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Criminal Negligence—A Workable Definition

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that "in the light of all that occurred" it could not be doubted that it was effected. The only thing that occurred after the donor learned that the gift could not be immediately completed was that he nodded his head when asked if he wanted the bequest in his will. Also, as the court points out, he did not ask for the return of the key. He did absolutely nothing to constitute the attorney and the banker trustees. Some courts have declared that in cases of doubt the presumption is that the third person takes as the trustee of the donee,²¹ but others have reached the opposite conclusion.²² Such a presumption is not relied on in this case. It is questionable whether or not the donor ever had the intention that the attorney and the banker be trustees for the donor. If he still wanted to complete the gift in his lifetime, he probably thought that he could do it when it was possible to get the certificate out of the bank. If he no longer had that idea, he probably thought his will would take care of it.

It really seems that the court holds that a gift was made when there was not a completed delivery. It is, in effect, saying that all that is necessary for a gift *inter vivos* is a clear intention to make the gift and, when delivery is impossible, some positive act in that direction.

BETTIE GILBERT.

CRIMINAL NEGLIGENCE—A WORKABLE DEFINITION

Although the courts seem to be agreed that criminal negligence must be something more than the negligence necessary to impose civil liability for damages,¹ there is a great diversity of opinion as to what are the essential ingredients necessary to constitute criminal negligence. In the final analysis, the question is one which is vague and unsettled. It is our purpose in this note to attempt to derive a definition for criminal negligence which will be broad enough to be of use in the solution of criminal cases.

In the civil field, we find the question of negligence virtually settled. In *Palsgraf v. Long Island R. Co.*,² the court said that "negligence is the absence of care according to the circumstances." In *Young v. State*,³ we learn that "negligence is the failure to do what a man of ordinary care and prudence would do under the same or like circumstances. "These definitions have been universally accepted, and courts in civil cases have no difficulty in incorporating them into their instructions to the jury. However, since, as we have stated above, criminal negligence must be something more than ordinary negligence, we cannot successfully apply this accepted tort definition in criminal cases. Uniformity of decisions in our courts is highly desirable. Because of

²¹ In re *White's Estate*, 129 Wash. 544, 225 Pac. 415 (1924); *Kennedy v. Nelson*, 125 Neb. 185, 249 N. W. 546 (1933).

²² *Clapper v. Frederick*, 199 Pa. 609, 49 Atl. 218 (1901).

¹ *State v. Lester*, 127 Minn. 282, 149 N. W. 297 (1914); *State v. McComb*, 33 Wyo. 346, 239 Pac. 526, 41 A. L. R. 717 (1925).

² 248 N. Y. 339, 162 N. E. 99 (1928).

³ 120 Tex. Cr. Rep. 39, 47 S. W. (2d) 320 (1932).

this fact, we are faced with the need for a definition of criminal negligence which is broad enough to be susceptible of application in all cases.

The task of finding such a definition is a difficult one, because there has been so little written on this point. In the discussion of this subject, textbook writers seem to shy away from giving an actual definition; they are content to merely state the effects of criminal negligence. For the most direct attempts toward a definition, we must go to the cases. The attempts at definition seem to fall into four general classes. The first class defines criminal negligence as "culpable negligence."⁴ The second class calls criminal negligence "willful and wanton disregard."⁵ In the third division we find the courts saying that criminal negligence is synonymous with "reckless disregard."⁶ In the fourth class criminal negligence is said to be "gross negligence." In order for us to derive our definition, we must examine each of the above classes and draw a generalization.

In *People v. Waxman*,⁸ the court said, "To establish culpable negligence, the evidence must show that the defendant disregarded the consequences which might ensue from his act and indifference to the rights of others." In *Clark v. State*,⁹ the court defined culpable negligence as "the omission to do something which a reasonable, prudent, and honest man would do, or the doing of something which such a man would not do, under the circumstances surrounding the particular case." All the cases which say that criminal negligence is culpable negligence seem to follow these definitions. In short, the culpable negligence necessary to render one criminally liable seems to be tantamount to gross carelessness or recklessness incompatible with proper regard for human life.

Next we consider the group of cases which call criminal negligence a willful and wanton disregard. In *Ziman v. Whitley*,¹⁰ the court, in defining a wanton act, said: "A wanton act is one done in reckless disregard of the rights of others, evincing a reckless indifference to the consequences to life, or limb, or health, or property rights of an-

⁴ *People v. Seiler*, 57 Cal. App. 195, 207 Pac. 396 (1922); *State v. Irvine et al.*, 126 La. 434, 52 So. 567 (1910); *State v. Lester*, supra, n. 1; *Schultz v. State*, 89 Neb. 34, 130 N. W. 927 (1911); *Clark v. State*, 27 Okl. Cr. 11, 224 Pac. 738 (1924).

⁵ *Carbo v. State*, 4 Ga. App. 583, 62 S. E. 140 (1908); *People v. Adams*, 289 Ill. 339, 124 N. E. 575 (1919); *People v. Schwartz*, 293 Ill. 218, 131 N. E. 806 (1921); *Jones v. Commonwealth*, 213 Ky. 356, 281 S. W. 164 (1926); *People v. Campbell*, 237 Mich. 424, 212 N. W. 97 (1927).

⁶ *People v. Driggs*, 111 Cal. App. 42, 295 Pac. 51 (1931); *People v. Herkless*, 361 Ill. 32, 196 N. E. 829 (1935); *Schultz v. State*, supra, n. 4; *State v. Agnew*, 202 N. C. 755, 164 S. E. 578 (1932).

⁷ *State v. Goetz*, 83 Conn. 437, 76 Atl. 1000 (1910); *People v. Adams*, supra, n. 5; *Jones v. Commonwealth*, supra, n. 5.

⁸ 249 N. Y. S. 180 (1930). See also N. Y. Penal Law, Sec. 244, Subd. 2.

⁹ Supra, n. 4.

¹⁰ 110 Conn. 108, 147 Atl. 370 (1929).

other, and is more than negligence, more than gross negligence, and is such conduct as indicates a reckless disregard of the just rights or safety of others." In *People v. Adams*,²¹ the court said: "Wanton negligence implies a positive disregard of the rules of diligence and a reckless heedlessness of consequences." Willful negligence may be defined as "such conduct as evidences a reckless indifference to safety."²² So we may conclude that willful and wanton disregard is synonymous with the reckless disregard spoken of by the courts in our third class of cases.

Gross negligence is the "omission of that care which even inattentive and thoughtless men never fail to exercise."²³ The court in *People v. Adams*²⁴ tells us that "gross negligence borders on recklessness." In a civil case, *Craig v. McAtee*,²⁵ the court said that gross negligence does not establish a rule of liability varying appreciably from reckless disregard.

All of these definitions, while they are phrased differently, seem to have at least one point in common: that to constitute criminal negligence, an act or omission must be evidence of a reckless disregard of consequences which will result from such act or omission.

Realizing that a one sentence definition, to be of any use, must be very broad, in order to cover all circumstances, it is with a great deal of hesitation that we submit for criticism the following definition, because in our effort to make the definition broad we may have exceeded the limit and made it too broad. However, with all the definitions and explanations which have been discussed above in mind, we submit the following, which we consider to be a workable definition for criminal negligence: *Criminal Negligence is abnormally dangerous conduct of such a nature as to indicate under all the circumstances, a reckless disregard for human life and safety.* We believe that this definition embodies all of the characteristics of criminal negligence set out in the cases which we have considered.

The adoption of a definition similar to the one proposed, would be valuable not only in promoting a greater uniformity of decisions, but also in providing a standard part of the court's instructions to the jury. This would make for fewer reversals on appeal because of erroneous instructions.

PHILIP SCHIFF.

LIVING APART WITHOUT COHABITATION AS A GROUND FOR DIVORCE UNDER KENTUCKY LAW

Carroll's Kentucky Statutes¹ provides that, "Living apart without any cohabitation for five years next before application" is ground for divorce "... to both husband and wife". A similar provision is found in

²¹ *Supra*, n. 5.

²² *Ashton v. Blue River Power Co.*, 117 Neb. 661, 222 N. W. 42 (1928).

²³ *Goodman v. Simonds*, 20 How. 343, 15 L. Ed. 934 (1857).

²⁴ *Supra*, n. 5.

²⁵ 160 Wash. 337, 295 Pac. 146 (1931).