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Is Criminal Negligence a Defensible Basis for Penal Liability?

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put to extensive efforts to collect and analyze prior awards not knowing whether the court will consider the collected precedents in the review of his case.[69]

It would be wise for the courts to eliminate the present confusion surrounding the rule of comparative damages by defining the form, if any; of the rule to which they will give notice and then consistently applying this definition. A modified and consistent use of the rule would balance the desireability of achieving justice in each case with the predictability necessary for both a stable legal system and an efficient allocation of our legal resources.

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IS CRIMINAL NEGLIGENCE A DEFENSIBLE BASIS FOR PENAL LIABILITY?

In 1965 the New York Legislature enacted and the Governor of New York signed into law a Revised Penal Law to take effect September 1, 1967.[1] The New York Commission for the Revision of the Penal Law adopted the suggestion of the American Law Institute Model Penal Code[2] by including a general statutory provision defining four concepts of mental culpability: intention, knowledge, recklessness and criminal negligence.[3] The purpose of this Comment is to demonstrate the inadvisability of punishing negligence by penal sanctions. More specifically, the following will be disscussed; first, the interrelation of recklessness and negligence under the present New York Penal Law, and, second, the lack of justification for the inclusion of negligence within the scope of penal liability.

STATUTORY DEFINITIONS

The New York Revised Penal Law defines recklessness as follows:

> A person acts recklessly with respect to a result or to a circumstance described by a statute defining an offense when he is aware of and *consciously disregards* a substantial and unjustifiable risk that such result will occur or that such circumstance exists. The risk must be of such nature and degree that disregard thereof constitutes a gross deviation from the standard of conduct that a reasonable person would observe in the situation. A person who creates such a risk but is unaware

69. The extent of preparation is exemplified in a case involving an automobile accident in Louisiana tried in the federal courts. In order to support its charge of excessive damages before the United States Court of Appeals, the defense analyzed in a brief "a resume of the 399 cases reported from 1941 through 1963 concerning facial disfigurement, some accompanied by emotional and psychic distress, and annotated 19 cases of awards exceeding the verdict in question (Appendix A); all cases in the United States except Louisiana (Appendix B); and all Louisiana cases (Appendix C)." 13 Defense L.J. 750 (1964).

1. N.Y. Rev. Pen. Law, ix.
2. Model Pen. Code § 2.02(2) (Proposed Official Draft 1962).
3. N.Y. Rev. Pen. Law § 15.05. Model Pen. Code § 2.02(2) uses the word "purposely" instead of "intentionally," in the New York Rev. Pen. Law.

thereof solely by reason of voluntary intoxication also acts recklessly with respect thereto.[4]

Criminal negligence is defined as follows:

> A person acts with criminal negligence with respect to a result or to a circumstance described by a statute defining an offense when he *fails to perceive* a substantial and unjustifiable risk that such result will occur or that such circumstance exists. The risk must be of such nature and degree that the failure to perceive it constitutes a gross deviation from the standard of care that a reasonable person would observe in the situation.[5]

These statutory definitions represent a marked change from the present New York Penal Law, which contains no general statutory provision defining the various elements of criminal culpability. For example, there is presently no statutory definition of recklessness; however there is a definition of negligence in section 3 of the Penal Law, which provides:

> Each of the terms "neglects," "negligence," and "negligently" imports a 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.[6]

A Theoretical Approach

A fundamental concept of Anglo-American criminal law requires a concurrence of a criminal state of mind (*mens rea*) and a forbidden act (*actus reus*), resulting in a proscribed harm before one can be criminally punished.[7] *Mens rea* refers to a state of mental awareness, such as an intention to do an immediate act or bring about a consequence, or recklessness as to such act or consequence.[8] The punishment of criminal negligence strays from this fundamental criminal concept, in that it involves no state of awareness. Rather, negligence occurs when a risk is *inadvertently created* of which the actor ought to be aware, considering its nature and degree, the character and purpose of his conduct, and the care that a reasonable person would exercise in his situation.[9] Since negligence involves no *mens rea*, the question is raised as to the advisability of punishing negligent conduct with criminal sanctions. Professor Edwin Keedy responded to this question as follows: "If the defendant, being mistaken as to the material facts, is to be punished because his mistake is one an average man would not make, punishment will sometimes be inflicted *when the criminal mind does not exist*. Such a result is contrary to fundamental principles, and is plainly unjust, for a man should not be held criminal because of lack of intelligence."[10] This argument is persua-

4. N.Y. Rev. Pen. Law § 15.05(3).
5. N.Y. Rev. Pen. Law § 15.05(4) (Emphasis added.).
6. N.Y. Pen. Law § 3.
7. Williams, Criminal Law § 14 (2d ed. 1961).
8. Perkins, Criminal Law 654 (1957).
9. Williams, *op. cit. supra* note 7, at § 36.
10. Keedy, *Ignorance and Mistake in the Criminal Law*, 22 Harv. L. Rev. 75, 84 (1908) (Emphasis added.).

sive, especially when considered in conjunction with the traditional concepts and goals of criminal punishment.

The concept of criminal punishment is based on one, or a combination, of four theories: deterrence, retribution, rehabilitation and incapacitation.

The deterrence theory of criminal law is based on the hypothesis that the prospective offender knows that he will be punished for any criminal activity, and, therefore, will adjust his behavior to avoid committing a criminal act.[11] This theory rests on the idea of "rational utility," *i.e.*, prospective offenders will weigh the evil of the sanction against the gain of the contemplated crime.[12] However, punishment of a negligent offender in no way implements this theory, since the negligent harm-doer is, by definition, unaware of the risk he imposes on society. It is questionable whether holding an individual criminally liable for acts the risks of which he has failed to perceive will deter him from failing to perceive in the future.

The often-criticized retributive theory of criminal law presupposes a "moral guilt,"[13] which justifies society in seeking its revenge against the offender. This "moral guilt" is ascribed to those forms of conduct which society deems threatening to its very existence, such as murder and larceny. However, the negligent harm-doer has not actually committed this type of morally reprehensible act, but has merely made an error in judgment. This type of error is an everyday occurrence, although it may deviate from a normal standard of care. Nevertheless, such conduct does not approach the moral turpitude against which the criminal law should seek revenge. It is difficult to comprehend how retribution requires such mistakes to be criminally punished.

It is also doubtful whether the negligent offender can be rehabilitated in any way by criminal punishment. Rehabilitation presupposes a "warped sense of values"[14] which can be corrected. Since inadvertence, and not a deficient sense of values, has caused the "crime," there appears to be nothing to rehabilitate.

The underlying goal of the incapacitation theory is to protect society by isolating an individual so as to prevent him from perpetrating a similar crime in the future. However, this approach is only justifiable if less stringent methods will not further the same goal of protecting society. For example, an insane individual would not be criminally incarcerated, if the less stringent means of medical treatment would afford the same societal protection. Likewise, with a criminally negligent individual, the appropriate remedy is not incarceration, but "to exclude him from the activity in which he is a danger."[15]

The conclusion drawn from this analysis is that there appears to be no reasonable justification for punishing negligence as a criminal act under any of these

11. Williams *op. cit. supra* note 7, at § 43.
12. Hall, *Negligent Behavior Should Be Excluded From Penal Liability*, 63 Colum. L. Rev. 632, 641 (1963).
13. Williams, *op. cit. supra* note 7.
14. *Ibid.*
15. Williams, *op. cit. supra* note 7, at § 43.

four theories. It does not further the purposes of deterrence, retribution, rehabilitation or incapacitation; hence, there is no rational basis for the imposition of criminal liability on negligent conduct.

This view, favoring exclusion of negligence from the criminal law, is not without support. The chief exponent of this position is Professor Jerome Hall, who maintains that there are persuasive historical, ethical and scientific reasons to support the exclusionary argument.[16]

Hall's historical ground rests upon a continuing trend toward restricting criminal negligence in many Anglo-American legal systems.[17] In addition, the same trend can be noted in civil law systems, where negligence is not criminally punishable absent a specific provision to that effect.[18] Such provisions are very few.[19] While Hall recognizes that history is often a dubious ground upon which to support a thesis, he argues that a long and sustained movement, such as that limiting the applicability of criminal negligence, places the burden of retention upon the proponents of penalization.[20] This burden, Hall maintains, has not been carried.

Professor Hall's ethical argument is based on the premise that, throughout the long history of ethics, the essence of fault has been voluntary harm-doing.[21] He maintains that this requirement of voluntary action becomes even more persuasive in the penal law, because no one should be criminally punished unless he has clearly acted immorally, by voluntarily harming someone.[22] Negligence, of course, cannot be classified as voluntary harm-doing. Therefore, no fault is involved and accordingly no punishment is justified.

In addition, Hall suggests scientific arguments for the exclusion of negligence from penal liability. One contention is that the incorporation of negligence into the penal law imposes an impossible function on judges, namely, to determine whether a person, about whom very little is known, had the competence and sensitivity to appreciate certain dangers in a particular situation when the facts plainly indicate that he did not exhibit that competence.[23] Also, Hall maintains that "the inclusion of negligence bars the discovery of a scientific theory of penal law, *i.e.*, a system of propositions interrelating variables that have a realistic foundation in fact and values."[24]

An Historical Approach

Although the proposal to exclude criminal negligence from penal liability appears radical, an historical analysis justifies this approach. Many state courts

16. Hall, *Negligent Behavior Should Be Excluded From Penal Liability*, 63 Colum. L. Rev. 632 (1963).
17. *Id.* at 634.
18. *Id.* at 635.
19. *Ibid.*
20. *Ibid.*
21. *Ibid.*
22. *Id.* at 636.
23. *Id.* at 642-43.
24. *Id.* at 643.

have refused to distinguish recklessness from negligence, and have, in fact, applied the recklessness standard where the statute merely involved criminal negligence.[25] The courts have thereby indicated their displeasure with criminally punishing negligent behavior. The applications of specific New York Penal Law provisions demonstrate that New York is a prime example of this judicial technique.

New York Penal Law Section 1052: Manslaughter in the Second Degree Defined

Although both negligence and recklessness can be elements in a section 1052 violation,[26] no definition of either term is found within the statute. Thus, the courts have been free to develop their own standards to determine what conduct constitutes criminal negligence and/or recklessness.

People v. Angelo,[27] which applied section 1052, represents the most celebrated New York opinion in the area of criminal negligence. In *Angelo*, the Court of Appeals explained that criminal negligence (or as the Court labeled it, "culpable negligence") is "something more than the slight negligence necessary to support a civil action for damages."[28] This statement appears to implicitly recognize the appropriateness of criminal punishment for negligence. However, the Court went on to define this higher degree of negligence, deserving of criminal punishment, as a "disregard of the consequences which may ensue from [an] act, and [an] indifference to the rights of others."[29] Under this definition, the Court has, in effect, said that the only type of negligence which deserves punishment is that which involves a *conscious disregard of risk*. This *conscious disregard* standard is the traditional test for reckless conduct. The Court, in using such a standard, is indicating its unwillingness to punish a person for that which he merely *fails to perceive*—that type of negligence which is intended to be punished under the Revised Penal Law.[30]

Angelo is still good law, and has been quoted extensively both in New York[31] and in other jurisdictions.[32] The New York courts have consistently refused to punish negligence criminally, applying the *Angelo conscious disregard* test.[33]

25. See, *e.g.*, State v. Hall, 209 La. 950, 25 So. 2d 908 (1946); People v. Pierce, 369 Ill. 172, 15 N.E.2d 845 (1938); Largent v. Commonwealth, 265 Ky. 598, 97 S.W.2d 538 (1936).

26. N.Y. Pen. Law, § 1052, as here relevant, states:

> Negligent use of machinery.—A person who, by . . . any unlawful, negligent or reckless act . . . Persons in charge of steamboats.—A person having charge of a steamboat . . . who, from ignorance, recklessness, or gross neglect. . . . Persons in charge of steam engines.—An engineer or other person . . . who wilfully, or from ignorance or gross neglect. . . .

27. 246 N.Y. 451, 159 N.E. 394 (1927).

28. *Id.* at 457, 159 N.E. at 396.

29. *Ibid.*

30. See N.Y. Rev. Pen. Law § 15.05(4).

31. See, *e.g.*, People v. Grogan, 260 N.Y. 138, 183 N.E. 273 (1932); People v. Waxman, 232 App. Div. 90, 249 N.Y. Supp. 180 (1st Dep't 1931); People v. Pace, 220 App. Div. 495, 221 N.Y. Supp. 778 (4th Dep't 1927).

32. See, *e.g.*, People v. Wilson, 177 P.2d 567 (Dist. Ct. App. 1947); Fuhs v. Swenson, 58 Wyo. 308, 131 P.2d 333 (1942); State v. Bates, 65 S.D. 105, 271 N.W. 765 (1937).

33. See, *e.g.*, *In re* Masten, 276 App. Div. 252, 94 N.Y.S.2d 277 (3d Dep't 1949); People v. Gardner, 255 App. Div. 683, 8 N.Y.S.2d 917 (4th Dep't 1939).

New York Penal Law Section 244: Assault in the Third Degree

Section 244 states that assault in the third degree is committed by any person who "operates or drives . . . any vehicle . . . in a culpably negligent manner . . . ."[34] Although the statute does not refer to recklessness, the Appellate Division, in *People v. Waxman*,[35] reversed a section 244 conviction for culpable negligence, stating, "To sustain a criminal prosecution . . . there must be coupled with the negligent act a *reckless* and wanton disregard of the rights of others, as, for example, a *deliberate* defiance of traffic regulations."[36]

A later Appellate Division case, applying section 244, continued the *Waxman* rationale by requiring a "willful and wanton disregard of the rights of others."[37] These cases, in requiring recklessness and a willful and wanton disregard of the rights of others under a statute which merely calls for negligence, demonstrate the courts' reluctance to hold an individual criminally responsible for negligent actions.

New York Penal Law Section 1053a: Criminal Negligence in the Operation of a Vehicle Resulting in Death

In 1936, seven years after *Angelo* and five years after *Waxman*, the New York Legislature added section 1053a to the Penal Law.[38] At this time, the legislature had the opportunity to reverse the existing trend, and mandate the courts to punish an individual for that which he *failed to perceive*. Instead, the culpability requirements of section 1053a[39] were drafted similarly to those in sections 1052 and 244, inasmuch as 1053a allowed the courts to continue requiring proof of recklessness under a statute merely calling for criminal negligence. Thus, the legislature did not reject the courts' decisions under sections 1052 and 244, which operated to exclude negligence from the scope of penal liability. The New York courts followed this legislative "invitation" and have continued to apply a *conscious disregard* test in deciding criminal negligence cases under section 1053a. This continued application is exemplified by the 1956 Court of Appeals decision in *People v. Decina*,[40] where the Court stated that a conviction pursuant to 1053a demands "a conscious choice of a course of action, in disregard of the consequences which he knew might follow from his conscious act . . . ."[41]

In 1963, the Appellate Division reaffirmed this judicial treatment of section

34. N.Y. Pen. Law § 244.
35. 232 App. Div. 90, 249 N.Y. Supp. 180 (1st Dep't 1931).
36. *Id.* at 92, 249 N.Y. Supp. at 183 (Emphasis added.).
37. People v. Biocchio, 259 App. Div. 267, 268, 18 N.Y.S.2d 786, 787 (1st Dep't 1940).
38. Added by N.Y. Sess. Laws 1936, ch. 733.
39. N.Y. Pen. Law § 1053-a states:
A person who operates or drives any vehicle of any kind in a reckless or culpably negligent manner, whereby a human being is killed, is guilty of criminal negligence in the operation of a motor vehicle resulting in death.
40. 2 N.Y.2d 133, 138 N.E.2d 799, 157 N.Y.S.2d 558 (1956).
41. *Id.* at 140, 138 N.E.2d at 803-04, 157 N.Y.S.2d at 565. *Cf.* People v. Eckert, 2 N.Y.2d 126, 138 N.E.2d 794, 157 N.Y.S.2d 551 (1956).

1053a crimes, holding that the standard for both recklessness and criminal negligence is conduct evincing a reckless disregard for the consequences or the safety of others.[42]

The Penal Law sections cited, along with the case law which has interpreted these statutory provisions, indicate that negligence and recklessness, supposedly different criminal concepts, are, in fact, both defined in terms of a recklessness standard. This continued reluctance to punish a *failure to perceive* is further demonstrated by a section of the New York Vehicle and Traffic Law.

New York Vehicle and Traffic Law Section 510: Suspension, Revocation and Reissuance of Licenses and Certificates of Registration: Subsection 3: Permissive Suspensions and Revocations

Subsection 3 of section 510 provides that "gross negligence in the operation of a motor vehicle or motorcycle . . . in a manner showing a reckless disregard for life or property of others"[43] constitutes one ground for the permissive suspension or revocation of licenses and certificates of registration. While this subsection seems to require both of the culpable elements under discussion, the cases which have interpreted this provision clearly state that negligence and recklessness both require *conscious disregard.* For example, in *Jenson v. Fletcher,*[44] the Appellate Division stated:

> "Gross," "culpable," "criminal" and "reckless" are the equivalent of each other in meaning and sense when applied to negligence. . . . Such meaning is the same whether applied to cases of manslaughter, negligently causing death, reckless driving or the section of the Vehicle and Traffic Law here under consideration. . . . [Both] the words "gross negligence" and the phrase "in a manner showing a reckless disregard for life or property of others" . . . import a disregard of the consequences of the act and an indifference to the rights of others.[45]

This historical view of New York law demonstrates that the proposal to exclude negligence from penal liability is not a novel approach. Rather, it represents the traditional position of the New York courts, in that they have demanded, under a statute calling for punishment of negligent conduct, that recklessness be established by proof of a conscious disregard of the consequences. This methodology of excluding negligence from penal liability has led to some conceptual confusion between recklessness and culpable negligence, as there have been no definitions which have distinguished the two terms.[46] This conceptual confusion led the New York Commission for the Revision of the Penal Law to

42. Application of Martinis, 20 A.D.2d 79, 244 N.Y.S.2d 949 (1963), *rev'd on other grounds,* 15 N.Y.2d 240, 206 N.E.2d 165, 258 N.Y.S.2d 65 (1965).

43. N.Y. Veh. & Traf. Law § 510(3)(e).

44. 277 App. Div. 454, 101 N.Y.S.2d 75 (4th Dep't 1950), *aff'd,* 303 N.Y. 639, 101 N.E.2d 759 (1951).

45. *Id.* at 457-58, 101 N.Y.S.2d at 79.

46. See Note, *The Proposed Penal Law of New York,* 64 Colum. L. Rev. 1469, 1481 (1964). See also N.Y. Prop. Pen. Law, Comm'n Staff Notes § 45.05.

distinguish and define these concepts.[47] The commission noted the purpose for the distinction as "an endeavor to crystallize an area of culpability and liability long fraught with uncertainty and confusion."[48] In so doing, the commission defined negligence as the *failure to perceive* a substantial and unjustifiable risk.[49] Although the New York Legislature, by accepting the Commission's revision, ended the conceptual confusion, it seemingly directed the New York courts to punish a form of criminal wrongdoing which has not previously been criminally punishable. An individual may now be criminally liable for *failing to perceive*, a mental state not previously punished by penal sanctions in the State of New York.

Ironically, there is no indication that the commission was aware that its inclusion of *failure to perceive* added a new culpable mental state. The revisers' only justification for the change was to clarify the existing conceptual confusion between the definitions of recklessness and criminal negligence.[50] However, the commission appears to have overlooked the fact that this conceptual confusion was an outgrowth of an underlying policy decision by the New York courts that a *conscious disregard* of risk be the minimal standard for criminal conviction. It is questionable whether, had the commission been aware of this policy choice, it would have made *failure to perceive*, and not *conscious disregard* the minimal standard for criminal culpability.

It may be argued that the Commission for the Revision of the Penal Law was aware of the courts' policy of excluding negligence, but deliberately added *failure to perceive* as a new culpable mental state. If this was the commission's intention, one would expect to find a justification for this change. However, the revisers gave no such justification; the Commission Staff Comments did not state that there was any change, and therefore gave no reasons for such change.

The commission did recognize some validity in the proposition that negligence be excluded from penal liability, and stated that of the four kinds of criminal culpability (intention, knowledge, recklessness and criminal negligence) there was least to be said for treating negligence as an adequate basis for imposing criminal sanctions.[51] However, the commission asserted that its inclusion would serve a useful purpose in two limited instances–assault and homicide.[52] Negligence was included in these limited areas based on the utilitarian ground of deterrence. The revisers cited with approval[53] an article by Professor Herbert Wechsler in which the author contended:

> [K]nowledge that conviction and sentence *may* follow conduct that inadvertently creates improper risk does supply men in some degree

47. N.Y. Rev. Pen. Law § 15.05(3), (4).
48. Prop. N.Y. Pen. Law, Comm'n Staff Notes § 45.05.
49. N.Y. Rev. Pen. Law § 15.05(4).
50. Prop. N.Y. Pen. Law, Comm'n Staff Notes §45.05.
51. Prop. N.Y. Pen. Law, Comm'n Staff Notes § 45.05.
52. Prop. N.Y. Pen. Law, Comm'n Staff Notes § 45.05; see N.Y. Rev. Pen. Law §§ 120.00(3), 125.10.
53. Prop. N.Y. Pen. Law, Comm'n Staff Notes § 45.05.

with an incentive to take care to use their faculties in gauging the potentialities of contemplated conduct. *To some exent,* at least, this motive *may* promote awareness and thus yield some added measure of control. Moreover, inattention *may* be due to lack of caring about other people's interests and not merely to an intellectual failure to grasp.[54]

Professor Hall refutes this position, stating that:

The theory of deterrence . . . is not relevant to negligent harm-doers since they have not in the least thought of their duty, their dangerous behavior, or any sanction. . . .

It follows that a theory of deterrence must rest on the assumption that punishment exercises an indirect influence or conditioning . . . [but] no evidence whatsoever supports the assumption that, in some mysterious way, insensitive negligent persons are improved or deterred by their punishment or that of other negligent persons.[55]

CONCLUSION

Criminal negligence should be excluded from the purview of penal liability. An historical analysis demonstrates that while some statutes demand punishment for negligence, individuals have not been punished for that which they have *failed to perceive.* A theoretical analysis establishes that negligence should continue to be beyond the reach of the criminal law. It is submitted that the New York Legislature should re-examine the policy considerations underlying the inclusion of criminal negligence (*failure to perceive*) in the Revised Penal Law. In light of the fact that most of the situations arising under the criminal negligence inclusion would involve the use of dangerous instrumentalities,[56] the legislature's reexamination should include the following as alternatives to criminal punishment:

First: increased licensing controls. Persons who are not qualified to operate dangerous instrumentalities should be barred by rigorous licensing examinations and stringent suspension and revocation provisions.[57]

Second: increased educational requirements. Concrete educational and instructional possibilities may be made available;[58] for example, an expanded driver education program, traffic school programs and the re-education of elderly drivers.

Third: increased insurance premiums for negligent wrong-doers. As between the insurance company and the negligent insured, the latter should be compelled to pay at least part of the damage, and this might take the form of increased

54. Wechsler, *On Culpability and Crime: The Treatment of Mens Rea in the Model Penal Code,* 339 Annals 24, 31 (1962) (Emphasis added.). See also Model Penal Code § 2.02, comment 3 at 126-27 (Tent. Draft No. 4, 1955).

55. Hall, *supra* note 16, at 641-42.

56. Typical of the situations which would be treated by the criminal negligence inclusion are cases involving automobiles and dangerous instrumentalities. See, *e.g.,* People v. Decina, 2 N.Y.2d 133, 138 N.E.2d 799, 157 N.Y.S.2d 558 (1956) (automobile); People v. Joyce, 192 Misc. 107, 84 N.Y.S.2d 236 (Allegany County Ct. 1948) (shotgun).

57. Hall, *supra* note 16, at 643-44.

58. *Id.* at 644.

insurance rates.[59] In view of the fact that punishing negligence cannot deter, this is a feasible method to protect the interests of the community.

Fourth: exemplary damages in civil negligence cases. If a negligent individual's actions approach, though do not reach, the standard of criminal recklessness, exemplary damages can be awarded to an injured party.

It is likely that the suggested methods would be more effective than criminal punishment. However, if the New York Legislature should decide against the advisability of these alternatives, it still does not follow that criminal punishment is necessary or helpful. Moreover, criminal punishment must rest not upon the deficiencies of alternative methods, but, rather, on its own positive grounds.[60] As Professor Hall has stated, "When punishment sanctioned by law is not justifiable, the significance of just punishment is dissipated. . . ."[61]

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ASSUMPTION AND DISCHARGE OF SELLER'S LIABILITIES AS YEAR OF SALE PAYMENTS FOR PURPOSES OF I.R.C. SECTION 453

Two recent cases, *Ivan Irwin, Jr.*,[1] decided by the Tax Court, and *United States v. Marshall*,[2] decided by the Court of Appeals for the Ninth Circuit, have highlighted a problem arising under the installment provisions of section 453 of the Internal Revenue Code.[3] In both cases, the issue presented was whether

59. *Id.* at 643. In addition, "accident-prone" victims of negligent wrongdoers should not have their insurance rates increased.
60. Hall, *supra* note 16, at 644.
61. *Ibid.*

1. 45 T.C. 544 (1966).
2. 357 F.2d 294 (9th Cir. 1966).
3. Int. Rev. Code of 1954, § 453, which provides in part:
(a) Dealers in Personal Property.
(1) In General. Under regulations prescribed by the Secretary or his delegate, a person who regularly sells or otherwise disposes of personal property on the installment plan may return as income therefrom in any taxable year that proportion of the installment payments actually received in that year which the gross profit, realized or to be realized when payment is completed, bears to the total contract price.
. . . .
(b) Sales of Realty and Casual Sales of Personalty.—
(1) General Rule.—Income from—
(A) a sale or other disposition of real property, or
(B) a casual sale or other casual disposition of personal property (other than property of a kind which would properly be included in the inventory of the taxpayer if on hand at the close of the taxable year) for a price exceeding $1,000,
may (under regulations prescribed by the Secretary or his delegate) be returned on the basis and in the manner prescribed in subsection (a).
(2) Limitation.—Paragraph (1) shall apply—