Michigan Law Review

Volume 50 | Issue 5

1952

CRIMINAL LAW-NEGLIGENT HOMICIDE STATUTE-MOTOR VEHICLE OPERATOR SUFFERING FROM DISEASE PRODUCING UNCONSCIOUSNESS

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CRIMINAL LAW—NEGLIGENT HOMICIDE STATUTE—MOTOR VEHICLE OPERATOR SUFFERING FROM DISEASE PRODUCING UNCONSCIOUSNESS—Defendant suffered a single, sudden attack of dizziness or unconsciousness. He was warned

by a physician, diagnosing his condition as Meniere's Syndrome,[1] that he might at any time, without warning, suffer another such attack. Defendant worked for a year and three months without a recurrence. Then defendant "blacked out" while driving alone and his automobile crashed into another, causing the death of its driver. The trial judge convicted[2] for statutory negligent homicide. On appeal, *held,* affirmed. Defendant's driving on a through state highway[3] with knowledge that he might become disabled without warning met the statutory criterion of driving "carelessly and heedlessly in willful or wanton disregard of the rights or safety of others"[4] so that he was criminally responsible for the death resulting. *State v. Gooze,* 14 N. J. Super. 277, 81 A. (2d) 811 (1951).

The operator of an automobile may incur, in the absence of legislation, criminal responsibility for all degrees of homicide,[5] as well as for assault and battery.[6] Nevertheless, among the problems produced by the impact of the motor vehicle on modern society is criminal responsibility for death caused by its negligent or grossly negligent operator. Common law manslaughter provisions, of course, do not apply to the ordinarily negligent operator; moreover, juries and judges have been reluctant to label as manslaughter deaths caused by the grossly negligent operator.[7] Therefore many states have enacted negligent homicide statutes varying in their requirements of negligence. Some statutes supplement orthodox manslaughter law by creating a lesser offense which requires ordinary rather than gross negligence to support a conviction.[8] Other statutes, such as

[1] A disturbance of the semi-circular canals of the ear. See MALOY, MEDICAL DICTIONARY FOR LAWYERS, 2d ed., 187 (1951).

[2] The fact that a conviction would serve as a basis for revocation of the defendant's license may have influenced the court. See appendix to appellant's brief, p. 93a, incorporating the trial record.

[3] A different result might have been reached on a little traveled road. Cf. the workman flinging debris from a roof, HOLMES, THE COMMON LAW 60 (1881).

[4] 1 N.J. Rev. Stat. (1937) §2:138-9.

[5] Generally 99 A.L.R. 756 (1935); for murder see Cockrell v. State, 135 Tex. Cr. 218, 117 S.W. (2d) 1105 (1938).

[6] Brimhall v. State, 31 Ariz. 522, 255 P. 165, 53 A.L.R. 231 (1927); 61 C.J.S. §597 (1949).

[7] Riesenfeld, "Negligent Homicide—A Study in Statutory Interpretation," 25 CALIF. L. REV. 1 (1936). For proposed murder legislation see 36 KY. L.J. 138 (1947). Cf. the guest statute problem, 18 UNIV. CIN. L. REV. 319 (1949).

[8] E.g., Michigan. People v. Barnes, 182 Mich. 179, 148 N.W. 400 (1914), set aside a manslaughter by auto conviction because gross negligence was not established. In 1921 Michigan pioneered by creating the lesser offense of negligent homicide. The statute required only ordinary negligence. People v. Campbell, 237 Mich. 424, 212 N.W. 97 (1927). See 25 Mich. Stat. Ann. (1938) §28.556; present form is substantially the same, 4 Mich. Comp. Laws (1948) §750.324. For the effect of contributory negligence see People v. Clark, 295 Mich. 704, 295 N.W. 370 (1940). Though the language of the statute does not expressly cover a killing in the commission of an unlawful act, it has been applied to this situation. People v. Townsend, 214 Mich. 267, 183 N.W. 177, 16 A.L.R. 902 (1921) (driving while intoxicated); but cf. People v. Beauchamp, 260 Mich. 491, 245 N.W. 784 (1932). The states assess varied penalties for homicide by ordinary negligence. See 1 Conn. Gen. Rev. Stat. (1949) §2415 ($250 and/or 30 days).

that of New Jersey, supplant that segment of the manslaughter law otherwise applicable to homicide through the grossly negligent operation of a motor vehicle, by providing a lesser penalty[9] for this special situation. Statutes in this latter group retain the criterion of gross negligence. Indeed, at least one state has established a mens rea in the shadowy realm between gross negligence and intent.[10] Though the court in the present case tends to equate "willful or wanton disregard" with gross negligence, it appears that this statutory language could be construed to require a mens rea above the level of gross negligence.[11] Whatever the defined mens rea may be, it is utilized to measure the pattern of conduct found in cases like the present: (1) a warning to the defendant of a condition potentially productive of sudden disability, (2) ignoring of that warning by defendant's persistence in driving, and (3) occurrence of that disability with resulting death or injury caused by a vehicle out of control. The question of criminal (or civil) responsibility in every case is whether the warning was of such a character that the ignoring of it[12] amounted to the mens rea denounced by the statute or the common law. Cases involving organic defects similar to the one at bar seldom arise. A disregard of a warning that defendant is afflicted with Bright's disease may be civil negligence, affording a basis for tort recovery by his passengers.[13] A California decision suggests that the ignoring of many attacks of epilepsy, the most recent being six years before the collision, demonstrates a mens rea somewhere between gross negligence and intent.[14] A disregard of the warning afforded by frequented attacks of vertigo may even

[9] In New Jersey the respective imprisonment terms are 3 years (negligent homicide statute) and 10 years (manslaughter). Cf. 1 N.J. Rev. Stat. (1937) §2:103-6 with §2:138-5.

[10] California's original statutory criterion of ordinary negligence, People v. Wilson, 193 Cal. 512, 226 P. 5 (1924), was altered to "with reckless disregard of, or wilful indifference to the safety of others," construed in People v. Young, 20 Cal. (2d) 832, 129 P. (2d) 353 (1942), noted in 16 So. CAL. L. REV. 103 (1943). After repeal of this statute in 1943, California has returned almost to mere ordinary negligence. People v. Wilson, 78 Cal. App. (2d) 108, 177 P. (2d) 567 (1947). Cf. the judicial fluctuation in Mississippi, 20 MISS. L.J. 345 (1949).

[11] Massachusetts distinguishes "wilful or wanton disregard of the rights and safety of others" from gross negligence for the purposes of its orthodox manslaughter provisions. Commonwealth v. Welansky, 316 Mass. 383 at 400, 55 N.E. (2d) 902 (1944). While there is little authority for clear demarcation, prior New Jersey cases appear to make such a distinction. See Eatley v. Mayer, 9 N.J. Misc. 918, 154 A. 10 (1931), affd. 10 N.J. Misc. 219, 158 A. 411 (1932); Staub v. P.S. Ry. Co., 97 N.J.L. 297, 117 A. 48 (1922); and Iaconio v. D'Angelo, 104 N.J.L. 506, 142 A. 46 (1928). However, gross negligence sufficed for manslaughter, State v. Blaine, 104 N.J.L. 325, 140 A. 566 (1928). See also State v. Linarducci, 122 N.J.L. 137, 3 A. (2d) 796 (1939); and State v. Hedinger, 126 N.J.L. 288, 19 A. (2d) 322 (1941).

[12] The ignoring of the warning, by driving, is a relatively constant factor. See note 3 supra.

[13] Decker v. Everson, 14 N.J. Misc. 860, 187 A. 783 (1936) (verdict for defendant upheld on instruction on assumption of risk). There must be warning to the defendant of his condition. Cohen v. Petty, 62 App. D.C. 187, 65 F. (2d) 820 (1933).

[14] People v. Freeman, 61 Cal. App. (2d) 110, 142 P. (2d) 435 (1943) (reversed because defendant's capacity to make a rational choice whether or not to drive was not submitted to the jury). Cf. Commonwealth v. Irwin, 345 Pa. 504, 29 A. (2d) 68 (1942).

supply the intent required to support a criminal assault and battery.[15] These cases and the principal case bear some analogy to the sleeping-at-the-wheel cases. Proof that a defendant fell asleep during the operation of an automobile is evidence of negligence, both civil[16] and criminal,[17] if not a prima facie case of negligence, on the theory that the human mechanism gives warning of approaching sleep. However, the warning in the sleep cases has an immediacy, and therefore an urgency, that must distinguish them from the cases involving organic defects. In the principal case with but a single preceding attack and a substantial time intervening before the recurrence, can it be said that the ignoring of the physician's warning amounted to a statutory mens rea equivalent at least to gross negligence?

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[15] Tift v. State, 17 Ga. App. 663, 88 S.E. 41 (1916).

[16] Bushnell v. Bushnell, 103 Conn. 583, 131 A. 432, 44 A.L.R. 785 (1925); John A. Appleman, "Sleeping at the Wheel," 9 S.D.B.J. 170 (1940).

[17] State v. Olsen, 108 Utah 377, 160 P. (2d) 427, 160 A.L.R. 508 (1945); see, also, 2 SYRACUSE L. REV. 399 (1951).