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Criminal Law—Proximate Cause in Negligent Homicide

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> Under the given instruction, the defense of not guilty by reason of mental irresponsibility is not available to a person who has the ability to understand the nature and quality of his acts, but, because of mental disease or defect, is somehow unable to control his own behavior.[47]

Yet in implementing the "social control" policy by subjecting to criminal sanctions all those who might *possibly* be deterred, an accused who is not in fact capable of being deterred may be convicted.

Conclusion. Under the Model Penal Code test an accused may be found "not guilty by reason of mental irresponsibility" if "he lacked substantial capacity either to appreciate the criminality of his act, or to conform his conduct to the requirements of law." It is submitted that this test is more appropriate than the court's restricted view of the *M'Naghten* rules to determine a defendant's mental responsibility. By this standard the admission of complete psychiatric data is relevant to the inquiry. It is consistent with the concept of *mens rea* based on the assumption that a person has the basic capacity to control his own behavior and to choose between alternatives. And it is consistent with the policy of deterrence and social control which appears to be paramount in the Washington court's analysis.

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Proximate Cause in Negligent Homicide. Defendant was charged with negligent homicide under RCW 46.56.040[1] for causing the death of a pedestrian through the operation of a motor vehicle.[2] The trial jury found the defendant guilty, but the trial judge entered an order arresting judgment and, in the alternative, granting a new trial. From this order the state appealed. In his trial memorandum, the judge ruled as a matter of law that the evidence was insufficient to show any causal relation between the defendant's state of intoxication and the resulting death to a pedestrian. The Washington Supreme Court in a 5-3 decision reversed and remanded with instructions to enter judgment upon the verdict of the jury. The court held that there was sufficient evidence for the jury to find that each element of the offense charged had been proved beyond a reasonable doubt.

[47] State v. White, 160 Wash. Dec. 554, 582, 374 P.2d 942, 959 (1962).

[1] RCW 46.56.040: "When the death of any person shall ensue within one year as a proximate result of injury received by the operation of any vehicle by any person while under the influence of or affected by intoxicating liquor . . . the person so operating such vehicle shall be guilty of negligent homicide by means of a motor vehicle."

[2] State v. Costello, 59 Wn.2d 325, 367 P.2d 816 (1962).

The most significant part of the *Costello* case is the special concurring opinion, which sets forth a novel view of causation in negligent homicide.[3] Here the argument is set forth that the state no longer needs to establish a causal relationship between the intoxication of the defendant and the act producing the fatal accident.[4] The author and the three other signers of the opinion contend that the crime is committed if injury occurs during a period of time when the driver is under the influence of intoxicating liquor, and death proximately results from the injury.[5] Thus proximate cause would no longer be considered in a prosecution under the negligent homicide statute in Washington.[6]

Prior to 1937, those who killed with an automobile were charged with manslaughter under RCW 9.48.060.[7] To obtain a conviction, the state had to prove beyond a reasonable doubt that the defendant-driver, while under the influence of intoxicants, drove so as to endanger unnecessarily the safety of other users of the public highways.[8] It was

[3] Although the decision in the *Costello* case follows the majority view, only the *result* appears to be satisfactory to the bare majority of five of the Washington Supreme Court Judges. Four of the Judges express a different attitude toward the element of proximate cause than has been previously followed. It appears that only one of the five majority judges believes a causal relationship must be shown, the other four advocating its complete elimination as a requirement. State v. Costello, 59 Wn.2d 325, 332-336, 367 P.2d 816, 820-822 (1962).

[4] *Id.* at 332-336, 367 P.2d at 821.

[5] *Id.* at 332-336, 367 P.2d at 822.

[6] The weight of authority favors the proximate cause requirement. Montaque v. State, 219 Ark. 242, 242 S.W.2d 697 (1951); People v. Kemp, 150 Cal. App. 2d 654, 310 P.2d 680 (1957); People v. Goodale, 33 Cal. App. 2d 80, 91 P.2d 163 (1939); People v. Cox, 123 Colo. 179, 228 P.2d 163 (1951); State v. Hupf, 9 Terry 254, 101 A.2d 355 (Dela. 1953); Edmonds v. State, 98 Ga. App. 827, 107 S.E.2d 286 (1959); Cain v. State, 55 Ga. App. 376, 190 S.E. 371 (1937); State v. Salhus, 68 Idaho 75, 189 P.2d 372 (1948); State v. Plaspohl, 239 Ind. 324, 157 N.E.2d 579 (1959); State v. Richardson, 216 Iowa 809, 249 N.W. 211 (1933); State v. McNichols, 188 Kan. 582, 363 P.2d 467 (1961); Bowling v. Commonwealth, 320 S.W.2d 306 (Ky. 1959); State v. Porter, 176 La. 673, 146 So. 465 (1933); State v. Hamilton, 149 Me. 218, 100 A.2d 234 (1953); State v. Budge, 126 Me. 223, 137 A. 244 (1927); People v. Clark, 295 Mich. 704, 295 N.W. 370 (1940); Goudy v. State, 203 Miss. 366, 35 So. 2d 308 (1948); State v. Medlin, 355 Mo. 564, 197 S.W.2d 626 (1946); State v. Darchuck, 117 Mont. 15, 156 P.2d 173 (1945); Birdsley v. State, 161 Neb. 581, 74 N.W.2d 377 (1956); State v. Diamond, 16 N.J. Super. 26, 83 A.2d 799 (1951); State v. Sisneros, 42 N.M. 500, 82 P.2d 274 (1938); People v. Lemieux, 176 Misc. 305, 27 N.Y.S.2d 235 (1941); State v. Lowery, 223 N.C. 598, 27 S.E.2d 638 (1943); State v. Schaeffer, 96 Ohio St. 215, 117 N.E. 220 (1917); Wilson v. State, 94 Okla. Crim. 189, 237 P.2d 177 (1951); State v. Wojahn, 204 Ore. 84, 282 P.2d 675 (1955); Commonwealth v. Root, 191 Pa. Super. 238, 156 A.2d 895 (1959); State v. Rachels, 218 S.C. 1, 61 S.E.2d 249 (1950); Copeland v. State, 154 Tenn. 7, 285 S.W. 565 (1926); Fox v. State, 145 Tex. Crim. 71, 165 S.W.2d 733 (1942); Goodman v. Commonwealth, 153 Va. 943, 151 S.E. 168 (1930); State v. Lewis, 115 W. Va. 1, 174 S.E. 483 (1934); Maxon v. State, 177 Wis. 319, 187 N.W. 753 (1922). See 5A AM. JUR., *Automobiles* §§ 1132, 1137, 1142 (1956); 5 AM. JUR. *Automobiles* § 791 (1936); 61 C.J.S. *Motor Vehicles* §§ 660, 663, 666 (1949); 3 WHARTON, CRIMINAL LAW AND PROCEDURE §§ 973, 985 (1957).

[7] "Manslaughter. In any case other than those specified in RCW 9.48.030-050, homicide, not being excusable or justifiable, is manslaughter."

[8] State v. Ramos, 159 Wash. 599, 601, 294 Pac. 233, 224 (1930). Note that the

also necessary to prove a causal relationship between the driver's intoxication and the fatal accident.[9] These requirements exist in other jurisdictions where the charge for a homicide through the operation of a motor vehicle is manslaughter.[10] Juries, however, manifested a strong reluctance to convict drivers of manslaughter. The connotations of that crime were apparently too grave. This dilemma caused prosecuting attorneys to seek relief from the state legislature, which then passed the 1937 negligent homicide statute.[11] In a case decided by the supreme court in 1960, it was held that this statute superseded the manslaughter statute in all prosecutions involving homicide through the unlawful or grossly negligent operation of a motor vehicle.[12]

In *Costello,* the majority made no special reference to the element of causal relationship, but the special concurring opinion proceeded to interpret the statutory use of "proximate result" in an unusually literal fashion.[13] The concurring judges appear to regard negligent homicide as a crime of strict or absolute liability. This note will consider the merit of this position from the standpoint both of statutory construction and public policy.

The question of proximate cause has been considered in previous Washington cases where the accused has been prosecuted under the

language used in this case is similar to that used in determining tort liability: Did the defendant's conduct create an unreasonable risk of harm to others?

[9] State v. Ramser, 17 Wn.2d 581, 586, 136 P.2d 1013, 1015-1016 (1943). Although this case was decided in 1943, the defendant was charged with manslaughter and the conviction was upheld by the Washington Supreme Court. In regard to the need of proving proximate cause the court said: "When a person is charged with manslaughter by reason of negligence on his part, whether it be the doing of some act, or his failure to do something he should have done, or whether the negligence is cast upon him as a matter of law by reason of his violation of some statute, there must be a causal connection between the negligence and the death of the person involved, so that it can be said that the act done or omitted was a proximate cause of the resultant death."

[10] See cases collected in 3 WHARTON, CRIMINAL LAW AND PROCEDURE § 973 n. 2 & § 985 n. 13 (1957). State v. Vanskike, 120 Wash. 659, 208 Pac. 84 (1922).

[11] RCW 46.56.040, quoted note 1 *supra.*

[12] State v. Collins, 55 Wn.2d 469, 348 P.2d 214 (1960).

[13] "It cannot be overemphasized that the crime is committed if the fatal accident occurs while the driver of the car is under the influence of intoxicating liquor. It is no defense that the injury is not the proximate result of intoxication. The words 'proximate result' refer only to the death being the result of an injury received while the driver is under the influence of intoxicating liquor. . . . The very purpose of this statute was to eliminate the necessity of proving intoxication to be the proximate cause of the fatal accident. [P]roximate cause of such an accident is not an element of the crime. . . . The predominant purpose of the statute is to prohibit drunken driving. The crime of negligent homicide is committed if a fatal accident occurs while the driver is under the influence of intoxicating liquor. The legislature has not required that the fatal accident be the proximate result of intoxication, but only that such accident occur during the period of time when the driver is intoxicated. The requirement of cause and effect is confined to proving that the death was the proximate result of the accident." State v. Costello, 59 Wn.2d 325, 333-336, 367 P.2d 816, 820-822 (1962) (concurring opinion).

negligent homicide statute.[14] In a recent case, the Washington Supreme Court held that instructions to the jury must contain an explanation of proximate cause and that the state has the burden of proving guilt beyond a reasonable doubt.[15] The great weight of case authority in Washington requires proof of a causal relationship between the defendant's conduct and a resulting death, and furnishes no support for the special concurring opinion's view.[16]

Under a criminal charge of manslaughter or statutory negligent homicide, since specific intent is not an element, the only thing that prevents a defendant from being held absolutely liable is the requirement of causal relationship between the unlawful conduct and the homicide.[17] The acute problem of drunken driving accounts for the view taken by the concurring opinion. According to this view, effective law enforcement and protection of the public can best be achieved by eliminating the requirement of proximate cause. Support for this position is found in other jurisdictions where courts have held that the policy of the law forbids an investigation of probable consequences when the driver of an automobile under the influence of an intoxicant kills another person.[18] Still other jurisdictions, however, have held to the contrary.[19]

An interesting aspect of this opinion is its use of and reference to "legislative purpose." It is said that the very purpose behind the

[14] State v. Bowman, 57 Wn.2d 266, 356 P.2d 999 (1960); State v. Baker, 56 Wn.2d 846, 355 P.2d 806 (1960); State v. Cordero, 36 Wn.2d 846, 221 P.2d 472 (1950); State v. McDaniels, 30 Wn.2d 76, 190 P.2d 705 (1948); State v. Carlsten, 17 Wn.2d 573, 136 P.2d 183 (1943).

[15] "[E]very element of the state's case must be proved beyond a reasonable doubt. . . . [O]ne of the elements of the state's case which must be proved is that the death . . . must have been a proximate result of appellant's operation of the automobile. . . . [I]t is not enough for the state to prove drunkenness or recklessness on appellant's part without also proving that such was the proximate cause of the accident. . . . The jury could not find him guilty unless there was misconduct (drunkenness or recklessness) on his part as defined by the trial court and, further, that such misconduct was the proximate cause of the accident." State v. Baker, 56 Wn.2d 846, 860, 355 P.2d 806, 807 (1960).

[16] There are no Washington Supreme Court decisions that have adopted the rule of absolute liability and the elimination of proximate cause in a negligent homicide situation. But see Tootle v. State, 100 Fla. 1248, 130 So. 912 (1930); Whitman v. State, 97 Fla. 988, 122 So. 567 (1929); Edwards v. State, 202 Tenn. 393, 304 S.W.2d 500 (1957); Keller v. State, 155 Tenn. 633, 299 S.W. 803 (1927); State v. Peckham, 263 Wis. 239, 56 N.W.2d 835 (1953).

[17] The general rule which is followed by the great majority of jurisdictions is summed up in 3 WHARTON, CRIMINAL LAW AND PROCEDURE § 985 (1957): "In accordance with the general rule that the defendant is not responsible for a homicide unless his act was the proximate cause of the death, it is held by decision or required by statutory provision that the operator of a motor vehicle cannot be convicted of homicide unless the operator's act was a proximate cause of the death. The rule applies whether the act of the defendant was merely culpable or was criminal negligence or whether it was an act committed in violation of a statute.

enactment of the negligent homicide statute was to eliminate the necessity of proving proximate cause.[20] The strongest indication of such intent would be that manifested by the language used in the statute itself. According to the concurring judges, the key words indicating this legislative intent are the words "while" and "proximate result." Obviously, the crux of the problem is *how* these words are to be used and the "how," unless specifically spelled out in the statute itself, is for the court to decide. Literal interpretation of these words means that the accused has committed a crime if "while" driving under the influence of an intoxicant a death "proximately results" to another from injuries received from impact with the accused's automobile. The special concurring opinion points out that the absence of any legislative reference to causal relationship in the statute should preclude the court from any "reading it in." But modern jurisprudence treats "legislative intent" as a fiction.[21] Leading authorities suggest that where statutory language does not express an unambiguous meaning, it is necessary for the court to supply the meaning in light of social needs and possible consequences.[22] If this meaning should frustrate

"It must be shown that the death must have been the natural and probable consequence of the negligence or unlawful act, and not the result of misadventure, or of an independent intervening cause, in which accused did not participate. There must be something more than a mere coincidence of time and place between the wrongful act and the death. Under these principles manslaughter by culpable negligence is not established by proof of the violation of a speed ordinance when it appears that such was not the proximate cause of the collision in which the death occured."

[18] See cases cited from other jurisdictions at note 16 *supra*. According to these holdings, there are many things a sober man, in the exercise of due care, would do to avoid such a result which would be entirely beyond the ability of an intoxicated driver. Those cases express the view that fatalities are too numerous and conditions too serious to permit speculative inquiries.

[19] People v. Goodale, 33 Cal. App. 2d 80, 91 P.2d 163 (1939); Cutshall v. State, 191 Miss. 164, 4 So.2d 289 (1941); Commonwealth v. Root, 403 Pa. 571, 170 A.2d 310 (1961); McWhirter v. State, 147 Tex. Crim. 268, 180 S.W.2d 364 (1944); State v. Capps, 111 Utah 189, 176 P.2d 873 (1947). The cases generally hold that criminal liability will not be imposed on the ground of driving while intoxicated if accused was operating his vehicle correctly and as a man should who was not under the influence of intoxicating liquor, so that his intoxicated condition did not bring about or contribute to the death of the deceased.

[20] "The legislature concluded that to treat the problem as a mere question of causation would sacrifice the public security in deterring extremely perilous conduct. That choice was for the legislature. The court's duty is only to apply the law as enacted. The predominant purpose of the statute is to prohibit drunken driving. The crime of negligent homicide is committed if a fatal accident occurs while the driver is under the influence of intoxicating liquor. The legislature has not required that the fatal accident be the proximate result of intoxication, but only that such accident occur during the period of time when the driver is intoxicated. The requirement of cause and effect is confined to proving that the death was the proximate result of the accident." State v. Costello, 59 Wn.2d 325, 334, 367 P.2d 816, 821 (1962) (concurring opinion).

[21] For articles dealing with "judicial legislation," see COHEN & COHEN, READINGS IN JURISPRUDENCE AND LEGAL PHILOSOPHY 497-526 (1951).

[22] "[T]he meaning of a statute consists in the system of social consequences to

the wishes of the legislators, then they must enact a more precise statute.

If there is a real need for a change in the present law of negligent homicide and proximate cause, it arises from the increasing number of traffic fatalities caused by intoxicated drivers.[23] Whether we ought to have a rule of absolute liability depends upon a balancing of that need with the rights of the accused. The harshness of a rule of absolute liability may best be illustrated by hypotheticals:

(1) Defendant is operating his motor vehicle while under the influence of intoxicating liquor. He is travelling at the prescribed rate of speed along a city arterial when suddenly his right-front tire is punctured and he loses control of his car and fatally injures a pedestrian. Defendant has conclusive evidence to prove that even if he had been sober, the accident could *not* have been avoided. Under the rule of the special concurring opinion, defendant will be found guilty. He will not be allowed to introduce the evidence of intervening cause which would have established the lack of causal relationship between his condition and the fatal injury to the pedestrian.

(2) Defendant, while driving under the influence of intoxicating liquor, brings his vehicle to rest at a signal light. While waiting for the light to turn green, X, in another vehicle, traveling at an excessive rate of speed, runs into defendant's vehicle and as a result, X is killed. If proximate cause is no longer a consideration in the prosecution of defendant, he will be found guilty of negligent homicide on the evidence

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which it leads or of the solutions to all the possible questions that can arise under it. These solutions or systems of consequence cannot be determined solely from the words used, but require a knowledge of the social conditions to which the law is to be applied as well as of the circumstances which led to its enactment. Legal rules related to human life, and grammar or formal logic alone will not enable us to deduce their juridical consequences. . . . The meaning of a statute, then, is a juridical creation in the light of social demands. It decides not so much what the legislature actually intended, nor what the words of a statute ordinarily mean, but *what the public, taking all the circumstances of the case into account, should act on.*" M. R. COHEN, *The Process of Judicial Legislation,* in COHEN & COHEN, READINGS IN JURISPRUDENCE AND LEGAL PHILOSOPHY 506 (1951). See Pound, *Common Law and Legislation,* 21 HARV. L. REV. 383 (1908).

[23] A yearly study made by the National Safety Council shows that the number of traffic fatalities where intoxication has been a contributory cause has increased over the past 10 years. In 1961 it was estimated that 57.5% of all traffic fatalities involved at least one party who was under the influence of intoxication; an increase of some 7% over the previous year. This increase is indicative of the growing problem in this area and is emphasized by the fact that on the whole the number of total traffic fatalities as compared with the increasing number of cars on the road and miles travelled yearly has decreased 11% since 1951. See statistics and reports compiled under the heading of "Alcoholism" in NATIONAL SAFETY COUNCIL, ACCIDENT FACTS (1962 ed.).

that when *X* was killed, defendant was driving under the influence of intoxication. In the field of criminal law, contributory negligence is not generally regarded as a defense.[24] However, where proximate cause is an element of the crime required to be proven, in a situation such as our second hypothetical, defendant would be allowed to show that *X's* death was caused by his own recklessness.

As a final justification for the elimination of proximate cause, the special concurring opinion points out that violators charged under RCW 46.56.040 are escaping punishment because of the difficulties presented the prosecution in proving causal relationship.[25] If the present requirements of proof of proximate cause place too great a burden upon the prosecution (resulting in an undesirable impediment to public safety), a different approach to this problem would be desirable, but not one resulting in the harsh rule of absolute liability. It it suggested that a rule be adopted which *shifts* the burden of proof of proximate cause onto the defendant. That is, if it be proved that the defendant, while intoxicated, has committed homicide by the operation of a motor vehicle, a prima facie presumption of guilt should arise. But the defendant would have the opportunity to rebut the presumption and to escape conviction by proving that his wrongdoing did not proximately cause the homicide.

It is submitted that the suggested presumption has the advantages of absolute liability without its disadvantages. The purpose of absolute liability is to enhance the public safety by easing the burden of proof borne by the prosecution and by deterring drunken driving. The presumption would accomplish the first of these objectives. Insofar as absolute liability would operate as a more effective deterrent than the presumption, to that extent absolute liability is arbitrary and unjust. The reason is that it singles out from drunken drivers as a class those who commit homicide, even though their drinking in no way contributes to the death. If drunken driving should be deterred by greater penalties, the penalties should apply to all drunken drivers, and not

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[24] "The general rule that the contributory negligence of the victim is not a defense in a prosecution for homicide applies in motor vehicle cases. The contributory negligence of the victim is no defense in a prosecution for homicide based upon the conduct of the accused driver of a motor vehicle in violation of law or upon his criminal or culpable negligence. The fact that the deceased was guilty of negligence directly contributing to his death does not exonerate the accused, unless deceased's negligence was the sole cause of death. In the latter case, the defendant is exculpated not because of the contributory negligence of the victim but because the defendant was not the proximate cause of the homicide." 3 WHARTON, CRIMINAL LAW AND PROCEDURE § 986 (1957). See 5 AM. JUR. *Automobiles*, §§ 793 and 796 (1936).

[25] State v. Costello, 59 Wn.2d 325, 334, 367 P.2d 816, 821 (1962).

just those who through *no added* fault happen to cause a fatal injury. Where drunkenness actually causes death, the situation is different. Criminal liability normally attaches to homicide that is neither justifiable nor excusable. In the absence of causal relationship between death and the fault of the defendant, the homicide would be excusable. Given that relationship the homicide would be culpable. The distinction evidently stems from the general belief that wrongful conduct warrants punishment either for itself or when it results in special harm, but not otherwise. A rule of absolute liability would abrogate the distinction between excusable and inexcusable homicide and would punish drunkenness as though it had caused special harm when in fact it had not. The suggested presumption, on the other hand, would retain the normal distinction, which is based on the community's sense of justice. Of course, the present rule, requiring the prosecution to prove proximate cause, preserves the distinction also.[26]

GUST S. DOCES

Search Incident to an Arrest. In a recent case, *State v. Michaels*,[1] the Washington Supreme Court announced a new rule for search and seizure incident to an arrest: the purpose of the arrest circumscribes the area and nature of the search.

The Pierce County Sheriff's department notified the King County department that the defendant was driving a certain car believed to contain gambling devices. Two King County deputies sought out his car and followed it. After he made an illegal left turn, the officers directed him to stop his car. After citing him for that violation, they opened the auto's trunk and discovered suitcases containing dice, magnets and magnetized dice.

On appeal from his conviction for the possession of gambling devices,[2] the state supreme court held that the arrest for the traffic violation was made as a pretext for the search for the gambling devices, and as such, did not furnish legal support necessary for the search. Therefore, the search was invalid, and the trial court erred in denying the appellant's motions to suppress illegally seized evidence.[3]

[26] The present law in Washington is that set forth in State v. Baker, 56 Wn.2d 846, 355 P.2d 806 (1960). The extreme importance of this special concurring opinion lies in the fact that it falls short of becoming a majority opinion by *one* vote.

[1] 160 Wash. Dec. 639, 374 P.2d 989 (1962).

[2] RCW 9.47.030.

[3] State v. Gibbons, 118 Wash. 171, 203 Pac. 390 (1922) established the exclusionary rule in Washington, which compels the exclusion at trial of all evidence obtained by