necessarily mean
that he is guilty of criminal negligence, if someone is gored.
"Guilt or innocence, and the degree of guilt, would depend
upon a variety of circumstances;—as the degree of vicious-
ness of the bull, the time, whether day or night, when he might
be put in the field, the size of the field, its nearness to or re-
moteness from a populous neighborhood, and many others
which might be suggested, but which cannot be foreseen or
properly estimated except in their relation to other concomi-
tant circumstances."357

the holes as was safe, considering the location of the operations. He
was convicted of manslaughter.
354 J. Kelyng, 40 (1664).
355 1 East, op. cit. supra note 29, at 231.
356 "The amount of traffic on the highway or street, the adjacent
terrain, the grade of the highway, the condition of the surface of the
highway or shoulders, the presence of rain, snow, glare of the sun,
darkness, fog, and smoke must all be considered in determining the
care required to relieve the driver for civil negligence. Each of
these external factors, or any combination of them, affects the care
which he must exercise. These factors likewise affect the care
which the driver must exercise to relieve himself of liability for
criminal negligence." Note (1942) 30 Ky. L. J. 430, 432.
357 May, Criminal Law (3rd. ed. 1905) 225.
SECTION 8. THE CRIMINALLY NEGLIGENT BATTERY

Liability in the case of assault and battery, as in other negligent crimes, is predicated upon the fact that the defendant has created an unreasonable risk. The standard of care by which the conduct of the accused is measured and the magnitude of risk required for liability are the same in this instance as in manslaughter.

The crime presents a special problem, however, in that the offense is commonly said to require an "intent to injure." If such a requirement were taken literally, the negligent battery would be an impossibility, since negligence always differs from intent. The courts, however, while rendering lip service to the supposed requirement of intent, have evaded the rule by the use of various devices.

A number of cases "infer" an intent to injure from the doing of a reckless act resulting in bodily contact. In State v. Hamburg the defendant was indicted for assault and battery with an automobile. The state claimed that she drove her car at a reckless rate of speed at night, when it was raining, and struck a pedestrian when the car skidded on a slippery street. The court charged the jury, in substance, as follows: "A wrongful intent is essential in a criminal prosecution for assault and battery, though it may be inferred from the facts and need not be specifically proved. Such intent may be inferred where physical violence results from gross negligence.

It is commonly stated by writers upon the English law that the common law criminal battery requires an "actual intention" to injure. Hall, supra note 223, at 138 and authorities cited.

In the United States it is commonly said that an "intent to injure" is required at common law. Radley v. State, 197 Ind. 200, 150 N.E. 97 (1926), Luther v. State, 177 Ind. 619, 93 N.E. 640 (1912); Com. v. Adams, 114 Mass. 323 (1873). May, op. cit. supra note 138, at 260; Tulin, supra note 146, at 1052.

See the outline, supra page 151, showing a "working distinction" between negligence and intent.

recklessness, or a wanton disregard of the consequences, although there is no intent to use violence against anyone. This is because every one is presumed to intend the probable consequences of his own acts." The conviction was affirmed.

Apparently, it is the court's position that there is sufficient "intent" for assault and battery, if the result is a "probable consequence" of the negligent act. This is a new definition of intent as the word is used in the law of crimes. Intent is commonly taken to mean either (1) a purpose, design, or hope that certain consequences will occur from the act, or (2) a knowledge that they are substantially certain to be produced by it. The factual situation in the Hamburg Case does not satisfy even the second requisite, since, in that case the consequences were only probable, not substantially certain. To accept such reasoning would be to adopt a definition of "intent" which would be peculiar to assault and battery cases.

A number of other questionable subterfuges have been used to evade the supposed requirement. Some courts permit recklessness to "substitute" for intent, others "imply" it from extremely negligent conduct.

Such expedients serve no useful purpose. They are fic-

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363 Gross negligence is the equivalent of intent. People v. Hopper, 69 Colo. 24, 169 Pac. 152, 153 (1917).
364 "To make one criminally responsible for such injury there must be such wanton and reckless disregard of the probable harmful consequences to others as to imply the infliction of a willful, intentional injury." Radley v. State, 197 Ind. 200, 150 N.E. 97, 98 (1926). Accord, Luther v. State, 177 Ind. 619, 98 N.E. 640, 642 (1912).
365 "It seems obvious that, under the beneficient fiction of implied intent, we are developing a doctrine of negligent assault and battery." Note (1919) 17 Mich. L. Rev. 705.
366 The fact that the battery results from an unlawful act is also of importance. If the unlawful act is malum in se, or a proximate cause of the battery, or accompanied by negligence, it has been held in a few states to be a sufficient basis for liability, and in Ohio any unlawful act resulting in injury is enough. In any event, the commission of an unlawful act is usually regarded as some evidence of negligence, to be considered with all the other circumstances by the jury in determining whether or not the requisite degree of recklessness is found." Hall, supra note 223, at 148-149.
tions, and tend to cloud the issue causing confusion and uncertainty in the law. This is another instance of "constructive intent," which is equivalent to saying that liability is based upon conduct rather than upon the mental state of the actor. \(^{365}\)

Realizing this, contributors to legal periodicals \(^{366}\) and modern texts, \(^{367}\) have repudiated the use of such fictions by the courts and adopting a realistic view of the matter, have accepted the criminally negligent battery as an established part of the law.

If one seeks an explanation of the source and development of the offense, he will do well to keep in mind the essential relationship between manslaughter and battery. Negligence as a basis of criminal liability appears first in the seventeenth century \(^{368}\) in the case of homicide. It appears that the negligent battery was a later development drawn from an analogy to the negligent manslaughter. \(^{369}\)

This relationship between the two crimes is suggested in the leading case of Commonwealth v. Hawkins, \(^{370}\) in which the defendant was accused of assault and battery with a dangerous weapon. At the trial in the Superior Court, the judge instructed that it was not necessary for the government to prove that the defendant intended to shoot anyone, that he would be guilty if he fired the pistol "in a grossly careless and negligent manner, or in a wanton and reckless manner, and by so doing wounded Mary A. Powers."

The appellate court found no error in the instruction. The rule is well established, said the court, that one who negligently

\(^{365}\) See the discussion, supra, pp. 34-41.

\(^{366}\) "We have found most of the automobile assault and battery cases following the historical development of battery in this country which started in 1858 with the Sloanaker case, by which, as in manslaughter, there may be liability for injury recklessly caused. This development of battery was virtually completed before the first automobile case was decided in 1912." Hall, supra note 223, at 157. See Tulin, cited supra note 146; Note (1942) 30 Ky L. J. 418.


\(^{368}\) See the discussion, supra, pp. 3-5.

\(^{369}\) See Professor Hall's discussion, supra, supra note 223, at 135-139.

dōes an act thiat results in the death of another is guilty of man-
slaughter, although he did not contemplate such a result. "If
Mary Poweir's had died the defendant would have been
guilty of manslaughter. As she survived the injury, the same
principle now requires a conviction of assault and battery." Ap-
parently, the court is drawing an analogy from the negligent
manslaughter and basing a conviction of assault and battery
upon criminal negligence.

Numerous cases use the manslaughter analogy or cite man-
slaughter cases in support of a conviction of negligent battery
An analogy from the negligent manslaughter is proper in
convictions of battery in cases where there was a direct, bodily
contact. But the analogy would not be proper, it is submitted,
where the killing resulted from a failure to act. The courts,
however, apparently, have failed to recognize this distinction
or have understood that in most negligent batteries the defend-
ant does affirmatively cause bodily contact, and, so, have em-
ployed the analogy.

A number of courts hold that where the facts would sustain
a conviction of negligent manslaughter the accused is guilty of
assault and battery if no death ensues on the theory that the offenses
are so related that a battery is included in the greater offense. Thus,
in State v. Sudderth, 184 N.C. 753, 114 S.E. 828 (1922), the court
approves the following language from another case:

"Where the facts of a case of homicide constitute the crime of
manslaughter, the same state of facts will make an assault if no
killing ensues."

This is a non sequitur. The two crimes are separate offenses;
neither is necessary to or contained in the other. State v. Thomas,
Such decisions fail to distinguish between an analogy to the negligent
manslaughter and a conclusion that an assault and battery is neces-
sarily included in that offense.

The distinction occurs because there can be no battery unless
there is a direct or indirect physical contact caused by the defendant.
However, in the case of the negligent manslaughter there may be
liability predicated upon a failure to act.

Thus, in State v. O'Brien, 32 N.J.L. 169 (1867), the defendant
was convicted of manslaughter for failing to perform his duty as a
switch tender in consequence whereof a tram ran off the track and a
passenger was killed. Certainly, if death had not ensued from his
negligence but only personal injury a charge of criminal assault and
battery could not have been sustained.

It would appear that a more logical analogy would have been
to murder, where negligence is sufficient to satisfy the requirement
of "malice." In such cases it has long been recognized that when the
courts speak of "implied malice" they disguise the fact that no
malice is actually required. Similarly, it can be shown in the battery
cases that, although the courts say an "intent to injure" is required,
they distort the law, since negligence is sufficient to satisfy the re-
quirement.
The use of this analogy has probably contributed a great deal to the fact that negligence in manslaughter and negligence in battery have developed along parallel lines and that they are identical in kind and in degree.

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