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Criminal Liability in Negligence Cases

E. W. Salisbury
University of Kentucky

negligence so as to satisfy the requirements of the statute, altho he was not guilty of gross negligence; and he was convicted of manslaughter. Altho the decision reaches the right result, it is apparent that this distinction between "gross" and "culpable" negligence is purely artificial and without basis. This case indicates the confusion which has arisen through the use of these terms.

In *Nail* v. *State*,[15] an Oklahoma case, defendant was indicted for manslaughter for allowing his automobile to hit and kill the deceased. The Oklahoma statute specifies that negligence sufficient to impose criminal liability must be culpable. The court in defining culpable negligence said that it is "the want of that usual and ordinary care and caution in the performance of an act usually and ordinarily exercised by a person under similar circumstances and conditions". Ample authority can be found sustaining the correctness of this definition,[16] and it is submitted that when the court instructs that negligence sufficient to impose criminal liability must be culpable, and then defines culpable negligence as a lack of due care under all the circumstances, it is in effect laying down the tort standard of negligence. This seems the best method of procedure when a statute specifies that negligence must be culpable in order to supply the intent necessary for a criminal conviction. However, in the absence of a statute to this effect it would seem that the only effect of the words "culpable", "gross", or "criminal negligence" in the instruction is to confuse the jury.

There is no question but that the decision in the principal case of *Banks* v. *State*[17] is correct and in line with the present tendency in the criminal law of looking less to the intent with which an act is committed and more to the consequences of that act.

BERT COMBS.

CRIMINAL LIABILITY IN NEGLIGENCE CASES

"Criminal or culpable negligence, within the meaning of the law, is the omission on the part of a person to do some act under given circumstances which an ordinarily careful or prudent man would do under like circumstances, or the doing of some act, under given circumstances, which an ordinarily careful, prudent man under like circumstances would not do, and by reason of which omission or action, another person is endangered in life or bodily safety."[1]

In this case the owner of a small chili stand placed a gun on

[15] 33 Okla. Cr. 100, 242 Pac. 270 (1926).

[16] 2 Words and Phrases, p. 1780; Sikes v. Sheldon, 58 Iowa 744, 13 N. W. 53 (1882); State v. Emery, 78 Mo. 77, 47 Am. Rep. 92 (1883).

[17] 85 Tex. Crim. Rep. 165, 211 S. W. 217 (1919), cited note 1, *supra*.

[1] State v. Beckham, 306 Mo. 566, 267 S. W. 817, 37 A. L. R. 1094 (1924).

the counter, and tied a string to it in such a manner that the gun went off and killed the deceased when he attempted to enter the building. The defendant was found guilty of the crime of manslaughter, and appealed on the ground, among others, that this instruction was erroneous. The supreme court affirmed the judgment. The Missouri statute[2] said, "Every killing of a human being by the act, procurement or culpable negligence of another, not herein declared to be murder or excusable homicide or justifiable homicide, shall be deemed manslaughter." No definition of the term "criminal negligence" is included in the statute; in the absence of such statutory definition, it is submitted that the court erred in giving this instruction to the jury.

A majority of the courts hold there must be something more than the lack of ordinary care to convict the defendant of manslaughter.[3] The rule is well stated in *Wells* v. *State*,[4] where the court said: "More than mere negligence must be shown to convict of manslaughter arising out of the operation of an automobile. A conviction can be based only on culpable negligence, which may be defined as such gross or criminal negligence as evinces a wanton or reckless and utter disregard of the safety and lives of others." It is further borne out in the case of *State* v. *Cope*,[5] "The degree of negligence necessary to support a prosecution for manslaughter is greater than is necessary to support a civil action and an instruction in a prosecution based on the negligent operation of an automobile, which lays down the test of negligence for civil liability is prejudicial error."

Admitting the majority rule requires something more than lack of ordinary care in order to convict a defendant of the crime of manslaughter, it is the purpose of this paper to inquire into the reasoning behind the doctrine and in some measure to answer those who would contend that the standard of negligence used in a manslaughter case should be the same as in a civil action.

In any discussion of a legal problem it is always advisable to inquire into previous decisions on the question. Such investigation serves two purposes: first, to show the prevailing rule, and second, to disclose some logical justification for it. Here nothing need be said as to what is the general rule. It is too well established to admit of any doubt, although there is a minority line of cases. But what is the basis of it? Why have the courts consistently refused to hold the defendant criminally liable when he has injured a person through the lack of ordinary care? Perhaps the real answer to this question will

[2] Mo. Rev. Stat. (1919) 3236.

[3] State v. Clark, 196 Iowa 1134, 196 N. W. 82 (1923); People v. Adams, 289 Ill. 339, 124 N. E. 575 (1919); People v. Barnes, 182 Mich. 179, 148 N. W. 400 (1914); People v. Schneider, 360 Ill. 43, 195 N. E. 430 (1935); Commonwealth v. Arone, 265 Mass. 128, 163 N. E. 758 (1928). See A. L. R. 829 for supplemental case authority.

[4] Wells v. State, 16 Miss. 617, 139 So. 859 (1932).

[5] State v. Cope, 204 N. C. 28, 167 S. E. 456 (1933).

be found by noting the difference between the purpose of a civil action and that of a criminal prosecution. The purpose of the first is to compensate the injured party, to restore him to status quo; while the purpose of the second is to prevent crime and maintain order in society through punishment of the offender. Thus the theories upon which liability rests in the two cases are separate and distinct. The problem resolves itself into this question, "Will accidents which have been caused by ordinary negligence be prevented or deterred by making the defndant criminally liable for such negligence?" If the rule is to be changed, this question must be answered in the affirmative. There is no need for a rule of law in which the defendant is punished criminally, without being deterred. The deterrence provided must be of such value as to overbalance the hardship of punishment which would be placed upon the defendant. Who knows whether or not the proposed rule would have any such value? Any answer to this question would be supposititious. It is impossible to answer it from any facts or statistics. There is no logical basis of reasoning which will determine the answer, and *thus* it is only through observation and experience that any definite conclusion can be reached. In this connection it must be remembered that the established rule has come down through the years, that human nature has changed but little in that time, and that if the proposed rule would deter and prevent crime to the degree some say it would, it would surely have been adopted before now. Thus time and experience lead to the conclusion that, after all, men are prone to be ordinarily negligent; it is their nature, and no amount of criminal punishment will prevent such negligence.

If the tort standard of negligence were adopted, how would the judge instruct the jury? Would he say, "Gentlemen of the jury, if you find that the defendant has failed to use that care which an ordinarily reasonable, prudent man would have used under the same or similar circumstances, then you will find him guilty of manslaughter"? If so, what kind of manslaughter would he have reference to? Manslaughter is governed by statutes which establish different degrees of it. If this instruction were given to a jury, it could find the defendant guilty of any one of the degrees, and thus the jury would be given a wide discretion, which would undoubtedly place a hardship on the defendant in many cases. To illustrate: A, who is an honest but poor citizen, usually prudent and careful in his conduct, is driving slowly down the street. He casually turns to wave to a friend who is passing by. While doing so, he loses sight of the road for a moment's time, and in this interval he hits a person and kills him. On the other hand, B, who is the son of a rich and influential business man, is driving through a mid-town business section at a fast and reckless rate of speed in total disregard to the safety of others. While so driving, he runs over a person and kills him. Both of these men were negligent. Both have been the direct cause of another's death. Yet,

how can it be said that both are guilty of the same crime which, under the proposed single standard, the jury might well find? There would be no limit placed on the jury's discretion; ordinary negligence might be made the basis of a conviction of manslaughter in the first degree.

If the rule were changed, what would be the practical result? The already overcrowded courts would be burdened by another species of crimes. The poorer class would suffer in that it could not pay the fines imposed, and would have to serve a jail sentence. The economic result would be bad. All this would be accomplished in trying to realize the vain hope of deterring negligent acts and thus preventing accidents.

It has been suggested that the ordinary negligence standard be used in criminal cases with the added provision that the jury be instructed that it is a criminal action when determining whether or not the defendant has been guilty of ordinary negligence. Such a technical rule would serve to confuse the jury until it would be almost impossible for it to come to a sensible decision on the defendant's guilt or innocence. The present rule is much simpler and much more desirable. When a judge instructs the jury that something more than ordinary negligence is necessary in a criminal action, something which evinces a wanton and reckless disregard of life, there flashes into the mind of the juror a mental picture in which the juror sees a person committing a rash and reckless act. Such a picture aids him in determining whether or not the defendant has committed such an act and thus enables him to come to a just decision.

The law must progress and expand to meet the needs of the times. It is in the constant process of growth and rightly so, but the proposed extension of the negligence standard in civil cases to the field of crime is a radical departure from the established rule, calculated to be of slight preventive value, which, when compared to the hardship and injustice placed upon the defendant, seems relatively small. In such a situation it is submitted that, even though the present rule has its faults, it should be retained until another and better one is suggested.

E. W. SALISBURY.

SOCIOLOGICAL EXPEDIENCY OF STERILIZATION STATUTE[1]

In Kentucky the marriage of an idiot or lunatic is declared void.[2] We have no provision prohibiting the feeble-minded from marrying, except that we penalize aiding or abetting the marriage of the feeble-

[1] In this note we are not considering the much controverted subject of sterilization for eugenical purposes, but only the sociological aspect of sterilization.

[2] Ky. Stat. (1929) Sec. 2097.