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THE DEVELOPMENT OF NEGLIGENCE AS A BASIS FOR LIABILITY IN CRIMINAL HOMICIDE CASES

By John L. Davis*

The criminal law of today would seem to consist of the rules applied by the social order to compel the individual to live in contact with his fellows with the minimum of friction. But at the outset of our discussion of the development of negligence as a basis for criminal liability, we are faced with an origin at a time in which social control was almost non-existent. The family stood all powerful and there was no central force as we know it today.1 Further, the individuals seem to have been essentially much simpler in their thought concepts. A child trips over a stool and immediately kicks it. This is a very infantile reaction, but is apparently the one which motivated our early Saxon and Jutish ancestors in their conceptions of liability. So if X killed Y, Y’s relatives killed X. This is simple, but more complicated situations present themselves. X accidentally killed Y. Still the blood feud must be satisfied. Vengeance must be had. The idea of revenge is the basis of all early liability whether in crime or tort.2 Nor was this limited to personal relations. The desire of retaliation is against the offending thing itself.3

Since revenge was the ultimate motive back of the penalties at the early law, it must be apparent that criminal liability would not depend on the intent or the negligence of the person doing the injury. The desire for revenge arose whenever the injury was done. Liability was founded on the act doing damage rather than on any subjective state of, or degree of care exercised by, the defendant. Reverting to the paragraph above, the stool did not intend to injure the boy, yet he kicked it. So when one of our ancestors was injured, he sought vengeance against the person or thing doing the injury because of the injury and not because of any concept of mens rea or degree of societal harm.


1 Holdsworth, History of English Law, 43.


3 Holmes, op. cit. supra note 2, at 34; 2 Pollock and Maitland, History of English Law, 474.
This idea was carried to an extent which seems almost ludicrous to us today. If two men were working on a tree and it fell and killed one of them, the tree was given to his kindred for them to wreak vengeance on.\(^4\) "If a man leaves his arms about and another knocks them over so that they kill or hurt a man, the owner is liable; if a man lends another his horse and ill befalls the borrower, the lender is liable; if a man asks another to accompany him, and the other is attacked by his enemies while accompanying him, the man who made the request is liable. It is clear that such liability is founded not upon negligence but upon the act doing damage.\(^5\)

Progress is impossible in a community which allows the blood feud. Limitation is necessary. This presented one of the largest problems of the early Saxon rulers. Perhaps not all of our ancestors would enjoy the trials and tribulations attendant upon the proper management of a feud, or perhaps there were some sordid souls who would prefer cash on hand to the doubtful pleasure of inserting a spear into the vitals of one who had fallen out of a tree on his third cousin, killing him. At any rate vengeance could be had and social standing maintained by the acceptance of a sum certain, the price of his relative, his\(^6\) wer. The problem of the early kings was to get all to accept this price rather than to wage private war. "The\(^6\) wer was at first simply an alternative to the feud. But when we first get evidence as to the Anglo-Saxon law, this stage has passed. Pecuniary compensation is, as a rule, obligatory." The rising power of the central authority has been able to force on the relatives of the deceased the bribe necessary to buy them off.

Most of the above discussion must be based largely on supposition. These ideas had received form before the advent of written history of the peoples of whom we are speaking. At any rate when we first begin to get any documentary records, "the system is dominated by the ideas of the blood feud and the\(^6\) bot and\(^6\) wer. When the main object of the law is to suppress the blood feud by securing compensation to the injured person or his kin, it is to the feelings of the injured person or his kin that attention will be directed rather than to the conduct of the

\(^{4}\) Holmes, \textit{op. cit. supra} note 2, at 19.
\(^{5}\) 2 Holdsworth, \textit{op. cit. supra} note 1, at 52.
\(^{6}\) Id. at 45.
It is the development of this idea that dominated the field of criminal law up to the twelfth century. "Qui peccat inscienter, scienter emendet." A complicated system of tariffs was worked out whereby the *wer* and *wite* varied according to the rank and station of the man injured or the amount of harm inflicted. The defendant was required to swear that he had done nothing whereby the person slain was "nearer to death or further from life." And if he was unable to so swear, he was required to pay the relatives of the deceased the customary *wer*. However where the person was purely passive, no liability was imputed. There was no act which brought the deceased nearer to death.

It is true that in this period there is some hint of negligence or intent as a basis for criminal liability. "It is moreover decreed," run the laws of Alfred, "if any man have a spear over his shoulder and any man stake himself upon it, that he shall pay the *wer* without the *wite*. If he be accused of wilfulness in the deed, let him clear himself according to the *wite*, and with that let the *wite* abate." "And let this be, if the point be three fingers higher than the hindmost part of the shaft, be that without danger." We cannot read into this doom a requirement of an intent or negligence as a uniform basis for liability. The defendant remained liable to the kin of the deceased for the *wer* despite any lack of intent or negligence. The only thing that was remitted was the payment due to the central authority. This is apparently the only thing which it had the power to give back, and the king could make the remittitur dependant on any condition that he saw fit.

The element of absolute liability for an act which causes the death of another is well illustrated by the idea that if a thing or animal is the cause of the death, that thing or animal must be given up; and it is only when the owner declines to give it up

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17 Id. at 50.
19 *Leg. Henr.* 88, 6; 90, 11.
20 "Payment due to the king for the killing.
21 2 Pollock and Maitland, *op. cit. supra* note 3, at 456 ff.
22 2 Holdsworth, *op. cit. supra* note 1, at 52.
23 Ibid.
24 Sayre, *op. cit.* note 8, at 982.
25 2 Holdsworth, *op. cit. note* 1, at 51, n. 8.
that he can be made liable.\textsuperscript{16} This was done so that the relatives of the deceased might take vengeance on the offending thing. Very early the owner of the thing causing the injury was subject to the blood feud. This blood feud came to be satisfied by the payment of the customary \textit{wer}, and later by the delivery of the \textit{res} itself.\textsuperscript{17} This idea was transferred to the later law and persisted until as late as 1846. The thing was forfeited to the king as deodand to be devoted by him to pious uses.\textsuperscript{18} This forfeiture depended not on any intent or negligence on the part of the defendant but on the fact that the thing itself caused the injury.

Perhaps it will be well if we pause at this point for a brief summary. The early basis for criminal liability was not negligence or intent. The theory of liability was based on vengeance and this was demanded whatever the state of mind of the party doing the injury. While the blood feud was soon dispensed with, this principle of absolute liability was carried on in the system of the \textit{wer} and \textit{wite}. Perhaps one of the chief reasons for this was the fact that the law made little difference between crime and tort.\textsuperscript{19} The compensation was made to the injured party regardless of the nature of the act causing the injury. However somewhat of a relaxation of these principles of absolute liability has been noted above. The public element of the man-price, the \textit{wite}, apparently in specific instances had been remitted by royal order where the act was not intentional or negligent. This is interesting as pointing the way to future development which however did not come about until a much later time.

Considerable changes were accomplished in the criminal law of the twelfth century.\textsuperscript{20} However these changes were largely in procedure and had little effect on the bases for criminal liability. Prosecution of criminals was largely at this time by way of appeal of felony.\textsuperscript{21} If the appellee was found guilty he suf-

\begin{itemize}
\item \textsuperscript{16}Id. at 46; Holmes, \textit{op. cit. supra} note 2, at 22-23.
\item \textsuperscript{17}Wigmore, \textit{Responsibility for Tortious Acts} (1894) 7 Harv. L. Rev. 315, 328.
\item \textsuperscript{18}2 Pollock and Maitland, \textit{op. cit. supra} note 3, at 473. For an application of this doctrine at a little later time see 24 Selden Soc. 72, 89.
\item \textsuperscript{19}2 Holdsworth, \textit{op. cit. supra} note 1, at 43.
\item \textsuperscript{20}2 Pollock and Maitland, \textit{op. cit. supra} note 3, at 458.
\item \textsuperscript{21}Appeal—a formal accusation made by one private person against another of having committed some heinous crime. 1 Bouv. Law Dict. 208.
\end{itemize}
ferred the same punishment as if tried on an indictment.\textsuperscript{22} Punishment was by the central authority.\textsuperscript{23} The law of the \textit{wer} has perished since it is no longer applicable if there is a felony, since punishment for felony is solely by the king.\textsuperscript{24} Side by side with the procedure by appeal, there is growing up the procedure by indictment which is to supplant the earlier mode.\textsuperscript{25} Perhaps one of the greatest difference between the indictment and the appeal lay in this, that a pardon could be granted in the former and not in the latter.\textsuperscript{26} The reason is probably that the proceeding by appeal bears a close analogy to the proceeding to recover the \textit{wer} which could not be remitted by the king. It is a private prosecution and not a public one.

However the law is but little removed from the state wherein the \textit{wer} and \textit{wite} were the ordinary remedies for homicide.\textsuperscript{27} It is too much to expect that the principles of liability should have changed in any material way. In the field of criminal homicide, certain types of killings had become to be absolutely justifiable.\textsuperscript{28} All others subjected the offender to criminal liability.\textsuperscript{29} Perhaps a reason lay in the procedural difficulties. "The modern judge with a convicted man-slayer before him has beneath his fingers a whole gamut of punishment ranging from lifelong penal servitude to a trifling fine."\textsuperscript{30} "The only courses open to it (the common law of this time) were (1) that of acquitting the man-slayer of all guilt, (2) that of granting him a pardon, and (3) that of sending him to the gallows, for it knew no other punishment for homicide."\textsuperscript{31} For negligence or intent to become a separate basis for criminal liability, it is necessary that there be a division of homicide into separate classifications, one classification basing liability on intent and the other on negligence. However there need be no differentiation if all must be punished alike. This was the case at the early common law. Bracton

\textsuperscript{22}4 Bl. Comm. 316.
\textsuperscript{23}2 Holdsworth, op. cit. note 1, at 256-7.
\textsuperscript{24}2 Pollock and Maitland, op. cit. note 3, at 483.
\textsuperscript{25}2 Holdsworth, op. cit. note 1, at 256-7.
\textsuperscript{26}4 Bl. Comm. 316.
\textsuperscript{27}3 Holdsworth, op. cit. note 1, at 311.
\textsuperscript{28}Killing in execution of a lawful sentence of the court or in the arrest of an outlaw or a manifest thief. 2 Holdsworth, op. cit. note 1, at 368.
\textsuperscript{29}2 Pollock and Maitland, op. cit. note 3, at 470–2.
\textsuperscript{30}Id. at 475.
\textsuperscript{31}8 Selden Soc. 235.
attempted a division of the types of homicide, but his work on this matter was practically a restatement of the work of a canon lawyer, Bernard of Pavia, and was not representative of the law of his day.\(^8\) Indeed the law of England was not yet ready to receive the distinctions made by Bracton since it had no large choice of punishments for criminal homicide.

Besides the procedural difficulties, the influence of the Roman and canon law made against liability based on negligence. The church laid considerable stress on the mental element in sin.\(^33\) The Penitential Books taught that punishment should be dependant on moral guilt, and the very essence of moral guilt is a mental element.\(^34\) "Henceforth the criminal law of England, developing in the general direction of moral blameworthiness, begins to insist upon a \textit{mens rea} as an essential of criminality."\(^35\) Although the early common law never made the intent punishable without the act,\(^36\) it did feel that the essence of the more serious crimes lay in the intent with which the act was done.\(^37\) The general rule came to be that no crime could be imputed to a man without a \textit{mens rea}.\(^38\) So with the increasing weight given to the mental element in crime, it is not surprising that we have found that negligence as a basis for criminal liability found little place in the minds of the judges.

So far then, as the bases for criminal liability are concerned, it is apparent that negligence could not, per se, be one. The killing of a man was a felony regardless of the nature of the act unless the act fell within one of the few narrow categories as comprised the execution of a lawful sentence.\(^39\) Even in the cases where the killing was done \textit{se defendendo} or \textit{per infortuniam}, liability attached.\(^40\) However the offender could get a pardon from the king.\(^41\) The procedure by way of pardon was

\(^8\) Sayre, \textit{op. cit.} note 8, at 985.
\(^2\) Pollock and Maitland, \textit{op. cit. supra} note 3, at 476.
\(^4\) Sayre, \textit{op. cit. supra} note 8, at 988.
\(^3\) \textit{Ibid.}
\(^32\) Id. at 991-2; 2 Pollock and Maitland, \textit{op. cit. supra} note 3, at 476, n. 8.
\(^3\) Holdsworth, \textit{op. cit. supra} note 1, at 373.
\(^33\) \textit{Ibid.}
\(^34\) Pollock and Maitland, \textit{op. cit. supra} note 3, at 472.
\(^35\) \textit{Ibid.}
\(^36\) Id. at 470.
\(^37\) Id. at 479; 3 Holdsworth, \textit{op. cit. supra} note 1, at 312; Sayre, \textit{op. cit. supra} note 8, at 994; 1 Selden Soc. pl. 114, 188. See, however, historical discussion in Reg. v. Mawgridge, Kelyng 120, 84 Eng. Rep. 1107 (1708) which says that he that killed an Englishman \textit{per infortuniam} was never in danger of death since the act was not a felony.
regulated by the Statute of Gloucester. The pardons at this time were not of course but they became so at a later age. Still later the jurors were allowed to return a verdict of not guilty instead of a special verdict of misadventure or self-defense.

By the time the seventeenth century opened, murder was a felony, but it depended on malice aforethought. Where the homicide was committed in the exercise of an unlawful act, it was also murder but the intent was implied or imputed from the unlawful act. So where a man struck at one and killed another, he was guilty of murder. "This malice is so odious in law as though it be intended against one, it shall be extended against the other." A division of homicide into murder and manslaughter had been accomplished. The latter was distinguished from the former in that a killing in a sudden affray (chance-medley) was manslaughter. Homicide in self-defense was not punishable, although we find a survival of the old absolute liability discussed above in that the goods and chattels of the defendant were forfeited although the act was done se defendo. Homicide by misadventure, "where a man does an act that is not unlawful but which without any evil intent causes the death of another," was not felonious but it also entailed a forfeiture.

After all, "crime in general always has depended and always will depend upon deep-lying psychological concepts." Considerable development will as yet be necessary before any general doctrine of the application of criminal punishments for a non-compliance with an external standard will be evolved. It had not arisen at this time. The concept of negligence as a general

Under this rule only the killing of a Norman was an offense against the crown.

\[6^{th} Edw. I, c. 9 (1278); 3 Holdsworth, op. cit. supra note 1, at 313; Coke, Third Inst. 56.
\[2 Pollock and Maitland, op. cit. supra note 3, at 481.
\[Id. at n. 3.
\[1 Hale, Pleas of the Crown, 449; Coke, Third Inst. 47.
\[1 Hale, op. cit. at 465; Coke, op. cit. 56.
\[Coke, op. cit. at 51.
\[Id. at 57.
\[Id. at 56.
\[Id.
\[1 Hale, op. cit. supra note 45, at 39.
\[Sayre, op. cit. supra note 8, at 989.
\[3 Holdsworth, op. cit. supra note 1, at 374.

K. L. J.–5
basis for criminal liability was unborn; yet we may say that such a concept was in its gestation period. There are isolated instances of liability without intent. The ethico-psychological concepts of the judges could not allow to go unpunished certain acts which today would be characterized as negligent. They felt in a dim way that liability should attach. It is to these cases that we must now turn our attention.

However, it is believed that the judges who imposed liability for acts which today we would characterize as negligent did not feel that they were establishing any new standard of liability. The doctrine of the time, and we may say the universal doctrine, was that there was no criminal responsibility without a *mens rea*. "As to criminal proceedings, if the act that is committed be simply casual and *per infortunium*, regularly that act which were it done *exanimi intentione*, were punishable with death, is not by the laws of England to undergo that punishment for it is the will and intention that regularly is required as well as the act and event, to make the offense capital." And again Hale says: "The consent of the will is that, which renders human actions either commendable or culpable; as where there is no law, there is no transgression, so regularly, where there is no will to commit an offense, there can be no transgression, or just reason for the punishment of crimes or offenses." If then a *mens rea* was required, and criminal liability imposed in the type of cases which we are discussing, the only conclusion is that negligence as we would call it was taken to be a type of *mens rea*.

With this in mind, let us take up a few cases. *Hull's Case* involved an indictment for murder. The defendant was a laborer working on a building situated about thirty feet from a highway. He was sent up to the top for a piece of timber. He called out, "Stand clear", and threw over the timber which struck a workman and killed him. It was held that this was misadventure since the defendant did nothing but what is usual with workmen to do. The case also contains dictum to the effect that if the defendant had done the act in London then the death would have been manslaughter despite the use of the warning. However Foster doubts that this statement is entirely correct. If

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65 1 Hale, *op. cit. supra* note 45, at 38.

66 *Id.* at 14.


the act was done early in the morning when few people were stirring, he believes that the death should be excused even though the accident happened in London. In speaking of this case, another author says, "For though the act itself might breed danger, yet the degree of caution requisite (is) only in proportion to the apparent necessity for it." In other words, what is required is that a man act with reasonable prudence.

In another case reported by Hale, a set his servant to watch his corn at night to prevent deer from destroying it. He ordered the servant to shoot anything rushing into the field, for it would be deer. A then went into another part of the field and rushed into the corn. The servant shot at the noise and killed the master. The court held that it was homicide per infortunium. The death was caused by the master's direction and by his own act. However the court says that if it had been a stranger that had been killed it might amount to manslaughter for want of due diligence and better inspection. However, if the servant were lacking in caution, it is difficult to see how the command of the master could supply it.

In Sir John Chichester's Case the defendant was playing at foils with his servant and the chafe of the defendant's scabbard fell off unknown to him upon a thrust, so that the rapier went into his man's belly and killed him. It was held to be manslaughter. However the reported facts do not present the true picture. In fact the defendant was using a sword in a scabbard and the servant only a bed-staff. The opinion of the court gives no reason for the holding. Foster puts it on a lack of caution which common prudence would have suggested. Hale however says that the act of playing at foils was unlawful and that this would explain the conviction. However it would seem that if this had been the case the defendant should have been convicted for murder.

The liability in these cases seems to be based on what we know today as negligence, that is, the lack of the caution that is usual with the ordinary man in that situation to take, or as we define it, failure to take the care that a reasonably prudent man

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1 East, Pleas of the Crown (1803) 262.
2 Hale, op. cit. supra note 45, at 40.
3 East, op. cit. note 59, at 266.
5 Foster, op. cit. supra note 59, at 260.
would take under the same or similar circumstances. However in the law at this time, there was another very similar type of liability. Perhaps an example will serve to illustrate what we mean. "A person driving a cart or other carriage happeneth to kill. If he saw or had any timely notice of the mischief likely to ensue and yet drove on, it will be murder for it was wilfully done . . . If he might have seen the danger, but did not look before him, it will be manslaughter for want of due circumspection. But if the accident happened in such circumstances that no want of due care will be imputed to the driver, it will be accidental death and the driver will be excused."

In this respect another author says: "Neither shall he be adjudged guilty of a less crime (than murder) who killed another in doing such a wilful act as shews him to be as dangerous as a wild beast and an enemy of mankind in general; as by going deliberately with a horse used to strike, or discharging a gun among a multitude of people or throwing a great stone or piece of timber from a house into a street through which he knows many are passing; and it is no excuse that he intended no harm to anyone in particular or that he meant to do it only for sport or to frighten people."

It must be apparent to all that this is more than mere negligence, although it is probably one of the roots from which liability for criminal negligence grew. In the first place there is a difference in punishment. The one is guilty of murder, the other, of manslaughter. As has been said above, negligence is the failure to use the care which a reasonably prudent man would use under the same or similar circumstances. In the type of crime which we have just discussed, there is more than a failure to use due care; there is an element of wilful wrongdoing. The crime involves a reckless and wanton disregard for human life. That reckless and wanton misconduct should not be considered the same as negligence is indicated by the modern rule that in the law of torts, contributory negligence is no defense to a claim for injury caused by wilful or wanton misconduct.

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64 Id. at 263. See also 1 Hale, op. cit. supra note 45, at 476; 1 East, op. cit. supra note 59, at 263.
66 1 Hawkins, Pleas of the Crown, 86 (8th ed. 1824), Sec. 12.
67 Snell v. Denncott, 161 Ala. 259, 49 So. 895 (1910); Zinc v. Foss, 221 Mass. 73, 108 N. E. 906 (1910). See also Fuller v. Ill. Cent. R. Co.,
It will be well at this point to pause to lay down the definition of negligence as the term is used in this paper. Negligence is the failure to use that care which the reasonably prudent man would use under the same or similar circumstances. This is the proper use of the word negligence. As we have shown above, negligence is not reckless and wanton misconduct. Nor are we able to define more than one degree of negligence. While the triple standard of care is used in many states, it is submitted that it is illogical. The ordinary definition runs something like this, "Gross negligence is the failure to exercise slight care." When called on to define slight care, the courts answer, "Slight care is that care which a person fails to exercise when he is guilty of gross negligence."

As has been said above, it is not believed that the judges of this time thought that they were establishing any new basis for criminal liability. On the contrary, they seem to have regarded negligence as a type of 

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Rampton's Case.

Here the defendant was indicted for manslaughter. He found a pistol in the street and tried it with a rammer to see whether or not it was loaded. Coming to the conclusion that it was not, the defendant pointed the pistol at his wife in sport, and it went off, killing her. It was held that the defendant was guilty of manslaughter. Foster thinks that this judgment was erroneous. He believed that the defendant used a reasonable precaution, what was usual and ordinary in like cases. This he considers to be sufficient, "for the law in these cases doth not require the utmost caution to be used." He then gives the second of our two cases. A man took a gun to church but discharged it before he got there. He left the gun at the door and a friend borrowed it and loaded it. He then put it back without telling the defendant. The defendant took up the gun after he brought it home, pointed it in the direction of his wife, touched the trigger, and the gun went off, killing her. The court was of the opinion that the defendant had reasonable grounds for believing that the gun was not loaded and directed the jury that if they

100 Miss. 705, 55 So. 783 (1911), where the court spoke of contributory negligence as being no defense to an action involving reckless misconduct.

were of the same opinion, they should acquit him. He was acquitted.

In both of these cases it is apparent that the mental state was the same. In both the defendant believed that the gun was not loaded, and was apparently attempting some uncouth pleasantry. While we may not agree with the finding of fact of the court in the second case, it must be apparent that the difference is in the degree of care used and not in any mental state which would have subjected the defendant to an ecclesiastical punishment in an earlier time. The whole ground for logical distinction is that in one case the defendant was living up to an external standard of care while in the other he was not.

After the establishment of negligence as a basis for criminal liability as represented by the cases above, little authority on the question appears in the books, roughly during the eighteenth century. That such cases must have arisen cannot be doubted, but they are not found in the published reports. However after 1800 there is a good deal of law on the matter. We may safely say that the prevailing English rule after this date is represented by the statement of Halsbury: "A person on whom the law imposes any duty or who has taken upon himself any duty tending to the preservation of life and who grossly neglects to perform that duty or performs it with gross negligence and thereby causes the death of another person is guilty of manslaughter." 70

It must be noted that under this rule liability is postulated on gross negligence. This apparently represents the prevailing English rule. In Regina v. Finney 71 the court in summing up to the jury told them that, "To render a person liable for neglect of duty there must be such a degree of culpability as to amount to gross negligence on his part." Regina v. Noakes 72 indicates that a greater degree of negligence is required to convict of crime than for civil liability. This is still the modern rule. As to reckless driving the court in Tinline v. White Cross Insurance Association, Ltd. 73 said, "The crime of manslaughter in a case like this consists in driving a motor car with gross or reckless
THE foregoing discussion indicates that a major problem to be faced is this: what is the development from the standard of care, "what is usual and ordinary in such cases," to the standard of gross negligence. The failure to use the care usual in a given situation is not the same as gross negligence in all cases. Failure to take slight care (gross negligence) differs from failure to take ordinary care (ordinary negligence under the triple standard) which is apparently the degree of care indicated by Foster. Apparently the explanation is that at one point a court considered that the early standard of care and gross negligence were one and the same thing. Perhaps the court looked at the cases based on reckless misconduct and failed to note that there was a distinction between those and the ones applying the ordinary standard of care. Probably the reason is that the court was unable to free itself from the idea of a _mens rea_. At any rate Halsbury cites the statement of Foster with approval. Another case approaches the early standard. In *Bigmaidon's Case* the deceased was killed by a falling barrel. It was the contention of the crown that the defendant was negligent in the mode in which he slung the cask. Parke, J. told the jury that, "... if you think that the mode which the prisoner used was reasonably sufficient, you cannot convict him." This case is cited by Halsbury as supporting the statement of Foster. The instruction was given at a time when the court was applying the standard of gross negligence and it is apparent that the court did not consider that it was making new law.

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"1 Levin 180, 168 Eng. Rep. 1064 (1833)."
In spite of the requirement of the English court of gross negligence, this rule has not been universally followed in the colonies. In the case of *Rex v. Murphy* the court expressly repudiates the statement of Halsbury give above. The court then goes on to say that the question for the jury was: "Would a reasonably careful milkman, reasonably sober, have done what this man did?" The reason for the court repudiating the standard of Halsbury is interesting in the light of what we have said above as to our inability to define more than one degree of negligence. "Every judge has endeavored to find out a clear crisp definition that will assist judges like myself in instructing jurors, and every judge, had, I think, failed. And I think that the most conspicuous failure of all is that given in the close of the book from which Mr. Johnston (counsel for the prisoner) has quoted—Lord Halsbury's Laws of England, Volume 9, page 285. The principles are . . . in my experience entirely incapable of application." 

In the case of *McCarthy v. The King* the court held the following instruction correct: "It is quite necessary and quite proper that any person who drives a vehicle of that kind (a motor car) must use care to see that he does not injure any person else, and that if through want of care on his part—that is, reasonable care, the care that an ordinary reasonably prudent man would exercise—i.e., injury or death ensues to another person, then in law—and I am so charging you—he is criminally responsible." There was a statute in the case which read as follows: "Every one who has in his charge or under his control anything whatever whether animate or inanimate, or who effects, makes, or maintains anything whatever, which in the absence of precaution of care, may endanger human life, is under a legal duty to take reasonable care to avoid such danger and is criminally responsible for the consequences of omitting without lawful excuse, to perform such duty."

The court placed the decision squarely on the statute, but it is interesting to note that Brodeur, J. did not feel that he was without common law authority to support the decision. It is

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72 *Rex v. Murphy*, cited supra note 78, at 15, 16.
73 59 D. L. R. 206 (1921).
74 Sec. 247 of the Canadian Criminal Code.
also interesting to note the opinion of Sedgewick, J. in Union Colliery Co. v. The Queen\cite{83} as to this section\cite{84} which is as follows: "This article I take to be a mere statutory statement of the common law, neither abridging or enlarging it in any respect." This holding is cited with approval by Duff, J. in the instant case.\cite{85}

These cases are interesting as pointing out the fact that there has been a movement in the colonies away from the nineteenth century English standard of care in criminal negligence cases. The reason for the decision is indicated by Anglin, J. in the Canadian case:\cite{86} "It would be most unfortunate if anything should be said or done in this court to countenance the idea that a motor car may be driven with immunity from criminal responsibility if reasonable precautions are not taken against and reasonable care be not used to avoid, danger to human life." It would seem that, according to the rationale of the case, in our complex state of society, where there are so many instrumentalities which if not carefully used will cause death, the threat of civil liability is not enough to act as a deterrent, and that the sanctions of society must be imposed on those who do not use reasonable care in order that the citizens of the state may be reasonably free from bodily harm at the hands of its careless individuals. However this case was later overruled by Rex v. Greisman\cite{87} wherein the court returned to the standard of gross negligence of reckless misconduct.

Turning now to the American authorities we are struck at the outset with the conflict indicated by the English and Colonial cases discussed above between the mental element and the external standard as applied to criminal negligence. The common law came to accept gross negligence as a substitute for intent. Indeed reckless and wanton misconduct, as gross negligence was defined, is a species of intent. This tradition was carried over into our jurisprudence.\cite{88} As was said by the court in State v. Custer:\cite{89}

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\cite{83} 31 Can. Sup. Ct. 81 (1900).
\cite{84} Then Sec. 213.
\cite{86} Rex. v. Murphy, cited supra note 30, at 208.
\cite{88} Id. at 209.
\cite{87}[1926] 4 D. L. R. 738.
\cite{89} Commonwealth v. Thompson, 6 Mass. 434 (1809); Robertson v. State, 2 Lea 259 (Tenn. 1879); Crystal v. Commonwealth, 72 Ky. 669 (1873); York v. Commonwealth, 82 Ky. 360 (1884).
\cite{88} 129 Kan. 381, 282 Pac. 1071, 67 A. L. R. 909, 916 (1929).
\end{flushright}
The first edition of Wharton on Homicide was published January 1, 1855. Chapter VII relates to homicide by negligence. The second division of the chapter relates to negligence of persons riding or driving, which the author considers under two heads, speed and caution. The English cases are reviewed, and East's Pleas of the Crown was cited and quoted; but the chapter contains nothing to indicate that the English common law relating to homicide by negligence had been displaced by an American common law governing the subject. The requirement of gross negligence is probably followed by the majority of American jurisdictions today.

It would seem that the refusal of many courts to base criminal liability simply on mere negligence lies in their requirement of a mental element in crime, an intent to commit a crime as distinguished from a mere error in judgment. As was said by the court in State v. Young: "But our law is so humane that no man will be adjudged to be a criminal who merely errs in judgment in a matter about which there is room for some honest difference of opinion." The court then goes on to require a reckless disregard of the probable consequences so as to imply a wilful wrong. This is merely an application of the universal rule that reckless and wanton misconduct is sufficient for criminal liability. But if we are to allow criminal liability to be postulated on negligence at all, it is apparent that the intentional

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\( ^{90} \) In Ohio there are no common law crimes. For conviction there must be violation of a statute. Manslaughter is defined: "That if any person shall unlawfully kill another without malice . . ., or unintentionally, while the slayer is in the commission of some unlawful act, every such person shall be deemed guilty of manslaughter . . ." Under this statute negligence, even gross negligence is held not to be such an unlawful act. It is necessary to have an act prohibited by a state statute. Johnson v. State, 66 Ohio St. 59, 63 N. E. 607 (1902); State v. O'Mara, 105 Ohio St. 94, 136 N. E. 885 (1922); and Steele v. State, 121 Ohio St. 332, 168 N. E. 846 (1929). Note however that the same rule did not apply in the Federal courts where there were no common law crimes. U. S. v. Hudson & Goodwin, 7 Cranch 32, 3 L. Ed. 259 (1812). In U. S. v. Meager, 37 Fed. 875 (1888) under a statute substantially like the Ohio statute, manslaughter was held to include a negligent killing. However the modern statute specifically includes negligence. 18 U. S. C. A., Sec. 453.

\( ^{91} \) Clark and Marshall on Crimes, Sec. 264a; Wharton on Homicide (3rd ed., 1907) 681; People v. Adams, 259 Ill. 339, 124 N. E. 675 (1919); State v. Young, 56 Atl. 471 (N. J., 1903); State v. Campbell, 82 Conn. 671, 74 Atl. 927 (1910).


element is lacking. Whether ordinary negligence or gross negligence is required to convict, the fact that the defendant makes an error in judgment will not relieve him of punishment. As was said by Holmes, J. in *Ocean Steamship Navigation Co. v. Aitken*, "The standard of conduct whether left to the jury or laid down by the court is an external standard and takes no account of the personal equation of the man concerned."

Criminal liability based on negligence must seek its justification in the establishment of an external standard.

"So far as civil liability is concerned, at least, it is very clear that what we have called the external standard would be applied and that if a man's conduct is such as would be reckless in a man of ordinary prudence, it is reckless in him. Unless he can bring himself within some broadly defined exception to the general rule, the law deliberately leaves his idiosyncrasies out of account, and peremptorily assumes that he had as much capacity to judge and to foresee the consequences as a man of ordinary prudence would have in the same situation.

"If this be the rule adopted in regard to the redistribution of losses which sound policy allows to rest where they fall, in the absence of a clear reason to the contrary, there would seem to be at least equal reason for adopting it in the criminal law which has for its immediate object and task to establish a general standard or at least general negative limits on conduct for the community, in the interest of the safety of all."

Although the generally accepted standard, gross negligence, was never seriously questioned by the majority of American jurisdictions, nevertheless, certain states by statute or decision adopted the principle embodied in the quotation of Mr. Justice Holmes above. The test required by the Iowa court in an early case, is only "such care as a reasonably prudent man should and ought to use under like circumstances." A similar rule was expressed in *Belke v. People* wherein the court said, "The law casts upon him the legal duty of observing such care and caution as is exercised by reasonable and prudent men under like circumstances." Also there is a line of cases in South

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4 "196 U. S. 589 (1904)."
5 "Holmes, J. in Commonwealth v. Pierce, 138 Mass. 165 (1884)."
6 "State v. Hardie, 47 Iowa 647 (1878)."
7 "125 Ill. 584, 17 N. W. 744 (1888)."
8 "See also Lee v. State, 41 Tenn. 62 (1860). Note however that this type of instruction was later limited in Iowa to cases where the use of a dangerous instrumentality was involved. See State v. Warner, 157 Iowa, 124, 137 N. W. 566 (1912). Where a non-dangerous instrumentality is involved the traditional rule as to the standard of care is followed. State v. Clark, 196 Iowa 1139, 196 N. W. 34 (1923), and State v. Richardson, 240 N. W. 659 (Iowa, 1932). See also People v. Marconi, 118 Cal. App. 693, 5 Pac. (2d) 974 (1931)."
Carolina which hold that only ordinary negligence is necessary to convict. The first of these is *State v. Gilliam*\(^9\) wherein the court approved a charge to the jury in part as follows: "Then the question is, was that death occasioned by the carelessness and negligence of the party who was handling that weapon or implement as to inflict a wound that caused death? Negligence is the want of ordinary care. Carelessness is also the want of ordinary care."\(^{100}\)

In Missouri the matter is governed by the following statute: "Every other killing of a human being by the act, procurement, or culpable negligence of another which would be manslaughter at the common law, and which is not excusable or justifiable, or is not declared in this chapter to be manslaughter in some other degree, shall be deemed manslaughter in the fourth degree." Under this statute, culpable negligence was defined in *State v. Emery*\(^{101}\) as, "The omission to do something which a reasonably prudent, and honest man would do or doing something which such a man would not do under all the circumstances of the case."\(^{102}\)

However this definition was expressly repudiated in *State v. Millin*\(^{103}\) where the court declared that the definition of culpable negligence as approved by the cases above was only the definition of the civil standard and said: \(^{104}\) "Before a person may be convicted of manslaughter by culpable negligence under our statute, not only must death have ensued from a negligent act or omission of such person, but there must be facts and circumstances in evidence tending to prove that such person was actuated at the time by a reckless disregard of the consequences of his act, from which the jury may reasonably infer the criminal intent so essential to guilt in every lawful conviction for

\(^9\) 66 S. C. 419, 45 S. E. 6 (1903).
\(^{100}\) This holding was approved in *State v. Revels*, 85 S. C. 213, 68 S. E. 523 (1910); *State v. McCalla*, 85 S. E. 720 (S. C., 1915); and *State v. Quick*, 167 S. E. 191 (S. C., 1932). *Cf.* however *State v. Davis*, 128 S. C. 265, 122 S. E. 770 (1924), where the court held that in every circumstance, mere negligence will not constitute manslaughter.
\(^{101}\) 78 Mo. 77 (1883).
\(^{102}\) This definition was followed in *State v. Horner*, 266 Mo. 109, 180 S. W. 873 (1915); *State v. Coulter*, 204 S. W. 5 (Mo., 1918); conversely in *State v. Weisman*, 256 S. W. 740 (Mo., 1923); and also in *State v. Pauly*, 267 S. W. 799 (Mo., 1924).
\(^{103}\) 318 Mo. 553, 300 S. W. 694 (1927).
\(^{104}\) *State v. Millin*, 318 Mo. 553, —, 300 S. W. 694, 697 (1927).
violation of our criminal statutes." In State v. Melton\textsuperscript{105} apparently the court is in accord with the Millin case since it held that the evidence showed that the defendant was so negligent as to indicate a reckless disregard of human life and safety. However the court cited the Horner, Watson and Emery cases as authority for the conviction which they are not.

In State v. Nevils\textsuperscript{106} apparently both types of definition are found combined in one instruction and the jury were told to convict if they found that the defendant without exercising the care of a reasonably prudent man under the circumstances did recklessly and carelessly fire the fatal shot. The instruction was approved on the theory that the use of the terms "carelessly and recklessly" told the jury that more was required to convict than mere civil negligence. In the recent case of State v. Ambruster\textsuperscript{107} the court again expressly approved the definition of culpable negligence found in the Emery case. However in State v. Studebaker\textsuperscript{106} the court apparently attempted to strike a middle ground. Culpable negligence under this case is still such negligence as is defined by the tort standard but the court refused to convict unless a reasonable man should know that life was endangered by the act.

In construing a statute substantially like that found in Missouri,\textsuperscript{109} the Wisconsin court held that mere want of ordinary care was sufficient to constitute the offense and relied heavily on the earlier Missouri cases.\textsuperscript{110} In Texas the definition of ordinary negligence is made a part of the statute.\textsuperscript{111}

There is a line of cases in Kentucky which distinguish between voluntary and involuntary manslaughter in so far as

\begin{footnotesize}
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\item 326 Mo. 962, 33 S. W. (2d) 894 (1930).
\item 330 Mo. 831, 51 S. W. (2d) 47 (1932).
\item 63 S. W. (2d) 144 (Mo., 1933).
\item 66 S. W. (2d) 877 (Mo., 1933).
\item Wis. Stat., Sec. 4363: "Every other killing of a human being by the act, procurement, or culpable negligence of another, where such killing is not justifiable or excusable, or is not declared in this chapter murder or manslaughter of some other degree, shall be deemed manslaughter in the fourth degree."
\item Clemens v. State, 176 Wis. 289, 185 N. W. 209 (1921). This holding was approved in Njieck v. State, 178 Wis. 94, 189 N. W. 147 (1922). See also Kleist v. Cobodas, 195 Wis. 537, 219 N. W. 366 (1929), where the court indicated that it still considered that the rule of the Clemens case was the law of that jurisdiction.
\item See Haynes v. State, 88 Tex. Cr. 42, 224 S. W. 1100 (1920), and Young v. State, 120 Tex. Cr. 39, 47 S. W. (2d) 320 (1932).
\end{enumerate}
\end{footnotesize}
the degree of care necessary to convict is concerned. Reckless or wanton misconduct or gross carelessness is necessary to convict for voluntary manslaughter. On the other hand, ordinary negligence only is necessary to convict for involuntary manslaughter. As was said by the court in Embry v. Commonwealth,112 "In these cases and others it was pointed out that if the act of conduct of the accused was wanton or reckless or grossly careless, he was guilty of voluntary manslaughter. On the other hand if he was guilty of only ordinary negligence or carelessness the offense was involuntary manslaughter." Apparently the way in which the Kentucky court gets around the requirement of gross negligence as a necessary postulate for criminal liability is that a want of ordinary care in the use of a dangerous instrumentality is per se gross negligence.113 This would seem to be clearly error because the commonly accepted definition of gross negligence is failure to exercise slight care and not failure to exercise ordinary care. However the following language in the Held case must be noted:114 "In that case the court approved an instruction on voluntary manslaughter based upon the recklessly careless use of a loaded pistol in a room where others were present, and affirmed a conviction thereunder carrying with it confinement in the penitentiary, from which it is clear that if a recklessly careless use of a loaded pistol amounts to voluntary manslaughter, a want of ordinary care in its use in the presence of others liable to kill and which does kill, would necessarily be involuntary manslaughter."115

However these cases seem to have made but little impression on the prevailing rule outside these jurisdictions. Most states seem to hold that more than negligence as defined by the tort standard is required.116 In Kansas the court held that a statute very similar to the Missouri and Wisconsin statutes mentioned above was merely declaratory of the common law and that there-

112 236 Ky. 204, 32 S. W. (2d) 979 (1930).
114 Id. at 775.
115 See also Jones v. Commonwealth, 140 Ky. 652, 131 S. W. 517 (1910). There is a complete collection of the Kentucky cases in Thacker v. Commonwealth, 263 Ky. 97, 91 S. W. (2d) 996, 1000 (1936).
fore a difference had to be made between ordinary and gross negligence, only the latter being sufficient to convict for a crime. The court in effect repudiated the early Missouri rule.\textsuperscript{117}

As has been said above the refusal of some courts to base criminal liability on simple negligence lies in a concept of criminality which is based on a mental element, a guilty mind.\textsuperscript{118} From our historical discussion we are led to the conclusion that such a concept is quite in accord with the common law principles of liability. Due to the influence of the church, the idea of a \textit{mens rea} has come to permeate our criminal law. The decisions applying the tort standard are much in the minority, and in at least two jurisdictions\textsuperscript{119} there has been a recent shift from the tort standard to the gross negligence standard.

Thus it will be seen that the great majority of the cases require that the defendant have been guilty of something in the nature of reckless disregard or at least gross negligence before a conviction may be had for manslaughter. This does not seem to be the view which logic requires. As has been pointed out the majority rule is dictated by the remains of the idea of \textit{mens rea}. In fact when liability is postulated on negligence, gross or ordinary, what the law does is to set up an external standard. Criminal law is approaching a breach from the concept of a mental element in criminality. This is indicated by the development of statutory crimes which do not depend on intent and by the development of negligence as a basis for criminal liability. It would seem better to apply a standard which is capable of as exact definition as the nature of the subject matter permits. The more difficult cases, those where there is little culpability, can be taken care of by light sentences.\textsuperscript{120}

However, it is thought that the application of the tort rule would not be accepted by the people with which the court has to deal. The idea of the odium of crime still attaches, that it is something morally wrong. Until the idea arises that the state

\textsuperscript{117} State v. Custer, 129 Kan. 381, 282 Pac. 1071 (1929).
\textsuperscript{118} State v. Young, \textit{supra} note 91.
\textsuperscript{119} Canada and Missouri.
has the right to punish for all injuries to it, whether they are black or white in the moral sense, the tort standard in criminal negligence cases will not be generally accepted. Perhaps the most advisable rule at this time would be to apply the tort standard to the use of dangerous instrumentalities, and the traditional rule to other negligent homicides. It is thought that this would be supported by public opinion and that it is a step in the right direction.
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