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Criminal Negligence—Regulation by Statute

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breach of a contract, it must follow the rule in force within the jurisdiction where the judgment is recovered.¹⁴ (2) The law of the jurisdiction where the contract was made, however, governs where there was an express or implied agreement to pay interest.¹⁵ Of course, in the light of the admitted majority rule that the *lex loci* instead of the *lex fori* will govern as to damages, the latter statement [(2) above] is to be accepted. The former statement, however, tacitly admits that damages (interest here) shall be governed by the *lex fori*, as being procedural in nature.

It would seem, then, that in our majority rule we have another "anomaly in the law", and that any court, if it so desired, should feel justified in disregarding precedent, and holding the law of damages to be procedural and not substantive, for logic itself would be behind the action.

HOWARD H. WHITEHEAD.

CRIMINAL NEGLIGENCE—REGULATION BY STATUTE.

In surveying the statute books of the several states of the United States, with the objective of ascertaining those statutes which either expressly define or apply the term, criminal negligence, it becomes obvious that to obtain some semblance of orderly treatment, a grouping is desirable. It can be said that statutes as a whole are either vague as to definitions, or narrow as to application of criminal negligence to injuries to the person or property whether resulting in death to the person or not.

The primary step in applying the theory of criminal negligence is illustrated by statutes providing, "In every crime or public offense, there must exist the union or joint operation of act and intent, or criminal negligence".¹ Arizona, California, Idaho and Montana have this type of statute as a basic structure from which their statutes dealing with criminal negligence evolve.

It might be relevant to note at this time that those statute books containing chapters on "Words and Phrases", or chapters containing "Definitions of Terms", almost as an entirety define and name the test of negligence in terms of the tort standard, i. e. "want of such attention to the nature or probable consequences of the act or omission as a prudent man ordinarily bestows in acting in his own concerns."²

"Criminal negligence", as expressly defined by Georgia and South

¹⁴ Grimshaw v. Bender, 6 Mass. 77 (1809), cited note 8, *supra*; Baringer v. King, 71 Mass. (5 Gray) 9 (1855); Eaton v. Mellus, 73 Mass. (7 Gray) 566 (1856).

¹⁵ Winthrop v. Carleton, 12 Mass. 4 (1815); French v. French, 126 Mass. 360 (1879).

¹ Rev. Code of Arizona (1923), Sec. 4486; Gen. Laws of California (1931), Sec. 20; Code of Idaho (1932), Ch. 17, Sec. 114; Rev. Code of Montana, Sec. 10726.

² California Penal Code (1931), Sec. 7. (Typical of all such statutory definitions.)

Carolina statutes is, "Any person employed in any capacity, by any railroad doing business within the state, shall in the course of such employment, be guilty of negligence, either by omission of duty or by any act of commission, in relation to matters entrusted to him from which serious bodily injury but not death, occurs to another, he shall be guilty of criminal negligence."³ This statute is restricted to injuries arising out of railroad employment. South Carolina also provides, "any person having control of a railroad train . . . guilty of gross carelessness or neglect . . . may be punished."⁴ Alabama punishes any engineer failing to use the proper precautions.⁵ Statutes of this type are prevalent throughout the states. Many other states have statutes applicable to the operation of boats such as "negligently overloading",⁶ covered by North Dakota, South Dakota, and New York. "Negligent mismanagement of a boat . . . to endanger life . . . is a criminal offense,"⁷ in Oregon, which is comparable to South Carolina's statute covering management or control of a railroad train, cited previously.

The statute most nearly approaching a literal application of criminal negligence is found under the Texas statute entitled "Negligent Homicide", providing, "whoever, in performance of a lawful act, shall by negligence or carelessness, cause the death of another, is guilty of negligent homicide in the first degree."⁸ For the crime to fall under this statute, "There must be an apparent danger of causing death." Negligent homicide is distinguished from excusable homicide by "the want of proper care and caution". Further, there must be "no apparent intention to kill" and the "homicide must be the consequence of the act done or attempted to be done". Michigan restricts the application of its statute, which is similar, to injuries arising out of the operation of motor vehicles.⁹

Statutes entitled "Motor Vehicle Statutes on Negligence",¹⁰ are found in Michigan, Minnesota, Louisiana and Connecticut. "Culpable Negligence", is, as treated by the Florida statutes, comparable to criminal negligence, wherein the statute provides, "whoever through culpable negligence or reckless disregard for the safety of others, inflicts injuries . . . shall be punished."¹¹

³ Code of Georgia (Penal), (Parks, 1914), Sec. 117; South Carolina Code of Laws (1932), Sec. 1689.

⁴ South Carolina Code of Laws (1932), Sec. 1690.

⁵ Code of Alabama (1923), Sec. 5333.

⁶ North Dakota Comp. Laws (1913 S. 1925), Sec. 9707; South Dakota Comp. Laws (1929), Sec. 4125; New York Consol. Laws (Cahill, 1930), Sec. 1890.

⁷ Code of Oregon (1930), Chap. 14, Sec. 206.

⁸ Texas Penal Code (1925), Art. 1231-1237.

⁹ Michigan Comp. Laws (1929), Sec. 16743.

¹⁰ Louisiana Code of Crim. Pro. (1932), Sec. 1047; Michigan Comp. Laws (1929), Sec. 16743; Minnesota General Statutes (1923), Sec. 10082; General Statutes of Connecticut (1930), Sec. 56-47.

¹¹ Rev. General Laws of Florida (1920), Sec. 7164.

Involuntary manslaughter is included in this grouping due to the common similarity of terms used. Utah, Montana and New Mexico have statutes providing "involuntary manslaughter . . . by unlawful acts or commission of a lawful act . . . without due caution or circumspection",²² which illustrates the point.

Kansas and Mississippi statutes differ from that of Utah only in the use of "culpable negligence" instead of "without due caution or circumspection".²³ The statutes of Illinois, Georgia, Colorado and Arkansas provide "a lawful act which might probably produce such consequences",²⁴ for their only variation from the original Utah statute. Idaho and California provide "a lawful act without due caution or circumspection"²⁵ for their variant from the aforementioned basic statute. These brief groupings can be summarized by simply noting that the Utah statute is the model from which all others take slight variations, and yet remain related to it by the common subject matter "involuntary manslaughter". Arkansas has a statute dealing with the operation of steam apparatus and steam boats wherein it provides "death resulting from negligence in overloading a boat or . . . in placing excessive steam in the boilers of a boat . . . is involuntary manslaughter".²⁶

The second classification, which is manslaughter, is so made because these statutes expressly recognize a variance in the degree of the felony, whereas the prior grouping, more or less, are applicable to particular offenses, or to those felonies not falling within the statutory interpretation of felony under the heading of manslaughter proper. Oregon and Wyoming statutes define manslaughter as ". . . every other killing of a human being by the act, procurement, or culpable negligence . . . when such killing is not murder in the first or second degree . . . shall be deemed manslaughter".²⁷ Oklahoma places the same offense under manslaughter in the first degree.²⁸

Minnesota, North Dakota, South Dakota and New Hampshire follow New York's statute providing "every killing of a human being by the act, procurement, or culpable negligence of another, which under the provisions of this chapter, is not murder or manslaughter in the first degree, or is not justifiable homicide, is second degree man-

²² Rev. Stat. of Utah (1933), Chap. 103-28-5; Rev. Code of Montana (1921), Sec. 10959; New Mexico Statutes (1929), Chap. 35, Sec. 305.

²³ Rev. Stat. of Kansas (1923 S. 1933), Chap. 21-414; Mississippi Code (1930), Secs. 997 and 1002.

²⁴ Illinois Rev. Stat. (1935), Sec. 38-842; Code of Georgia (1914 S. 1926), Sec. 67; Colorado Stat. (Courtright, 1927), Sec. 1757; Arkansas Stat. (Crawford & Moses), Sec. 2356.

²⁵ Code of Idaho (1932), c. 17-1106; Gen. Laws of California (1931), Sec. 192.

²⁶ Arkansas Stat. (1921), Secs. 2362 and 2313.

²⁷ Code of Oregon (1930), c. 14, Sec. 210; Wyoming Rev. Stat. (1931), c. 32, Sec. 205.

²⁸ Oklahoma Stat. (1931), Sec. 2228.

slaughter".²⁰ A still further variation is brought out by the Vermont statute, which though listed previously under motor vehicle statutes, nevertheless provides that "such shall not be a bar to prosecution for manslaughter".²⁰

The Texas statute on negligent homicide heretofore considered, where homicide resulted in the performance of a lawful act, is considered in this grouping from the viewpoint of its second provision applying to homicide resulting in the performance of an unlawful act. The statutory sections under this provide, that the same rules will apply as in the prior section, with the distinction that, where homicide resulted in the performance of an unlawful act, "There must be an intent to commit a felony though no apparent intention to kill another". If such a combination of circumstances is present, Texas places it as negligent homicide in the second degree. Since the Texas statute on manslaughter contains no reference to the element of criminal negligence, it seems that this statute on negligent homicide resulting in the performance of an unlawful act, supplies the deficiency.^{20A}

Michigan has a negligent homicide statute similar to that of Texas, but it falls in this grouping due to the fact that it is restricted to motor vehicle operation and is the converse of the Texas statute mentioned heretofore, in that it lies in the jury's discretion, if the defendant is found not guilty of manslaughter to render a verdict of guilty of negligent homicide.²¹ Kansas also previously classified under involuntary manslaughter, in addition, terms such offenses as third degree manslaughter.²² Wisconsin provides "where such killing . . . is not declared murder or manslaughter of some other degree, it shall be deemed manslaughter in the fourth degree".²³ Kansas brings criminal negligence into fourth degree manslaughter if homicide results from culpable negligence.²⁴ Mississippi, Florida, Wyoming and Missouri, though their respective statutes contain the term "culpable negligence", nevertheless follow the common law and make no distinction as to the degree of manslaughter.²⁵ Georgia, Arizona, Oregon and Nevada hold the same way, and vary from the prior citation only by the substitution of "lawful act without due caution",²⁵ in the place of "culpable negligence".

²⁰ Consol. Laws of New York (Cahill, 1930), Sec. 1052; Minnesota Gen. Stat. (1923), Sec. 10078; Comp. Laws of North Dakota (1913 S. 1925), Sec. 9491; Public Laws of New Hampshire (1926), c. 392-9; Comp. Laws of South Dakota (1929), Sec. 4024.

²⁰ Public Laws of Vermont (1933), c. 212-5152.

^{20A} Texas Penal Code (1925), Art. 1238-1241.

²¹ Michigan Comp. Laws (1929), Sec. 16744.

²² Rev. Stat. of Kansas (1923), c. 21-414.

²³ Wisconsin Stat. (1933), c. 340-26.

²⁴ Rev. Stat. of Kansas (1923), c. 21-420.

²⁵ Mississippi Code (1930), Sec. 1023; Comp. Gen. Laws of Florida (1927), Sec. 7141; Wyoming Rev. Stat. (1931), c. 32-205; Missouri Rev. Stat. (1929), Sec. 3988.

²⁵ Code of Georgia (Parks, 1914, S. 1926), Sec. 64; Rev. Code of Arizona (1928), Sec. 4586; Code of Oregon (1930), c. 14-206; Comp. Laws of Nevada (1929), Sec. 10069.

The third classification under murder is justified in that it is the extreme interpretation and substitution of criminal negligence for the absence of intent and at the same time is the least specific as to definition as to actually what constitutes criminal negligence by statute.

New York, Colorado, Alabama, Washington and Utah provide "homicide resulting from the doing of any act greatly dangerous to the lives of others and indicating a depraved mind . . . is punishable as murder in the first degree".²⁷ Florida, Wisconsin and Oregon statutes, using identical terms, place the offense as murder in the second degree.²⁸ Minnesota makes by statute "such killings . . . evincing a depraved mind . . . murder in the third degree".²⁹ Mississippi, South Dakota and North Dakota make no distinction as to the degree of murder, thus following the common law.

The Kentucky statutes are conspicuous by the absence of any statute which embraces criminal negligence.

The Statutes at Large, which cover the law of England and North Ireland, contain no application of criminal negligence whatsoever. However, a statute providing "whoever having charge of any carriage or vehicle shall by wanton or furious driving or racing or other willful misconduct, or by willful neglect, do or cause to be done any bodily harm to any person whatsoever, shall be guilty of a misdemeanor"³⁰ may have some remote consideration of the element of criminal negligence.

The Canadian Revised Statutes, though they apply English law, wherever possible, are more specific in their treatment, wherein they provide "homicide is either culpable or not culpable". It is "culpable" when it consists of the killing of any person, either by an unlawful act, or by an omission without lawful excuse".³¹ Another statute provides that "culpable homicide is murder if he kills any person and knew or should have known it likely to cause death though he may have desired that his object should be effected without hurting anyone".³² Another statute provides that "persons in charge of dangerous things are under a legal duty to take reasonable precautions against and use reasonable care to avoid such danger".³³

The Philippine Penal Code provides "any person who by reckless imprudence shall commit any act which, if malice were present, would constitute a grave felony, shall suffer a penalty ranging from arresto mayor in its maximum degree, to prison correccional in its minimum

²⁷ Stat. of Colorado (Courtright, 1927), Sec. 1753; Consol. Laws of New York (Cahill, 1930), Sec. 1044; Code of Alabama (1923), Sec. 4454; Code of Washington (Pierce, 1929), Sec. 8997; Rev. Stat. of Utah 1933, c. 103-28-3.

²⁸ Comp. Gen. Laws of Florida (1927), Sec. 1137; Wisconsin Stat. (1933), Sec. 340.03; Code of Oregon (1930), c. 14-203.

²⁹ Minnesota Gen. Stat. (1923), Sec. 10070.

³⁰ Statutes at Large, 24-5 V, c. 100, s. 6.

³¹ Canadian Rev. Stat. v. 1, c. 36, s. 252.

³² Canadian Rev. Stat. v. 1, c. 36, s. 259.

³³ Canadian Rev. Stat. v. 1, c. 36, s. 247.

degree".³⁴ This same statute applies under the Philippine Motor Vehicle Statute.

The Philippine statute recognizes three classes of negligence which are: 1. Reckless negligence (lack of foresight). 2. Simple negligence (less than reckless or gross negligence). 3. Simple imprudence or negligence (punishable as a misdemeanor). An example to illustrate the distinction between the three: A man is walking on the left side of his horse and wagon on the right side of the street. The man, horse and wagon approach an intersection and turn at right angles. A child is asleep in the gutter. The man is not reckless (since he could not foresee a child would be asleep in the gutter). It is not a pure accident (since, had he looked, he would have seen the child). He did no unlawful act (since he, the horse and wagon were on their own side of the street).³⁵ He is guilty, then, of simple imprudence. It must be noted that Philippine Law is not based on the English or American concept of law, but since its law is what it is in relation to criminal negligence, it merits consideration to that extent.

The Hawaiian statutes contain no express definition or application of the term criminal negligence. However, a statute provides that in the absence of premeditated intent, the offense shall constitute second degree murder.³⁶

In brief summarization, the statutes herein covered were selected with a view to the particular recognition of the elements of criminal negligence. It is perhaps an open question as to whether a state should have any number of statutes covering what might be termed isolated or specific cases of criminal negligence, or one basic statute adequately defining what shall constitute criminal negligence by and large. The writer is inclined to the latter viewpoint on the score of uniform treatment in harmony with administration. The Texas statute on negligent homicide previously referred to seems to most nearly approximate such treatment.

DAVID W. CARTER.

CRIMINAL NEGLIGENCE—OMISSION TO DISCHARGE A LEGAL DUTY.

Properly speaking, criminal negligence is of two distinct types: (1) positive or active negligence in the commission of an act and (2) negative or passive negligence by omission to act at all. This classification when first made was thought by the writer to be original but upon further study it was found that substantially the same classification had been enunciated in *Corpus Juris*. In that work we find these words: "A distinction is drawn in some cases between negligence in doing what a prudent man would not do, which is termed

³⁴ Philippine Code (Acts & Procedure), v. 1, Art. 568, p. 653.

³⁵ *Ibid.*

³⁶ Revised Stat. of Hawaii (1935), Chap. 193, Secs. 5990 and 5996.