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CRIMINAL LAW CASE NOTES AND COMMENTS

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Russell Gremel, *Criminal Law Editor*

NEGLIGENT HOMICIDE OR MANSLAUGHTER: A DILEMMA

Frank A. Karaba

The enactment of a negligent homicide statute during the last session of its legislature brought the State of Illinois in line with the trend towards special statutes dealing with reckless drivers who cause highway deaths.¹ These statutes generally provide that motorists, who while failing to exercise a prescribed standard of care cause the death of another, are subject to the penalty provision of the statute. Generally, the prescribed penalty is something less than the corresponding penalty for a manslaughter case.² The negligent homicide statutes in this country are so diversified in nature, name, standards, and coverage as to preclude any definite classification. But it is apparent that a single major problem underlies their enforcement in those states which have two weapons, negligent homicide and manslaughter provisions, to wield in the auto death cases. The question facing those states is this: what are the respective scopes of the two statutes?

It is a matter of common knowledge that manslaughter convictions in auto death cases meet with insurmountable difficulties.³ Juries are frequently unwilling to condemn as a felon one who is guilty only of some act of negligence even though that act has resulted in the death of another. It has been said that the term "manslaughter" imports a degree of brutality which jurors do not care to cast upon a merely negligent driver.⁴ Moreover, the penalty in manslaughter cases is often greater than that which jurors feel is warranted in auto death cases. The obstacles to manslaughter convictions appear not only at the trial stage but also at the appellate level. The judges themselves exhibit a good deal of reluctance in auto death manslaughter convictions. Tests of criminal culpability necessary to sustain such convictions are many and varied.⁵ But it is generally agreed that slight negligence

1. "Reckless Homicide. Any person who drives a vehicle with reckless disregard for the safety of others and thereby causes the death of another person shall be guilty of the offense of reckless homicide. Any person convicted of reckless homicide shall be punished by a fine of not less than one hundred dollars (\$100) or more than one thousand dollars (\$1,000), or by imprisonment in the county jail for a determinate period of not less than sixty (60) days and not more than six (6) months, or by both such fine and such imprisonment, or by imprisonment in the penitentiary for an indeterminate period of not less than one (1) year or more than five (5) years." Ill. Rev. Stat. c. 38, §364(a) (1949). Act approved July 25, 1949.

2. Punishment for negligent homicide varies, imprisonment ranging up to 20 years and/or a fine up to \$2,000. The average is imprisonment for a period up to 6 months and/or a fine up to \$500. The punishment for the crime of manslaughter in the several states varies from a few months to thirty years. In Illinois the crime is punishable by imprisonment for one to fourteen years. Ill. Rev. Stat. c. 38, §364 (1949).

3. "It is widely asserted by prosecuting attorneys and by judges in the United States, and by English officials, likewise, that it is extremely difficult to convict an automobile driver on a charge of involuntary manslaughter." Robinson, *Manslaughter by Motorists*, 22 Minn. L.R. 775, 784 (1938). See also Note, *Manslaughter by Motor Cars*, 12 Fort. L.J. 113 (1942).

4. Robinson, *supra* note 3, at 785.

5. Robinson, *supra* note 3, at 779-783 suggests six tests commonly used by the courts.

or even "ordinary" or "civil" negligence is not sufficient to sustain manslaughter convictions. The courts look for a degree of carelessness which might be labeled "willful" or "wanton" or "gross or culpable."⁶ Moreover, the judiciary has been unwilling to follow strictly the "misdemeanor-manslaughter doctrine" by which a motorist who while committing a misdemeanor kills another is guilty of manslaughter.⁷

To avoid these obstacles to auto death convictions the State of Michigan in 1921 passed the first negligent homicide statute in this country.⁸ Elimination of the troublesome wording and name of the manslaughter charge, along with the reduction in penalty, seemingly made convictions more possible.⁹ Following the apparent success of the Michigan statute, a number of other states soon passed negligent homicide statutes. Vermont passed its special statute in 1925,¹⁰ New Hampshire in 1931,¹¹ New Jersey in 1935.¹² As matters stand today, some twenty-five United States jurisdictions as well as Canada and England rely in whole or in part upon such special statutes in the auto death cases.¹³ The rest of our states still look to their manslaughter provisions in prosecuting reckless drivers who cause highway deaths.¹⁴

The experience of Michigan indicates the difficulty which the courts have in answering the question: when does the negligent homicide statute apply and when do the manslaughter provisions apply in the auto death cases? Prior to the passage of the special statute, it was well settled in Michigan that not every degree of carelessness or negligence resulting in the death of another subjected the guilty party to the manslaughter provisions.¹⁵ In order, therefore, "to curb reckless, careless, and negligent driving which caused death, in cases where the negligence was less than gross"¹⁶ the Michigan legislature in 1921 passed this statute:

These are: (a) negligent omissions to act ("criminal," "culpable," or "gross" negligence); (b) acts done recklessly ("willful," "wanton," or "reckless"). He submits the word "reckless" is best suited for the test of criminal intent in the involuntary manslaughter cases.

6. Riesenfeld, *Negligent Homicide—A Study in Statutory Interpretation*, 25 CALIF. L. R. 1, 23 (1936).

7. "Gradually there seems to have grown up a dislike of this rule." *Ibid.* But see *Keller v. State*, 155 Tenn. 633, 299 S.W. 803 (1928) (drunken driver convicted for manslaughter even though the accident was not his fault). Noted in 38 Ky. L. J. 118 (1949).

8. Mich. Stats. 1921, p. 217.

9. Robinson, *supra* note 3, at 786 contends that the name is still bad and the penalties still too high.

10. Vermont Stats. 1925, p. 102.

11. N. H. Stats. 1931, p. 85.

12. N. J. Stats. 1935, p. 913.

13. Ark. Stats. Ann. §75-1001 (1947); Calif. Penal Code §192 (1949); Conn. Rev. Stats. 1949 §2415, §354; Colo. Stats. Ann. c. 48, §39 (1935); D. C. Code §40-606 (1940); Fla. Stats. 1941, §860.01; Idaho Code §18-4006 (1949 Cum. Supp.); Ill. Rev. Stat. c. 38, §364(a) (1949); Ind. Stat. Ann. §47-2001 (Burn's 1949 Supp.); Kansas Stats. §8-529 (Corrick 1947 Supp.); La. Code of Criminal Law §740-32 (1943 Dart); Ann. Code of Md. Art. 27, §436a (1947 Supp.); Mich. Stats. Ann. §28.556 (1949 Supp.); Minn. Stats. §169.11 (1945); N. J. Stats. Ann. §2:138-9 (1949 Supp.); Rev. Laws of N. H. 1942, c. 118, §12; N. Y. Penal Law, Art. 94, §1053a; Ohio Gen. Code Ann. §12404 (Page's 1949 Supp.); Ore. Comp. Laws §23-410a; Code of S. C. c. 78, §29; Texas Penal Code, Art. 1230-1243 (Vernon's 1936); Pub. Laws of Vt. 1933, §5152; Rev. Stats. of Wash. §6360-120 (Remington's 1940); Wis. Stats. 1947, §340.271; Wyo. Comp. Stats. 1945 Ann. §60-413; Canada Stats. 1930, p. 162, c. 11, §25; England, 20 & 21 Geo. V., 1930, c. 43, and 24 & 25 Geo. V., 1934, c. 50, §34.

14. *State v. Ponce*, 59 Ariz. 158, 124 P. 2d 543 (1942); *State v. Powell*, 114 Mont. 571, 138 P. 2d 949 (1943); *Puckett v. State*, 144 Neb. 876, 15 N.W. 2d 63 (1944); *Commonwealth v. Holman*, 160 Pa. Super. 211, 50 A. 2d 720 (1947) (car going only 30-35 mph. in daylight); *State v. Busby*, 102 Utah 416, 131 P. 2d 510 (1942).

15. *People v. Barnes*, 182 Mich. 179, 148 N.W. 400 (1914).

16. *People v. McMurchy*, 249 Mich. 147, 161, 228 N.W. 723, 728 (1930).

"Every person who, by the operation of any vehicle at an immoderate rate of speed or in a careless, reckless or negligent manner, but not willfully or wantonly, shall cause the death of another, shall be guilty of the crime of negligent homicide. . . ."17

It is apparent that the purpose of the legislature in passing this statute was to extend criminal liability in the auto death cases. The statute was intended to cover the less than gross negligence cases.¹⁸ In other words, the two offenses, negligent homicide and manslaughter, covered separate ground. Very shortly some overlapping took place. In the case of *People v. Townsend*,¹⁹ the Michigan court pointed out that driving while intoxicated is an unlawful act (*malum in se*) and that if death results the driver is guilty of manslaughter; but later Michigan cases also sustain negligent homicide convictions in drunken driver cases.²⁰ Moreover, in a 1941 case²¹ the Michigan court, relying on the *Townsend* case, again sustained an involuntary manslaughter conviction. One might conclude that the Michigan court has simply refused to keep the unlawful act concept separate from the negligence concept. In so doing the court affirms negligent homicide convictions in drunken driver cases where the negligence, aside from its unlawful act aspects, is regarded as less than "gross," and where the intoxication results in "grossly" negligent conduct, the court firmly sustains manslaughter convictions. In any event, the Michigan statute seemingly has gone a long way in making auto death convictions possible.

The slight overlap in Michigan shows up as a relatively minor difficulty when compared to the difficulties of other negligent homicide states. The experiences in California are of special import, in light of California's many amendments to and subsequent repeal of its original negligent homicide law. That law, commonly known as Vehicle Code Section 500, was enacted in 1935. It read:

"Negligent Homicide: When the death of any person ensues within one year as the proximate result of injuries caused by the driving of any vehicle in a negligent manner or in the commission of an unlawful act not amounting to a felony, the person so operating such vehicle shall be guilty of negligent homicide, a felony, and upon conviction thereof shall be punished by imprisonment in the county jail for not more than one year or in the state prison for not more than three years."²²

17. Mich. Stats. 1921, p. 217. Punishable by a maximum of five years imprisonment and a \$1000 fine. Negligent homicide was expressly considered as part of the manslaughter statute and it was left to the jury to determine which penalty provision, if any, applied. The present Michigan statute is much the same as was the 1921 statute. It reads, "Any person, who by the operation of any vehicle at an immoderate rate of speed or in a careless, reckless, or negligent manner, but not wilfully or wantonly, shall cause the death of another, shall be guilty of a misdemeanor punishable by imprisonment in the state prison not more than 2 years or by a fine of not more than \$2000 or by both such fine and imprisonment." Mich. Stats. Ann. §28.556 (1949 Supp.).

18. Cases where convictions were sustained under the special statute in situations where manslaughter convictions would not be possible under the Michigan requirement of gross negligence are *People v. Spence*, 250 Mich. 573, 231 N.W. 126 (1930) (immoderate rate of speed), and *People v. Robinson*, 253 Mich. 507, 235 N.W. 236 (1931) (driver fell asleep).

19. 214 Mich. 267, 183 N.W. 177 (1921).

20. *People v. Gibson*, 253 Mich. 476, 235 N.W. 225 (1931); *People v. Beauchamp*, 260 Mich. 491, 245 N.W. 784 (1932).

21. *People v. Layman*, 299 Mich. 141, 299 N.W. 840 (1941).

22. Cal. Stats. 1935, p. 2141.

At the same time the California involuntary manslaughter provisions defined that crime as:

“the unlawful killing of a human being without malice . . . in the commission of an unlawful act, not amounting to felony, or in the commission of a lawful act which might produce death, in an unlawful manner, or without due caution and circumspection.”²³

A quick reading of these two provisions indicates both statutes dealt with the unlawful act cases. Where the act was lawful the manslaughter provision applied in cases where the act was committed in an unlawful manner or without due caution and circumspection (gross negligence); the negligent homicide statute where the act was committed with negligence. This distinction was quickly seen and applied by the California court in *People v. Beckhard*²⁴ and in *People v. Pociask*.²⁵ In both cases the court upheld negligent homicide convictions based on an ordinary care test rather than the usual criminal negligence test applied in the manslaughter cases. In *People v. Amick*²⁶ the court again held that the two statutes were separate and distinct from one another.

“. . . a verdict of either conviction or acquittal upon one such charge has no effect or bearing upon other separate counts which are contained therein.”²⁷

In 1941 Section 500 was amended and express words were used to except homicides caused by the driving of any vehicle from the provisions of the involuntary manslaughter statute.²⁸ In *People v. Young*²⁹ the 1941 amendment was construed to abolish the ordinary care test and once again “wilful misconduct” was necessary to sustain convictions.

In 1943 the California legislature expressly repealed Section 500 of the Vehicle Code.³⁰ The method of repeal raised a serious problem as to whether the effect of the repeal was to exempt negligent homicide by automobile from any and all prosecution. Two cases settled the difficulty by holding that these cases once again fell within the province of Section 192 of the Penal Code (involuntary manslaughter).³¹ Those cases held that the 1941 amendment to Section 500 did not repeal the involuntary manslaughter provision (Section 192) but only excepted the motor vehicle cases from the latter section.

The history of the California negligent homicide statute does not end with the repeal in 1943. In 1945 California revised Penal Code Section 192 and subsection (3) now expressly refers to homicides caused by vehicles.³²

Turning from California to Indiana, one would conclude at first glance that the scope of coverage of the Indiana special statute is quite fixed. The act, first passed in 1939, provides:

“Reckless Homicide. Any person who drives a vehicle with reckless

23. Cal. Penal Code, §192 (1949).

24. 14 Cal. 2d 690, 96 P. 2d 794 (1939).

25. 14 Cal. 2d 679, 96 P. 2d 788 (1939).

26. 20 Cal. 2d 247, 125 P. 2d 25 (1945) where the California Supreme Court adopted Mr. Justice Griffen's Appellate Court opinion reported in 118 P. 2d at 490 (1941).

27. 118 P. 2d at 493. See also *People v. Crow*, 48 Cal. App. 2d 166, 120 P. 2d 686 (1941).

28. Cal. Stats. 1941, p. 1414.

29. 20 Cal. 2d 832, 129 P. 2d 353 (1942).

30. Cal. Stats. 1943, p. 1959.

31. *People v. Ely*, 71 Cal. App. 2d 729, 163 P. 2d 453 (1945) and *People v. Mitchell*, 27 Cal. App. 2d 729, 166 P. 2d 10 (1946).

32. Cal. Penal Code §192 (1949).

disregard for the safety of others and thereby causes the death of another person shall be guilty of the offense of reckless homicide."³³

The crime of reckless homicide in Indiana does not modify, amend, or repeal existing law, but is supplementary thereto.³⁴ Reckless homicide and involuntary manslaughter may be joined as separate counts of the same indictment or affidavit.³⁵ Although the Indiana statute provides that conviction of one is a bar to a prosecution for the other,³⁶ it is silent as to when and if acquittal under one acts as a bar to a prosecution to the other.

In *Turrell v. State*³⁷ the Indiana Supreme Court reversed a reckless homicide conviction where the state could prove the defendant was speeding (89 mph) but could not prove an allegation of defective brakes. The next year found that same court sustaining a manslaughter conviction (greater penalty) where the evidence merely proved the defendant was going in excess of the 30 mph speed limit.³⁸ In light of these cases and in view of the established test for manslaughter in Indiana,³⁹ one wonders whether indeed the existing reckless homicide statute neither modifies, amends, or repeals the existing laws.

Prior to the enactment of the Wyoming Negligent Homicide Act,⁴⁰ the Wyoming court had declared that driving a car at a speed that is unreasonable or such that it is likely to endanger life or limb is not necessarily criminal carelessness within the manslaughter provisions.⁴¹ One might conclude the Wyoming legislature intended to cover the less than gross negligence gap and thus one could justify an ordinary negligence test. On this point the court has not as yet spoken.

The most recent judicial interpretation of negligent homicide statutes is found in the 1947 Wyoming case of *State v. Cantrell*.⁴² The fact that the case involved an intoxicated driver afforded the Wyoming court an easy way out. The court simply held that since the special statute neither dealt with voluntary manslaughter nor the unlawful act cases it was not repugnant to the manslaughter statute.⁴³ The court stated this was an

33. Acts of Indiana, 1939, p. 289. The crime of reckless homicide is punishable in Indiana by a fine of \$100 to \$1000 and/or imprisonment in the county jail for from 60 days to six months, or by a fine not in excess of \$1000 and imprisonment in the state penitentiary for from one to five years.

34. Ind. Stat. Ann. §47-2001 (Burn's 1949 Supp.).

35. *Ibid.*

36. *Ibid.*

37. 221 Ind. 662, 51 N.E. 2d 359 (1943).

38. *Cross v. State*, 222 Ind. 241, 52 N.E. 2d 727 (1944).

39. The test for manslaughter is in "the reckless disregard of the rights and safety of others." *State v. Dorsey*, 118 Ind. 167, 20 N.E. 777 (1889).

40. Wyo. Comp. Stats. 1945 Ann. §60-413 provides, "When the death of any person ensues within one year as a proximate result of injury received by the driving of any vehicle in reckless, willful, or wanton disregard of the safety of others, the person so operating such vehicle shall be guilty of negligent homicide." Punishment provided is a maximum of one year in jail and a fine of \$1000. A manslaughter conviction carries a penalty of up to 20 years in jail.

41. *State v. McComb*, 33 Wyo. 346, 239 P. 526 (1925).

42. 64 Wyo. 132, 186 P. 2d 539 (1947). Justice Blume, specially concurring, laments: "As pointed out in the opinion, we have now three different statutes dealing with the killing of a human being as the result of unlawful driving of an automobile—the manslaughter statute and two special statutes. It is impossible to determine definitely as to whether or not the legislature when it passed these special statutes intended that they should govern in all cases when a death occurs as the result of improper driving of an automobile. . . . It would seem that the legislature should reconsider the subject with some degree of care, definitely establish the policy that should govern in cases like that before us, and fix a more recognizable rule of guidance for the courts." 64 Wyo. at 156, 186 P. 2d at 548.

43. "Section 24 (60-413) aforesaid fails to deal not only with the inhibition of the statute

unlawful act case and thus justified a manslaughter conviction. The court specifically pointed out that it was not deciding here whether the special act repealed the manslaughter provision dealing with "unlawful killing by a culpable neglect or criminal carelessness."⁴⁴

It is clear that the negligent homicide statutes have as an incident a clear cut problem in their application. The answer to the problem is not so clear as is the problem itself. One writer suggests the manslaughter provisions be applied if foreseeability is presumed and the special statute be reserved only where death results in situations where the circumstances indicate that the driver could not reasonably have foreseen the likelihood of causing bodily harm.⁴⁵ Others indicate they would like to see the negligent homicide statutes treated as slighter degrees of manslaughter, to come into play where the negligence is greater than "slight" and less than "gross."⁴⁶ The yardstick for choice would then be the degree of culpability. A third view favors lesser penalties and more convictions.⁴⁷ This, seemingly, would favor more emphasis on the special statutes in auto death cases.

The situation in Illinois before the Reckless Homicide Act was fairly typical. The vehicle death cases were handled within the involuntary manslaughter provision.⁴⁸ It was well established that:

"The gist of the offense of involuntary manslaughter with a motor vehicle is criminal negligence . . . Negligence, to become criminal, must be reckless or wanton and of such a character as to show an utter disregard for the safety of others under circumstances likely to cause injury. . . . On the other hand, criminal liability does not attach to every act of negligence resulting in injury, or even in death, to another person, but only to negligence of such a reckless or wanton character as to show an utter disregard for the safety of others under circumstances likely to cause an injury."⁴⁹

Although it appears that the terms used by the court in defining involuntary manslaughter come very close to the terms used in the special auto statute, the court can find grounds for distinguishing the two. While involuntary manslaughter is defined in terms of a negligence of such a character as to show an *utter* disregard for the safety of others *under circumstances likely to cause injury*, reckless homicide is defined simply in terms of *reckless* disregard for the safety of others. The latter can then be held to refer to cases involving a lesser degree of negligence than need be found in the involuntary manslaughter cases.

concerning voluntary manslaughter but also the ban of the law upon involuntary manslaughter 'in the commission of some unlawful act.' It is not repugnant to either of these provisions." State v. Cantrell, 64 Wyo. at 145, 186 P. 2d at 543.

44. Wyo. Comp. Stats. 1945 Ann. §9-205 (Manslaughter provision).

45. Orr, *Death on the Road*, 113 Just. P. 443 (1949).

46. Riesenfeld, *supra* note 6; Attorney General's Points in the Cantrell case, 64 Wyo. at 137.

47. Robinson, *supra* note 3.

48. "Involuntary manslaughter shall consist in the killing of a human being without any intent to do so, in the commission of an unlawful act, or a lawful act, which probably might produce such a consequence, in an unlawful manner. . . ." Ill. Rev. Stat. c. 38, §363 (1949).

49. People v. Crego, 395 Ill. 451, 458, 70 N.E. 2d 578, 581 (1947). *Accord*, People v. Lynn, 385 Ill. 165, 52 N.E. 2d 166 (1943) (manslaughter conviction reversed in a case where the defendant had left his truck parked without lights on a dark public highway causing another car to smash into it); People v. Hansen, 378 Ill. 491, 38 N.E. 2d 738 (1941) (manslaughter conviction affirmed where defendant went through a red light at a high rate of speed); People v. Burgard, 377 Ill. 322, 37 N.E. 2d 558 (1941) (manslaughter conviction reversed where defendant struck down pedestrian).