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## **Differentiation of Levity and Criminal Negligence in Criminal Law**

**Valery V. Pitetsky\***

*Siberian Federal University  
79 Svobodny, Krasnoyarsk, 660041 Russia<sup>1</sup>*

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*The article deals with the issue on kinds of negligent guilt differentiation: levity and negligence which sufficient consideration was given neither in criminal law science nor in judiciary practice. The certain situations are analyzed, and the author's solution to a kind of guilt definition is given in them. It is suggested that the definition of levity in the law text should be improved.*

*Keywords: Differentiation of levity and criminal negligence*

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According to article 9 of the RSFSR Criminal Code, the crime recognised to be committed by negligence if a person committed it foresaw possibility of socially dangerous consequences of this action or omission occurrence, but thoughtlessly counted on their prevention or did not foresee possibility of such consequences occurrence though should and could have foreseen them. The criminal code of the RSFSR at a legislative level did not separate out and did not formulate kinds of negligent guilt. Concepts of criminal self-confidence and a criminal negligence as kinds of negligent guilt existed only in a criminal law science.

Scientific research in the field of the doctrine about guilt, judiciary practice has allowed to specify the content of negligent guilt kinds and to formulate them in article 26 of the Criminal code, 1996. Criminal self-confidence thus reasonably has been renamed into levity. Fixing independent kinds of careless guilt in the law logically

assumes their existence in reality, establishment and definition of corresponding criminally-legal meaning in every separate case.

The problem put in the given article heading was a subject of special researches neither in educational, nor in the scientific literature on criminal law. Its decision has not been claimed by judiciary practice either. This is explained by the fact that the criminal law does not differentiate responsibility depending on kind of negligent guilt. For investigation agencies it not so important: whether a crime is committed by levity or by negligence. The main issue for them is: whether the committed crime was intentional or negligent as its qualification and all criminally-legal consequences following from them depend on it. A fundamental issue both in science and in practice of criminal law application is accepted to consider differentiation of direct and indirect intention as certain criminally-legal consequences (responsibility for an unfinished

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\* Corresponding author E-mail address: sfu-pravo@yandex.ru

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crime, for complicity in a crime and a number of others) are also connected with it.

Based on the analysis of legislative formulas of these kinds of guilt this distinction is deemed to be simple enough: at levity the subject foresees possibility of socially dangerous consequences of the act occurrence, but at negligence such foreseeing is missing. At definition of a kind of negligent guilt in judicial-investigatory practice this distinction does not represent special complexity in some cases either. We will analyze two situations. In the first case driver M. knowing about malfunction of brakes of the car had drove out on a haul but, having appeared in the conditions of emergency braking, committed a road accident entailing a person's death. In the course of investigation it was established, that M. had a long term of work experience before committing that road accident he drove out by a faulty car several times and everything went safely. He was going to eliminate malfunction of the brakes in the coming days off. M realised the fact of the Traffic Regulations violation by him, foresaw possibility of socially dangerous consequences occurrence but, having wide experience, counted on prevention of consequences. His reckoning in this case appeared erroneous, self-confident. We believe that in this case any investigator will ascertain guilt in the form of levity, and it will be correct.

In another case A. walked a dog out without a muzzle and let it off a lead. In a house court yard there was a drunken passer-by with a stick in his hands. When the dog ran by him, that drunken man waved a stick at it. The dog went for him and caused serious mutilation. In this case the master of the dog has demonstrated evident criminal negligence signs. Proceeding from it, it is possible to draw a conclusion that the trespass to this passer-by became a result of concurrence of variety of circumstances which the master of the dog did not foresee. At the same time in

both above-stated cases the subjects (driver M. and the master of the dog A.) realised the fact of precaution rules violation. In this connection the question arises: why the driver M's guilt is in the form of levity and the dog's master A's is in the form of negligence?

Psychological and legal grounds of criminal liability for levity and negligence are common: violation of those or other rules of precaution takes place in both cases. In most cases the subject realises the fact of their violation. At levity it always happens, that it predetermines the subject's foreseeing of possibility of socially dangerous consequences occurrence and reckoning on their prevention. In this connection we believe, that realisation of precaution rules violation at levity should be included in the legislative definition of this kind of negligent guilt. The legislative formula of levity should be expressed as follows: « Crime is recognised to be committed by levity if the person realised precaution rules violation by it, foresaw possibility of socially dangerous consequences of the actions (omission) occurrence, but counted on prevention of these consequences in a self-confident way without sufficient bases for that».

However, recognition of the fact of precaution rules violation at negligent guilt does not always take place. At criminal negligence it is possible to separate out its two variations that did not use to be the subject of criminal science attention. In the first case the person, despite *recognition of precaution rules violation by him*, for all that does not foresee socially dangerous consequences occurrence. The above-stated situation with a dog and the passer-by can be an example of such negligence variation. The master of the dog, walking it without a muzzle and without a lead, fully realized that he breaks walking of dogs rules. Nevertheless, he did not foresee real consequences to occur to the force of, as it was noted above, concurrence of

variety of occasional circumstances. However, he should and could have foreseen them. That is, objective and subjective criteria of negligence take place in this case. The walking dogs rules are meant, including occasional concurrence of circumstances as well. It is possible to give other examples of criminal negligence when the subject though realised precaution rules violation by him, but did not foresee socially dangerous consequences occurrence.

Another variation of negligence is cases where the person does not realise precaution rules violation by him and does not foresee, in this connection, socially dangerous consequences occurrence. Such variation of negligence is inherent to so-called, «tort of omission». Such «torts» are cases of trespass by omission with guilt only in guilt of negligence where the person did not realise precaution rules violation by him. The psychological reasons for «torts of omission» are carelessness, forgetfulness, absent-mindedness. In «torts of omission» the subject switches his attention from a duty on consequences prevention to more important requirements for him at that moment. As a matter of fact, the subject neglects his duties on harm prevention, which stipulates grounds for his criminal liability. For example, the driver of the car in the course of driving changed a disk in the tape recorder, did not notice a speed limitation sign, did not undertake any measures to its restriction, that resulted in a car accident with a criminally-legal meaning. In the given case replacement of a disk for the driver was a more urgent requirement, rather than control over a road situation and safe movement of the car.

In the absence precaution rules violation recognition by the person guilt in the form of levity is always excluded. So, if in the above-stated example with driver M. he «has forgotten» to check up the car brakes condition his guilt can be expressed only in negligence.

The stated allows to draw the following conclusion: breaking precaution rules, the subject both at levity, and at negligence can realise the fact of such violation. In this connection there is a main theoretical and practical question: how to define, at violation of *which rules* and in *what conditions* the subject foresees possibility of socially dangerous consequences occurrence and it will testify to levity and in what -where he does not foresee, negligence should be ascertained.

In algorithm of a form and a kind of guilt establishment the first thing to define is whether the subject did not foresee possibility of socially dangerous consequences of his act occurrence. If the person foresaw possibility of socially dangerous consequences occurrence, then both intention (direct or indirect), and negligence in the form of levity are possible. If he did not foresee such consequences occurrence then it can be either negligence, or an innocent trespass. Basis of the main link of the specified algorithm establishment (foreseeing or not foreseeing socially dangerous consequences occurrence) is *an estimation* of investigation agencies and court. This estimation should be made with regard for all concrete circumstances of a trespass and individual qualities of the subject. Existence of estimation procedure in guilt establishment as, however, in all other cases of estimating activity always assumes ambiguity, presence of alternative variants in a final conclusion.

In respect of consideration of the issue stated in the article heading, we will give two situations and define a kind of guilt in them. In the first case P. was walking a big beautiful of bull-dog breed dog without a muzzle. The child approached them and asked to pat a dog. P. allowed. The child while patting the dog stepped carelessly on its paw. The dog caught unexpectedly at his hand, having caused serious mutilation. In the course of investigation P. stated, that the dog was very kind, children often

tapped it, but similar consequences had never occurred. In another offered situation two young men K. and V., coming back from a restaurant went along a slippery sidewalk, pushing each other, putting each other footboards. When K. pushed V. another time, the latter moved back, stumbled against a border, fell down, hit an occipital part against a tree stub and died after a while. It is quite obvious, that in both given situations the subjects broke corresponding rules of behaviour and their guilt is negligent. In the case with the dog's master P., the latter broke formally established rules of animals walking. In the situation with young men household rules of precaution were broken. The statement of an intention on a trespass matter in both given situations does not fit common sense. But how can a kind of negligent guilt in the given cases be determined? We believe that for this purpose it is necessary to start with some rules of negligent guilt establishment. For guilt in the form of levity, violation of such rules and under such conditions which give the direct information on *imminent* danger is characteristic and generates reckoning of the person on prevention of consequences. Infringement of such rules should be rough enough. The trespass mechanism in such cases is rather simple. So, if the person being in a condition of strong alcoholic intoxication starting driving a car does not cope with it and commits a road accident then it is obvious, that he inflicted harm by levity. For a criminal negligence more difficult mechanism of a trespass and in such conditions which does not bear the due information about *direct imminent danger* is typical. In this connection the person breaking rules of precaution at this kind of guilt, does not foresee possibility of socially dangerous consequences occurrence either. As it was marked above, the trespass due to negligence in many cases arises out of concurrence of variety of circumstances.

Proceeding from stated, we believe, that in situations where P. allowed the child to pat a dog, guilt was in the form of levity. He, being the master of the big bull-dog breed dog though realised its potential danger, however, proceeding from the previous experience reckoned that in this very case everything will go safely. But he has made a mistake which always takes place at levity. P. did not take into account that the child would step on the dog's paw and its reaction to it. In situations with young men K. and V. we believe that K. has deprived V. of life due to negligence. Firstly, the situation of a trespass did not bear any information about obvious direct danger for the guilty person secondly the trespass mechanism in this case has a complicated character typical to negligence. In the beginning the victim stumbled against a border, and then hit exactly an occipital part against a tree stub.

Criteria of differentiation of levity and negligence are estimating. In many cases it is difficult enough to define a kind of negligent guilt unequivocally. Even the higher judicial instances make mistakes delivering incorrect formulations. As an example, it is possible to give a G. case which has become a subject of consideration of the RSFSR Supreme Court. G. took three watchdogs without muzzles from nursery against instructions, walked them on a foot path and led towards a vegetable storehouse. G. let the dogs off the leads, and they ran to a scrap metal dump where in two unfit for use cabins of agricultural car four juvenile children were sitting. Having seen the dogs, Vitya D. and Misha B. shouted: «Dogs!» and began to escape. The youngest 6-year old Misha B. did not manage to escape in time, he was attacked by dogs and they inflicted him grievous bodily harm which resulted in his death at hospital on the ninth day after the accident. According to witness Vitya D.'s testimony G. might not have seen him and other children as they were sitting inside the cabins

of the agricultural car. The judicial board of the RSFSR Supreme Court established guilt in the form of self-confidence (levity according to the Russian Federation Criminal Code) in this case and specified that crime committed by G. should be qualified under art.106 of the RSFSR Criminal Code providing liability for manslaughter<sup>1</sup>.

Qualification in this case does not raise any doubt, however it is deemed, that the Judicial board conclusion on definition of the kind of negligent guilt as self-confidence (levity) is incorrect. Conditions and the trespass mechanism in this case are characteristic for guilt in the form of negligence. The given circumstances of the case do not give the bases to assert, that G. foresaw possibility of a trespass to children. If he had foreseen it, then a question arises: on what did he count to prevent harm? The definition of the Judicial board on the given case contains incorrect statement either: « G. taking dogs from nursery without muzzles and letting them off leads, **should have foreseen** (it is marked by

us. – V.P.), that at such actions of his harmful consequences can occur, but he **thoughtlessly hoped** (is marked by us- V.P.) that in this case these harmful consequences will not occur». Incorrectness of the given statement is obvious. Obligation of consequences foreseeing is an objective criterion of a criminal negligence, as this very kind of negligent guilt is confirmed by G. case.

Practical value of an exact establishment of a kind of negligent guilt is seen in two aspects: firstly, it is correctness, «purity» of a committed act qualification that facilitates principle of legality observance; secondly, – influence of degree of guilt on punishment imposition. Guilt degree at levity, with other things being equal, is higher, than at negligence. It should be reflected in imposition of punishment for the committed crime. At guilt in the form of levity punishment should be more severe, than at negligence that will contribute to principle of justice observance.

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<sup>1</sup> See: Collection of decisions of Presidium and definitions of Judicial board on criminal cases of the Supreme Court of RSFSR (1964-1972), M. Legal. liter. 1974. P.277-278.

## **Разграничение легкомыслия и преступной небрежности в уголовном праве**

**В.В. Питецкий**

*Сибирский федеральный университет  
Россия 660130, Красноярск, пр. Свободный 79*

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*В статье рассматривается вопрос о разграничении видов неосторожной вины: легкомыслия и небрежности, которому в науке уголовного права и судебной практике достаточного внимания не уделялось. Анализируются конкретные ситуации, и приводится авторское решение по определению вида вины в них. Предлагается усовершенствовать определение легкомыслия в тексте закона.*

*Ключевые слова: разграничение легкомыслия и преступной небрежности.*

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