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Negligence: The Standard of Care Required of Physicians and Surgeons

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The civil rule, however, results in the presumption that the infant is not capable of exercising the same discretion as an adult or acting as a reasonably prudent man until he reaches majority.

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 knowledge of legal right and wrong 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.

Not all infants of the same age are capable of exercising the same degree of care or able to distinguish right from wrong in an equal degree. Arbitrary age limits are artificial and do not serve the purpose of justice. In civil cases it is recognized that chronological age is a poor standard in determining an infant’s capacity to be negligent and that it is far more just to consider the infant’s general characteristics, only one of which is age. If age limits are not conclusive in determining an infant’s capacity to be negligent in cases where only his tort liability is involved, a fortiori they should not be used in criminal cases where their use results in the unjust protection of the intelligent infant under seven years of age and the unjust punishment of the dull infant over fourteen. It would be better to leave the question of the infant’s accountability to the jury to decide in the light of what might fairly and reasonably be expected of an infant of the defendant’s age, intelligence, experience, and general capacity. This would make the tort and the criminal rule the same.

MARY LOUISE BARTON

NEGLIGENCE: THE STANDARD OF CARE REQUIRED OF PHYSICIANS AND SURGEONS

Not infrequently in the study of law, one finds situations in the field of negligence in which a different standard of care is employed to determine liability in civil and in criminal cases. It is the purpose of this note to compare the standards of care required of physicians and surgeons in the two fields. Do the courts, in the prosecution of a physician or surgeon or one assuming to act as such, judge the prisoner by the same objective standard that is used to determine his civil liability, or is a different standard used?

Tort liability of a physician is measured by the following standard: A physician or surgeon is required to exercise the degree of care ordinarily exercised by average members of the profession
in good standing practicing in the same or similar locality. This standard is wholly objective, giving no attention to the physician's state of mind, but requiring him to be as careful as his fellow physician would be under similar circumstances.

The cases, until the latter part of the nineteenth century, in which a physician was prosecuted for manslaughter resulting from gross negligence, reveal a striking departure from this objective standard. Thus in the case of Rice v. State, in which the defendant gave harsh steam baths and administered lobelia which caused the death of the patient, it was held error to refuse the following instruction:

"If the jury believe from the evidence that Rice in his treatment of Mrs. Keithley acted with good and honest intention, they will find him not guilty."

And in the case of State v. Schultz, the court held a proper instruction to be:

"To constitute manslaughter, the killing must have been the consequence of some unlawful act and if the prisoner acted with honest intentions and expectations of curing the deceased by his treatment, although death, unexpected by him was the consequence, he was not guilty of manslaughter and you must acquit him."

Commonwealth v. Thompson, an early Massachusetts case, although it tends toward objectivity, is similar to the previous cases in result. It holds that the defendant must be acquitted if he had honest intentions and expected recovery; but if the defendant had such knowledge or probable information of the fatal tendency of his prescription that it could be reasonably presumed by the jury that his act was the result of obstinate, willful rashness and not of honest intentions, he could be convicted of manslaughter.

In the light of these early cases it seems clearly apparent that the objective standard of the civil law was not used in determining criminal liability. In fact there seems to be no standard at all other than the subjective elements of good intentions and honest expectations. Bishop in his work on criminal law gives a rationalization of this subjective approach. He says that because it is commendable for one to attempt to cure another, this is a more humane doctrine.


3 Honnard v. People, 77 Ill. 481 (1875); State v. Schultz, 55 Iowa 628, 8 N. W. 469 (1881); Com. v. Thompson, 6 Mass. 134 (1809); Rice v. State, 3 Mo. 561 (1844).

4 8 Mo. 561 (1844).

5 55 Iowa 628, 8 N. W. 469 (1881).

6 6 Mass. 134 (1809).
No one in fact knows much of the science of medicine; therefore, no one ought be heard to say that some one else was ignorant or negligent in something about which he knows little.\(^*\)

From a very subjective viewpoint in the early cases, the courts have swung to an almost totally objective viewpoint. No longer do the good intentions and honest expectations of the physician serve as an adequate defense in a prosecution for homicide resulting from gross negligence.\(^*\)

In the case of **Hampton v. State**, the court holds that where the death of a person results from the criminal negligence of a physician, the latter is guilty of manslaughter and this notwithstanding that the physician administered with good intentions and did so with full expectations of recovery.

The court instructed in **Commonwealth v. Pierce**, that it was not necessary to show an evil intent. If the defendant caused the death by gross negligence he was guilty of manslaughter in the opinion of the court without regard to his intentions and expectations.

As is illustrated by the above cases, the criminal liability of a physician in modern times for unintentional death is predicated fundamentally upon criminal negligence. It becomes necessary therefore to determine what constitutes criminal negligence of a physician and by what standard it is measured?

Cases have held that criminal negligence exists where the physician or surgeon exhibits gross lack of competency, or gross inattention or criminal indifference to the patient's safety.\(^*\) This may arise from the physician's gross ignorance of the science of medicine or surgery and through his gross negligence in the use of his instruments and in the selection of his remedies.\(^*\)

In the cases which hold a physician criminally liable for gross negligence, the writer has found no mention of the standard by which this gross negligence is measured. In determining a physician's criminal liability do the courts use the standard of the average physician in good standing practicing in the same or similar locality or do they revert to the standard of the reasonably prudent man under the circumstances which is used to determine civil liability in ordinary negligence cases?

\(^*\)As paraphrased from quotation in State v. Schultz, 55 Iowa 628, 8 N. W. 469 (1881).


\(^*\)50 Fla. 55, 39 So. 421 (1905).


\(^*\)State v. Hardister, 38 Ark. 605, 42 Am. Rep. 5 (1882); Hampton v. State, 50 Fla. 55, 39 So. 421 (1905); State v. Lester, 127 Minn. 282, 149 N. W. 297 (1914).

\(^*\)Hampton v. State, 50 Fla. 55, 39 So. 421 (1905).
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.22

There were sound reasons which prompted the courts to make this exception to the general rule.

First, the reasonably prudent man standard does not adequately emphasize the professional capacity of the physician.

Secondly, it was decided that not only must physicians and surgeons be limited as a class for the purpose of setting a standard, but that the standard must be set by the conduct of the average members of the class in good standing for in no other manner could the standard be made sufficiently high.

Thirdly, it is recognized that cities offer a more profitable practice and more convenience than does the country. Because of this the best men in the profession are usually drawn to the city. To require the country doctor to measure up to a standard set by the city doctor would result in the imposition of a hardship on the country doctor. For this reason the locality in which the physician practices has a material bearing upon the standard of care which is required of him.23

If the professional capacity of the physician deserves emphasis in a civil action, why should it not deserve the same emphasis in a criminal prosecution? If it would be unfair to hold the city and the country doctor to the same standard in a civil action, why would it not be just as unfair to do so in a criminal prosecution?

It is submitted that there is no sound reason why one standard should be used to determine civil liability and another standard be used in determining criminal liability. It is also submitted that when the courts refer to gross negligence in a criminal prosecution, they refer to negligence as measured by the standard of an average physician in good standing practicing in the same or similar locality, and not negligence as measured by the standard of the reasonably prudent man under the circumstances.

Justice Holmes lends his support to this view by way of dictum in the case of Commonwealth v. Pierce, in which he seemingly implies that the standard is the same in both civil and criminal cases. He says:

"If a physician is not less liable for reckless conduct than other people, it is clear in the light of admitted principle and in the later Massachusetts cases, that the recklessness of the criminal no less than that of the civil law must be tested by what we have called the external standard."24

22 Supra note 1, see cases cited.
23 Note (1941) 29 Ky. L. J.
A number of courts have held that criminal negligence is largely a matter of degree left for the determination of the jury, such degree necessarily being higher than that required for ordinary negligence. If criminal negligence is only a higher degree of negligence, civil and criminal negligence being the same in kind and differing only in degree, some basis is established for saying that the standard for determining each should be the same.

By way of summary it can be said that the early criminal cases did not invoke the well established civil standard of care but used a subjective one. The later criminal cases have swung to an objective view and it is believed that the standard used in determining criminal negligence of a physician should be and is the same as that used to determine his ordinary negligence.

Thus a physician can be civilly liable, criminally liable, or both civilly and criminally liable for his negligent acts. The distinction is not in the standard of care by which negligence is measured in the two cases, but in the degree of carelessness which the act exhibits. To impose criminal liability, the degree of negligence must be greater than that required to impose civil liability, but the standard of care for determining when negligence occurs is the same in either case.

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