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Criminal Negligence--Standard of Care Necessary

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was a matter of degree. So long as the basis of criminal responsibility is predicated upon negligence it is immaterial whether the defendant was engaged in a lawful or an unlawful act,[20] or what the degree of the homicide happened to be,[21] the only question being whether, under that particular situation, the defendant's conduct measured up to that of an ordinary man. It, therefore, seems erroneous to instruct that simply because the defendant was using a dangerous weapon a higher degree of care should be required, or on the other hand that criminal liability cannot be imposed unless there is something in the nature of gross negligence. In determining criminal responsibility based upon violation of any duty owed to the state, the jury should be instructed as to whether, under that particular situation, the defendant exercised such care as an ordinary man would have exercised.

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CRIMINAL NEGLIGENCE—STANDARD OF CARE NECESSARY

The defendant was indicted for manslaughter. The act of culpability as alleged in the information was that defendant feloniously and recklessly, without regard to the lives or safety of others, placed a loaded trap gun in such a position and manner on the inside of his chili stand in Joplin, Missouri, as to cause said gun to be fired or discharged by the movement or opening of a certain window in the building. The court instructed the jury that culpable or criminal 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 and prudent man would do under like circumstances, or the doing of some act, under given circumstances, which an ordinarily careful and 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. The supreme court of the state of Missouri upheld the instructions of the lower court as being correct.[1]

The court in the principal case adopted the standard of care laid down by the majority of the courts in civil cases based on actions of tort. It shall be the purpose of this paper to attempt to show that such a standard of care should be followed by the courts in cases based on criminal negligence. However, the court must keep in mind the fact that in these cases they are dealing with *Crime*, and not mere civil liability. Therefore, they should instruct the jury that the negligence of the accused must be established beyond a reasonable doubt, and not by mere preponderance of the evidence, as is the general rule in cases involving civil liability.

[20] Comm. v. Adams, 114 Mass. 323 (1873).
[21] Gregory v. State, 152 Miss. 133, 118 So. 906 (1928).
[1] State v. Beckham, 306 Mo. 566, 267 S. W. 817 (1924).

When do the negligent acts of an individual cease to be mere negligence and become criminal negligence? It has been said, "The term criminal negligence has reference mainly to the authority by whom reparation is sought. An inseparable incident of criminal negligence may be that it is a violation of duty imposed for the preservation of human life. It is criminal because it constitutes a violation of an obligation to the state, which can be remitted only by the state. Criminal negligence *Per Se* does not differ from negligence simply. The same negligence as it affects the individual and the state is respectively gross negligence and criminal negligence, while it is the ground work of reparation to the private individual; however heinous it may be it is no more than negligence. So soon as it is the subject matter in respect of which reparation is exacted by the state, it becomes criminal negligence. . . . Criminal negligence then is negilgence in such circumstances that it imposes an obligation remissible by the state, but irremissible by the individual actually damnified by it, and since the state will not lightly intervene, criminal negligence must be some substantial thing and not a mere casual inadvertence. Between criminal negligence, however, and actionable negligence, there is no principle of discrimination, but a question of degree only."[2]

It is well settled that a negligent act or failure to act may be the basis for a manslaughter.[3] *Quaere*: What degree of negligence will suffice to justify a conviction? It is conceded that at the present time a majority of the courts say that negligence must be in the nature of recklessness and indifference.[4] However, it is submitted that *stare decisis* should not be an impediment in cases involving criminal liability. The purpose of a criminal action is the protection of society, and not any individual right. However, such an action must be based upon justice. That is most just which is most fair. Can it be argued that a fairer result for all parties concerned can be reached by following the standard of "Ordinary Care" than that of "Reckless Disregard"?

The tendency of criminal courts in the present day is to enlarge the safety of individuals from the negligent onslaughts of other members of society. From the time of the early English law we see attempts made by the courts and text writers to adopt a uniform standard, for injuries inflicted upon the person of another by negligence. Reading from passages of early English law, we see attempts to adopt the standard of care of an "ordinary man" in cases of manslaughter committed through negligence. One early English writer says, "Law in these cases does not require the utmost caution that can be used, it is sufficient that a reasonable precaution, what is usual

[2] Beven, Negligence in Law, Vol. 3, p. 7.

[3] See 61 L. R. A. 277—note.

[4] People v. Adams, 289 Illinois 339, 124 N. E. 575 (1919); Fitzgerald v. State, 112 Ala. 34, 20 So. 966 (1896); State v. Clark, 196 Iowa 1134, 196 N. W. 82 (1923); People v. Barnes, 182 Mich. 179, 148 N. W. 400 (1914).

and ordinary in like cases be taken."[5] While another says the criterion in such cases is whether common or social duty would, under the circumstances, have suggested a more "circumspect conduct."[6] While still a third says the criterion is whether or not he used "due diligence."[7] The foregoing show the idea in its embryonic stage of adopting a standard which could be applied to all cases with a reasonable assurance that justice to all would be equally and fairly administered.

Wrongs may be placed in two categories, public and private. "A private wrong", otherwise termed a "tort" or "civil injury" ,is "an infringement or privation of the civil rights which belong to individuals, considered merely as individuals." A public offense, or crime, is "a breach and violation of the public rights and duties due to the whole community, considered as a community in its social aggregate capacity."[8]

As has been said before, by the weight of authority the negligence required in criminal cases must be more than the failure to exercise the care of an "ordinary man" under like or similar circumstances.[9] *Quaere*: Could the tort standard of care be used in cases of criminal negligence and a better result be reached than that gained by the majority rule?

The term "reasonable man" denotes a person exercising those qualities of knowledge, concept of duty, intelligence, and judgment which society requires of its members for the protection of their own interests and the interests of others.

One advantage to be gained by the adoption of the tort standard of care in criminal negligence cases, is that the minds of the jurors are relieved from the vague and illusory task of determining hair splitting distinctions as to due care and negligence, and then refitting them in their respective compartments.

Although "culpable negligence" in criminal law is usually defined as an offense resulting from an accident produced by such carelessness and recklessness on the part of the party charged as to indicate a disregard for the safety of others,[10] one court has gone so far as to define "culpable negligence" as the omission to do something which a reasonable and prudent person would do, or the doing of something which such a person would not do under the circumstances surrounding the particular case.[11]

It has been said in tort actions that "gross" negligence is nothing

[5] Foster's Crown Law (1791) 302.
[6] 1 East's Cases of the Crown (1806) 268.
[7] Hale's Pleas of the Crown (1680) 475.
[8] 4 Bl. Comm. 5; see 16 C. J. 50, and cases there cited.
[9] *Supra* note 4.
[10] Nail v. State, 33 Okla. Cr. 100, 242 Pac. 270 (1926).
[11] See American Digest System, Criminal Law, Key No. 23.

more than negligence with a vituperative epithet.[12] Is it not best to say that it is only reasonable care that is required in any case; but the greater the danger the more precautions and the closer vigilance reasonable care requires? Rather than to say in order to find the defendant guilty of a crime you must find that he was guilty of "wanton" or reckless disregard for the safety of others. The suggested standard would be open, practicable, and easily applied to any given statement of facts, instead of being a standard based entirely upon degree.

The term "culpable" or "gross" negligence is vague and illusory, and places upon the jury the burden of making an arbitrary decision, which may be based upon facts which are not any too clear, while the adoption of the standard of care of an "ordinary" man would eradicate these difficulties, and place before the jury a clear mental picture of just what their duties consisted of, thereby simplifying, and at the same time clarifying, their sworn duty to the state, thus enabling them to reach a practical and just decision.

The terms "gross negligence" and "reckless disregard" are not very helpful in determining what the term criminal negligence means. It is better to describe negligence in terms of care or caution, and to say one is guilty of manslaughter if he kills another in the commission of an act in such a way that an ordinarily prudent person under the circumstances would not have acted. We cannot say, however, that he is guilty merely because he did not adopt the safest mode of doing the act, even though that mode were accessible; on the other hand in order to be guilty he need not have adopted a clearly unsafe mode. It is submitted that the proper test should be, "Did he exercise the care of a reasonably prudent person under the circumstances in adopting the mode of acting which he followed?"

It is well known that cases based upon criminal negligence do not require a criminal intent, as is the usual rule in cases of homicide in general. It is submitted that "gross" and "culpable" negligence are so closely associated with actual intent that it is almost impossible to separate the two entirely, and reach a result which is based upon negligence alone, which is the desired result.

It is the duty of every citizen of a state to conduct himself in a manner consistent with reason and due care. Is it fair to the other members of society to say that a man must be guilty of an act bordering on actual intent as is required, before it can be said that he has been guilty of gross negligence, before society should be entitled to protection from his depredations? If his conduct is not that of a gentleman, and of one who recognizes his duty to safeguard the lives and property of others, then he should be removed beyond the sphere of every-day society and given an opportunity to meditate on his misdeeds and capricious conduct.

Every negligent omission of a legal duty whereby death ensues to another is indictable either as murder or manslaughter. When a

[12] Wilson v. Brett (1843 Exch.) 11 M. & W. 113-116.

man, says Archbold,[13] takes upon himself an office or duty requiring skill or care, if, by his ignorance, carelessness, or negligence he causes the death of another, he will be guilty of manslaughter.

If there be any negligence or want of proper care in the action of any person from which death to another ensues, the cause of such death cannot be said to be purely accidental; it is the consequence of such act of negligence or want of proper care, and criminal liability should attach, without proving there was a reckless disregard for the lives of others on the part of the one accused.

It is generally well known that in cases of criminal liability based upon negligence an intent is not required. Yet some of the cases, holding the accused must be guilty of gross negligence, say that such gross negligence will supply the criminal intent.[14] Such a result shows the confusion in which a court finds itself in trying to separate gross negligence and criminal intent.

It is often said that the negligence or carelessness must be so gross as to imply a criminal intent, but the question still remains as to when it reaches that point, and no rule by which to test it has been or can be given.

A man is responsible for the natural consequences of his criminal acts, although from ignorance, carelessness, or neglect, he does not take precautionary measures to prevent those consequences.

So long as the crime resulted from the neglect of a plain legal duty imposed by law or contract upon the defendant personally, is it fair to the other members of society to say that the one in breach of his legal duty must have shown a "wanton" or "reckless" disregard for the safety of others? Such a position is untenable and is without merit.

It might well be argued that Kentucky is in accord with the majority in saying that a person may be guilty of an offense resulting from negligence if it was produced by such carelessness and recklessness on his part as to indicate a disregard for the safety of others.[15] However, the Kentucky courts say that the carelessness or recklessness, necessary to convert the accident from an innocent into a guilty one, must occur under such circumstances as to indicate a disregard on the part of the perpetrator for the safety of others. It is submitted that such a qualification could be complied with more logically by showing that the perpetrator did not exercise that degree of care which an ordinarily prudent person would have used under the same or similar circumstances.

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[13] Bishop Crim. Law (6th ed. 1923), Sec. 314, p. 178.
[14] State v. Irvine, 126 La. 534, 52 So. 567 (1910).
[15] Pray v. Commonwealth, 181 Ky. 396, 205 S. W. 404 (1918).

Conclusion

In order to reach more just decisions, and in order to facilitate present day litigation in the criminal courts, certainly there can be no harm done in incorporating into the criminal law certain standards and measurements as they exist in the civil law. However, the court should take cognizance of the fact that it is dealing with a *crime* and not merely a civil action between two or more individuals. The standard of care proposed in this paper will cover any given sort of situation and make it possible for the court to instruct the jury fairly and clearly, and at the same time make it possible for the jury to reach a just verdict after the case has been presented to them.

The growth of criminal law in this country has been more retarded than that of any other branch of the law. It is time to call a halt to the old guesswork manner of construing what the law is, and start applying sound principles based upon the facts of the case as it was presented before the court.

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