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Criminal Negligence--Omission to Discharge a Legal Duty

Town Hall
University of Kentucky

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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.

active or positive negligence, and the omission to do what a prudent man would do, which is termed passive, or negative negligence."¹

To those not versed in the law, perhaps no contradistinction between the two types of criminal negligence just alluded to is apparent. But to the legal thinker, who sees more or less with an analytical eye, a clear line of demarcation is obvious. In the first type, the defendant commits the act, he is dynamic, but he fails to use due care and the prudence of a reasonable man under the same or similar circumstances. Here the individual accused goes forward, he does the thing his legal duty enjoins him to do, but is guilty of positive or active negligence in failing to measure up to required standards of care. In the second type the defendant fails to act at all. He is static when his legal duty enjoins him to act with due care and with the prudence of a reasonable man under the same or similar circumstances. Such non-feasance is negative or passive negligence, and may render the individual so failing to act guilty of a crime as will be exhibited in succeeding paragraphs.

In connection with a discussion of criminal negligence predicated upon omission to act, three situations present themselves: Omission to discharge a legal duty imposed (1) by law or relationship; (2) by contract; and (3) by the act of taking charge. In either situation the defendant by his failure to perform such duty, or non-feasance which results in injury or death to another person, may be held criminally liable. One writer expresses it this way: "Every one upon whom the law imposes any duty, or who has by contract, or by any wrongful act taken upon himself any duty tending to the preservation of life, and who neglects to perform that duty and thereby causes the death of a person, or bodily harm to such person, commits the same offense as if he had caused the same effect by an act done in the state of mind, as to intent or otherwise, which accompanied the neglect of duty."² On first reading, the writer's apparent meaning is that every omission to perform a legal duty which results in injury or death to another would result in criminality. But when we read the same author in the same work in succeeding pages, we may deduce that such was not the meaning intended to be conveyed. He makes the qualification himself, and tells us in explicit language that negligence in the omission to perform a legal duty in order to constitute a crime must be culpable, and that what is culpable negligence is a question of degree for the jury, depending upon the circumstances of each particular case.³

That one may be criminally liable for omitting to perform a legal duty imposed by contract is exemplified by an Alabama case.⁴ Stein was the lessee on waterworks, having contracted to supply water for the city of Mobile. His contract bound him to supply water for the

¹ Negligence, 45 Corpus Juris, s. 15, pp. 638-639.

² *Stephen, Digest of Criminal Law* (1877), 149.

³ *Id.* at 150.

⁴ *Stein v. State*, 37 Ala. 123, — (1861).

city's use from Three-Mile Creek. The contract contained no stipulation as to the quality of the water to be supplied by him. It resulted that the water so supplied under the contract was impure, and unwholesome. Stein was indicted, but his demurrer to the indictment was sustained because it was not shown that he had contracted to supply good and wholesome water. The defendant was bound under his contract to supply only such water as was afforded by the designated source—Three-Mile Creek. Nevertheless, the fundamental proposition was laid down in the dictum of the case that if the defendant had bound himself by contract to supply good and wholesome water, his failure to perform the legal duty imposed by contract in favor of the public would have rendered him indictable.

As a general rule the breach of a contract is not an indictable offense. It seems to be the law that before criminality attaches because of an omission to perform a contracted duty there must be a status created in the eyes of the law between the party injured and the one failing to act. There must be a "helplessness" on the part of the injured person because of the agreement. The injured person must have been lulled into a false sense of security by the contract. Suppose a person is a passenger on a railroad train. The person has paid his fare, he has made a contract with the carrier, and has a right to rely upon the carrier and its agents to look out for his safety. In other words, his contract has made him inadvertent to possible dangers. He is helpless, as it were, since his body is in charge of a fast-moving train over which he has no control. There is more than a mere contract here. There is a status; and nonfeasance in performing the duty imposed by law and by contract upon the carrier would constitute criminal omission.⁵ The same result would be reached if a person under contract bound himself to supply wholesome water to a large city, since the contract would be an inducement to the public to rely upon the water furnished under the terms of the contract,⁶ thereby creating a status, or helplessness on the part of those who use the water.

The principle that one may be guilty of a crime if he assumes to act, although under no duty so to do, is well embodied in an old English case.⁷ The prisoner, it appears in evidence, while attending a funeral of a Mrs. Reeves, sister of the aged Mary Warner, apparently from magnanimity told Mrs. Warner she could come and live with him. Mrs. Warner was 74 years old, and she replied that it was a kind offer. Mrs. Warner went along with the prisoner. At first she had a servant while at the prisoner's house, but as time passed this service was discontinued. Then the prisoner would lock Mrs. Warner up in her room, without fire, and with scant food. Later, she was not

⁵ Cross, *Criminal Non-Feasance* (1931), 11 B. U. L. Rev. 273.

⁶ Stein v. State, 37 Ala. 123 (1861), cited note 4, *supra*.

⁷ Regina v. Simon Marriott, 8 Car. & P. 425, 173 Eng. Rep. 559 (1838).

permitted to get out of her room. The old lady languished and finally died. The prisoner was indicted for murder, but was convicted for manslaughter. In its opinion the court intimates that the prisoner had assumed the duty of caring for the aged woman by contract, but it is difficult to make out such from the evidence. At any rate, whether from contract, or the voluntary act of taking charge of the old lady, the prisoner made little attempt to provide bare necessities for her, and his omission so to do without doubt accelerated her death. He failed to exercise the care of a reasonably prudent man, and was rightfully convicted for his omission in performing his legal duty.

A most peculiar case evidencing a crime by omission after once having taken charge is that of the *Queen v. Instan*.⁸ One can hardly imagine such a horrible state of facts. The deceased, a woman of seventy-three, permitted the prisoner, her niece, to stay at her home. The niece was provided for with the deceased aunt's money, and since she had taken charge, the niece was under the legal duty to look after the aunt in her declining days. But, during the last ten days of her life, the deceased aunt suffered from a disease which prevented her from moving or doing anything to procure assistance. The prisoner-niece took in food and paid for it with deceased's money, but gave none of it to her aunt. Neither did she procure medical attendance, nor inform the neighbors or relatives as to her aunt's condition. Both neighbors and relatives were nearby. While the prisoner was still living in the house, the deceased was found much decomposed. Held: A duty was imposed upon the prisoner under the circumstances to supply the deceased with food in her helpless days and since the death of the deceased was accelerated by prisoner's neglect of duty the prisoner was properly convicted of manslaughter.

Without doubt the two cases just discussed sustain the proposition that criminal liability may result from a culpable omission to perform a duty imposed by an implied contract, or by the voluntary act of taking charge. The facts hardly bear out the idea that any contract was in existence, even by implication. And it is the theory of the writer that the most logical basis of the decisions was criminal liability predicated upon the omission to perform a legal duty imposed by the act of taking charge. In other words the accused assumed to act in the premises. He omitted to exercise the care and prudence of a reasonable man under the circumstances, and for his dereliction was rightly adjudged guilty of culpable negligence warranting a conviction.

This short discussion on criminal negligence based upon omission to perform a legal duty imposed by contract and the act of taking charge is not meant to be exhaustive. In fact these phases of criminal negligence based upon omission to perform a legal duty are only incidental to the main thesis of this paper, and are put in only for the

⁸The *Queen v. Instan* (1893), 1 Q. B. 450.

purpose of showing that criminal negligence in such cases is an actuality.

The rest of our time will be devoted to our main purpose—criminal negligence predicated upon the omission to discharge a duty imposed by law or relationship. If the law requires a person to do an act, and he, disregarding his duty, causes the death of another by his misconduct, negligence, or lack of skill, he is guilty of involuntary manslaughter.⁹

In such cases, however, there must be a legal duty as distinguished from a moral duty to act.¹⁰ A person may see another drowning; he may see a decrepit old man languishing for want of food and medicine; he may see his paramour in a paroxysm of pain because of excessive drinking or use of morphine while in his apartment; and death may result in each case. Yet, if there is no legal duty on his part to act, however great and impelling the moral duty, in this modern, humane civilization, there can be no criminality for failure to render assistance.¹¹

Moreover, it is not every act of negligence in the omission of a legal duty resulting in injury to, or death of, another that will render one guilty of a crime. Such negligence must be more than mere ordinary negligence.¹² It must be "gross, wanton, or willful" negligence.¹³ Such negligence must be culpable, and what is culpable negligence is a question of degree for the jury, depending upon the circumstances of each particular case.¹⁴ Culpable negligence, as applicable to our problem, has been more particularly defined, however, as the omission to do something which a reasonable, prudent, and honest man would do.¹⁵ A recent Oklahoma case exemplifies this definition of culpable negligence. The Oklahoma statute prescribed for and made mandatory in mining operations the use of large fans for forcing fresh air underground in diluting possible noxious gases, and in addition an underground telephone system to be used in informing miners of an impending danger. The legal duty of seeing that both the fan and the telephone system were in working order devolved upon the mine superintendent or the person in charge. The defendant was the mine foreman left in charge when the catastrophe occurred. The fan ceased to work for nearly thirty minutes, and the telephone system had become incapacitated. When the fan was restored to working order, accumulated gases were blown back where the miners were working and the

⁹ *Miller on Criminal Law* (1934), 288.

¹⁰ *Clark and Marshall on Crimes* (3d ed.), 335.

¹¹ *People v. Beardsley*, 150 Mich. 206, 113 N. W. 1128 (1907); *Miller on Criminal Law* (1934) 288, and cases cited in Note 52.

¹² *State v. McComb*, 33 Wyo. 346, 239 Pac. 526 (1925).

¹³ *People v. Campbell*, 237 Mich. 424, 212 N. W. 97 (1927); *Jones v Commonwealth*, 213 Ky. 356, 281 S. W. 164 (1926).

¹⁴ *Stephen, loc. cit. supra*, note 2, at 150; *People v. Seiler*, 57 Cal. App. 195, 207 Pac. 396 (1922).

¹⁵ *Miller, op. cit. supra*, note 9, at 287.

lights of their lamps caused an explosion in which ten men lost their lives. The defendant foreman in charge was indicted for manslaughter, and in holding him guilty, the court said that because of the defendant's dereliction in omitting to perform his duty, imposed upon him by law, he omitted to do something which a reasonable, prudent and honest man would do, and was therefore guilty of culpable negligence and the crime of involuntary manslaughter.¹⁶

The early view of crimes was that there were two prerequisites to criminality: (1) an act; and (2) criminal intent. The well-known Latin phrase *Actus non facit reum nisi mens rea sit* (the act does not make the crime unless the mind is guilty) is quite expressive of those early views. Those views are classified and accentuated in a learned article written by Professor Sayre.¹⁷ But this noted author tells us in his article that the old rules have been relaxed, that intent is no longer necessary, and that criminality may be predicated upon culpable negligence in failing to discharge a legal duty. These views are borne out and corroborated by the cases discussed in this paper. *People v. Pierson*¹⁸ throws considerable light upon our problem. The defendant had adopted a female child less than two years old. In January, 1901, the child developed whooping cough, with which malady it was afflicted until February 20. On the latter day it developed catarrhal pneumonia resulting in its death on February 23. The defendant testified that for forty-eight hours preceding the child's death he noticed that the symptoms were of a dangerous character, but that he did not send for a physician, although financially able to do so. His reason for not procuring a physician in his own words was that he believed in Divine healing. The defendant was a strong believer in the Catholic Church. He believed in disease but believed that prayer was a panacea for all ills. It was in evidence that the defendant prayed zealously for the child to get well. He was found guilty of a crime, although there is not the slightest vestige of a criminal intent. The defendant loved his adopted child, he prayed for its life and such conduct completely negatives the slightest intent. But because the defendant failed to measure up to the "reasonable man" test, in omitting a legal duty owed the infant, he was adjudged guilty of a crime.

Negligence in the omission to perform a duty imposed by law, which is sufficient to "supply" criminal intent, is similar in character to gross negligence in tort law, and consists in reckless or indifferent omission to do what a reasonable and prudent man would do.¹⁹ In crimes which consist in culpable failure to perform a duty, criminal intent consists in the state of mind which necessarily accompanies the culpable omission.²⁰ Here the same author in the same work in two succeeding pages talks of "supplied" intent and of "the state of mind

¹⁶ *Clark v. State*, 27 Okla. Cr. 11, 224 Pac. 738 (1924).

¹⁷ Sayre, *Mens Rea* (1932), 45 Harv. L. Rev. 974.

¹⁸ *People v. Pierson*, 176 N. Y. 201, 68 N. E. 243 (1903).

¹⁹ Miller, *op. cit. supra*, note 9, at 66.

²⁰ *Id.* at 65.

which necessarily accompanies the culpable omission." When one talks of a supplied intent, he is dealing with a fiction, and it is equivalent to no intent at all. Then the author, Miller, details five elements as necessary in finding such intent:²¹ (1) There must be a legal duty of care owned upon the part of the defendant; (2) there must be a knowledge upon his part of such duty, and a knowledge that there is a present, existing danger; (3) there must be an ability on the defendant's part to perform the duty owed; (4) there must be a failure on the defendant's part to perform the duty; (5) it must appear that the defendant's negligent act of omission was the cause of the injury. In neither of these elements is there anything that amounts to intent. Hence we may deduce that what this writer means to say is that if one culpably fails to perform a legal duty, if he fails to exercise the care and prudence of a reasonable man under the same or similar circumstances, he is guilty of a criminal omission if injury or death results, regardless of intent. This is exactly the degree of negligence which would render one liable in tort law, as our author intimated at the outset.

Criminal negligence resulting from an omission to perform a duty imposed by law encompasses three principal situations: (1) criminal omission in the operation of locomotives, steamships and automobiles; (2) criminal omission in practicing medicine and surgery; and (3) criminal omission in failure of duty to dependents.²² This classification is by no means all-inclusive, but is deemed sufficient to substantiate our major premise: that one is guilty of a crime if he culpably omits to perform a duty imposed by law.

(1) A statute provided that all steamers be equipped with suitable life preservers and pumps. The duty imposed by law devolved upon the owners, the captain, and officers in charge of the particular steamer. The owners of a steamer provided worthless life preservers for it, and the officers and captain failed to replace them with suitable ones. A fire broke out, and 900 persons were drowned when obliged to jump overboard. The passengers had been induced to rely upon proper precautions being taken for their safety on the part of those in charge of the steamer, and thus a status was created. The officers in charge were adjudged guilty of criminal non-feasance in failing to perform the duty imposed by law.²³ Other cases of like import are in the books.²⁴

A legal duty devolved upon a railroad company to see that switches were properly adjusted in order that collisions of trains and possible danger to life from derailment might be averted. The defendant as switch tender assumed this duty, not so much by contract, as from

²¹ *Id.* at 66-68.

²² Note (1902) 61 L. R. A. 277.

²³ *United States v. Van Shaick*, 134 Fed. 592 (1904).

²⁴ *United States v. Knowles*, 4 Sawy. 517, 26 Fed. Cas. 800 (1864); *United States v. Thompson*, 12 Fed. 245 (1882).

his employment and position. He failed to properly adjust the switches, and a passenger train was derailed, killing one of its passengers. The defendant was indicted for manslaughter, and was convicted.²⁵ He complained of an instruction to the effect that a mere act of omission may be so criminal or culpable as to be the subject of an indictment for manslaughter. But in sustaining the conviction the Supreme Court of New Jersey said, "Such we believe is the prevailing current of authority. . . The defendant in this case omitted his duty under such circumstances as amounted to gross, or culpable, or criminal negligence". Nowhere do we find *mens rea*. We find only an act of omission in performing a duty enjoined by law, with a consequent result of criminal negligence.

A recent Georgia case is quite impressive in connection with criminal negligence based upon omission to perform a legal duty owed by the owner of an automobile.²⁶ The defendant owner in his own car was being driven by his chauffeur. The chauffeur was driving at an excessive rate of speed, and on the wrong side of the road. A collision with an oncoming car was the result, and a woman riding in the other car was killed. The defendant owner was convicted of involuntary manslaughter. In sustaining the conviction the supreme court of Georgia said: "It would be the owner's duty when he saw that the law was being violated, and that his machine was being operated so as to be dangerous to the lives and property of others on the highway, to curb and restrain one in his employment and under his control, and prevent him from violating the law with his own property. He was bound to know that a car operated at such a place and in such a manner was likely to come into collision and injure occupants of other automobiles upon the highway. That being so, he was equally guilty with his employee in causing the homicide." This conviction was based upon the owner's neglect or omission to act in performing a legal duty owed to the public in failing to see that his chauffeur drove his car in a lawful and careful manner. The chauffeur was guilty of positive negligence in the commission of an act, whereas the defendant owner was guilty of negative negligence in omitting to act. The books are replete with cases of like tenor.²⁷

(2) Interesting cases are found when physicians were found guilty of a crime because of culpable negligence in the omission or failure to perform the legal duty owed to their patients.²⁸ The defendant physician was called to treat the deceased. With the patient's consent, he caused her to be wrapped in flannels saturated with kerosene, and left in that condition for three days, more or less by reason

²⁵ State v. O'Brien, 32 N. J. L. 169 (1867); State v. Harrison, 107 N. J. L. 213, 152 Atl. 867 (1931).

²⁶ Moreland v. State, 164 Ga. 467, 139 S. W. 77 (1927).

²⁷ Ex parte Liotard, 47 Nev. 169, 217 Pac. 960 (1923); State v. Hopkins, 147 Wash. 198, 265 Pac. 481 (1928).

²⁸ Commonwealth v. Pierce, 138 Mass. 165, 52 Am. Rep. 264 (1884).

of which she died. There was evidence that the defendant had made similar application with favorable results upon previous occasions. In one case, however, it appeared that the patient had been burned and blistered as in the present case. The court upon indictment of the defendant, instructed the jury (1) that it was not necessary to show an evil intent; (2) that if by gross and reckless negligence he caused the death, he is guilty of culpable homicide; (3) that the question was whether the kerosene was applied as the result of foolhardy presumption or gross negligence on the part of the defendant. The defendant was convicted of manslaughter. The court went on to say that if the defendant had known the fatal tendency of the prescription, he would have been perilously near the line of murder. Here it is obvious that the defendant physician meant to effect a cure for his patient. He had used the same methods on prior patients with apparent success. At first blush it would seem that the defendant was guilty of positive negligence. But upon reconsideration, the act of omission is more salient. All in all, the defendant omitted to use the care and prudence of a reasonable physician under the circumstances; and his dereliction in failing to fulfill the legal duty owed to the deceased patient rendered him guilty of negative negligence.

(3) The situations ordinarily involving criminal negligence based upon the omission to perform a legal duty owed to dependents are the parent-child and husband-wife relationships. In the absence of other extrinsic and intervening circumstances, it is believed that these are the only situations where a duty is imposed by law from mere relationship alone.²⁹ Of course the parent-child situation is meant to include step-children under the age of majority, and adopted children.

The defendant²⁹ had special charge of his four-year-old stepson. The child's feet became frozen and the defendant step-father applied cloths saturated with vaseline. No physician was called. The defendant was a fairly intelligent man, surrounded by friends and neighbors who were able and willing to render any necessary assistance, but to whom the step-father failed to mention the child's condition. Soon the child's feet became decomposed requiring amputation. The operation was unsuccessful and the child died. The defendant was indicted for manslaughter, and the court gave an instruction to the effect that he was guilty of gross negligence. A conviction followed. The step-father owed the child under his care the legal duty to provide medical treatment. He was financially able, and as a reasonable man should have foreseen what his duty was. His act of omission in failing to measure up to the "reasonable man" test in performing this legal duty constituted culpable negligence and a crime. Culpable omission in the discharge of the legal duty owed by a parent to a child in providing for its care, food, nurture, sustenance, medical assistance, and protection from exposure to inclement weather with a consequent

²⁹ Note (1902) 61 L. R. A. 293-294.

³⁰ Stehr v. State, 92 Neb. 755, 139 N. W. 676 (1913).

injury or death to the child, constitutes criminality. This proposition is fortified by numerous decisions in other jurisdictions.³¹

The defendant³² and his wife had been out drinking and carousing. On the way back home the wife became incapacitated a few paces from their home. The weather was inclement. The wife fell prostrate upon the icy road, and the defendant husband allowed her to remain there the rest of the night. He rendered no assistance to her whatever, medical or otherwise, until the next day when he and an employee brought the benumbed wife into the house where she soon died. The defendant husband was indicted and found guilty of manslaughter. Here the husband stood by and omitted to discharge the legal duty which he owed to his wife, such omission resulting in her death. It was the duty of the husband imposed by the marital relationship to help her to the house, and to provide food and medical assistance for her. This duty he failed to discharge, causing the death of his wife. His conduct was culpable, for a reasonable man under the circumstances would have fully performed. The defendant was rightfully convicted. This legal principle has been sustained in other states.³¹

From the foregoing discussion we may conclude that criminal negligence may result from culpable omission to discharge a legal duty imposed by contract, by relationship, or by the voluntary act of taking charge; and that criminality results where there is a culpable failure to perform a duty imposed by law, such omission resulting in injury to, or death of, another. No criminal intent is necessary, as has been exhibited by the cases cited and discussed, if all the five elements as detailed in a previous paragraph are present making the omission culpable.³⁴ Finally, it is submitted that the "reasonable man" test talked about so much in tort law is applicable to criminal omissions of a legal duty, and that culpable negligence in criminal law has a marked similarity to, or is equivalent to, gross negligence in torts.

TOWN HALL.

³¹ State v. Staples, 126 Minn. 396, 148 N. W. 283 (1914); Gibson v. Commonwealth, 106 Ky. 360, 50 S. W. 532 (1899); State v. Barnes, 141 Tenn. 469, 212 S. W. 100 (1919); Commonwealth v. Breth, 44 Pa. Cr. C. 56, 65 U. of Pa. L. Rev. 88 (1916).

³² Territory v. Manton, 8 Montana 95, 19 Pac. 337 (1888).

³³ State v. Smith, 65 Me. 257, — Atl. — (1876).

³⁴ Miller, *op. cit. supra*, note 21.