

Louisiana Law Review

Volume 5 | Number 1
December 1942

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J.J.C.

Repository Citation

J. J. C., *Criminal Negligence - Involuntary Homicide Statutes - Louisiana Criminal Code*, 5 La. L. Rev. (1942)
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restrictions,⁴⁷ but it may nevertheless show a substantial transformation.⁴⁸ A subsequent zoning ordinance will not prevent enforcement of the plan if the development of the area is in substantial conformity therewith.⁴⁹ Especially is this true when the ordinance negatives any idea of interfering with the existing restrictions.⁵⁰

It is submitted that the decision in the instant case, being in accord with the great weight of American authority, was correctly decided and the injunction properly issued.

J. C. W.

CRIMINAL NEGLIGENCE—INVOLUNTARY HOMICIDE STATUTES—LOUISIANA CRIMINAL CODE—The defendant, while driving on a public highway at night, accidentally hit and caused the death of Robert McCrory. Evidence showed that only one headlight was burning at the time of the accident and that alcohol was found in the automobile. The defendant was convicted of the crime of involuntary homicide, as defined by Act 64 of 1930.¹ The information stated that the defendant caused the death of McCrory "by the operation and use of a motor vehicle, to-wit: an automobile in a grossly negligent and grossly reckless manner, but not wilfully or wantonly." The defendant argued that the allegation in the bill that the act was not done wilfully or wantonly is contrary to the charge of gross negligence and gross recklessness, because to charge that the act is done in a grossly negligent and grossly reckless manner is equivalent to charging that the act was done wilfully and wantonly. *Held*, the words "wilfully" and "wantonly" are not synonymous with words "negligently" and "recklessly," the former implying intention or deliberation and the latter mere

47. *Burgess v. Magarian*, 214 Iowa 694, 243 N.W. 356 (1932); *Goodwin Bros. v. Combs Lumber Co.*, 275 Ky. 114, 120 S.W. (2d) 1024 (1938); *Hayslett v. Shell Petroleum Corp.*, 38 Ohio App. 164, 175 N.E. 888 (1930).

48. *Goodwin Bros. v. Combs Lumber Co.*, 275 Ky. 114, 120 S.W. (2d) 1024 (1938); *Hayslett v. Shell Petroleum Corp.*, 38 Ohio App. 164, 175 N.E. 888 (1930).

49. *Bachman v. Colpaert Realty Corp.*, 101 Ind. App. 306, 194 N.E. 783 (1935); *Magnolia Petroleum Co. v. Drauver*, 183 Okla. 579, 83 P. (2d) 840, 119 A.L.R. 1112 (1938).

50. *Castleman v. Avignone*, 56 App. D.C. 253, 12 F. (2d) 326 (1926); *Burgess v. Magarian*, 214 Iowa 694, 243 N.W. 356 (1932); *Kramer v. Nelson*, 189 Wis. 560, 208 N.W. 252 (1926).

1. La. Act 64 of 1930, § 1 [Dart's Crim. Stats. (1932) § 1047] provides that "any person who, by operation or use of any vehicle in a grossly negligent or grossly reckless manner, but not wilfully or wantonly, causes the death of another person, shall be guilty of the crime of involuntary homicide. . . ."

carelessness or lack of due and reasonable care or disregard for the rights and safety of others. *State v. Vinzant*, 7 So. (2d) 917 (La. 1942).

The majority of the courts agree that criminal negligence must be something more than the negligence necessary for civil liability.² Generally, civil negligence is the absence of the care a person of ordinary prudence would exercise under the facts and circumstances.³ The phrases "due care," "reasonable care," and "ordinary care" are commonly used to denote the required standard of conduct to which one must conform in order to avoid being negligent. All jurisdictions except Texas seem to agree that ordinary negligence is not sufficient for criminal negligence.⁴ There must be some higher degree of carelessness, which is ordinarily labelled "wilful or wanton"⁵ or "gross or culpable."⁶

2. Criminal negligence is gross negligence or reckless disregard of consequences and rights of others, and not mere failure to exercise ordinary care. *State v. McMahan*, 57 Idaho 240, 65 P. (2d) 156 (1937). The mere fact that one commits a civil wrong and accidentally kills another does not in itself render him criminally liable. *Regina v. Franklin*, Sussex Assizes, 15 Cox C.C. 163 (1883). Criminal negligence must be more than ordinary negligence; it must be "gross, wanton, or wilful negligence." *Jones v. Comm.*, 213 Ky. 356, 281 S.W. 164 (1926); *People v. Campbell*, 237 Mich. 424, 212 N.W. 97 (1927). Criminal negligence must be "culpable" negligence. *People v. Seiler*, 57 Cal. App. 195, 207 Pac. 396 (1922). Gross and culpable negligence will supply a criminal intent. *State v. Irvine*, 126 La. 434, 52 So. 567 (1910). Ordinary negligence alone is not enough. *People v. Falkovich*, 280 Ill. 321, 117 N.E. 398 (1917). Contra: Degree of negligence necessary to constitute manslaughter is civil or tort negligence. *Haynes v. State*, 88 Tex. Crim. Rep. 42, 224 S.W. 1100 (1920); *Young v. State*, 120 Tex. Crim. Rep. 39, 47 S.W. (2d) 320 (1932).

3. Omission of that care which a man of common prudence usually takes of his own concerns. Negligence is the failure to do what a man of ordinary care and prudence would do under the same circumstances. *Young v. State*, 120 Tex. Crim. Rep. 39, 47 S.W. (2d) 320 (1932), cited supra note 2. Negligence is failing to exercise degree of care which an ordinarily and reasonably prudent man would use under like circumstances. *Meredith v. Reed*, 26 Ind. 334 (1866). Negligence is any conduct, except conduct recklessly disregarding of an interest of others, which falls below the standard established by law for the protection of others against unreasonable risk of harm. 2 A.L.I., *Restatement of the Law of Torts* (1934) 738, § 282. Unless the actor is a child or an insane person, the standard of conduct to which he must conform to avoid being negligent is that of a reasonable man under like circumstances. *Id.* at 741, § 283.

4. *Riesenfeld, Negligent Homicide—A study in Statutory Interpretation* (1936) 25 Cal. L. Rev. 1.

5. Although rejected by some courts and writers as involving a contradiction of terms, this phrase is occasionally used to describe a higher or more aggravated form than gross negligence. A wanton act is one done in reckless disregard of rights of others, evincing a reckless indifference to the consequences to life or limb or health, and is more than negligence, more than gross negligence. *Ziman v. Whitley*, 110 Conn. 108, 147 Atl. 370 (1929). Wilfulness is such conduct as evidences a reckless indifference to safety. *Comm. v. Guillemette*, 243 Mass. 346, 137 N.E. 700 (1923); *Ashton v. Blue River Power Co.*, 117 Neb. 661, 222 N.W. 42 (1928); *State v. Taylor*, 59 Idaho 724, 87 P. (2d) 454 (1939); *Lee v. Hoff*, 163 Ore. 374, 97 P. (2d) 715 (1940).

6. Gross negligence is substantially higher in magnitude than simple in-

Until recently, all homicides resulting from criminal negligence were prosecuted as manslaughter. However, juries were reluctant to convict the negligent driver or handler of firearms of so serious a crime; as a result, the reckless motorist was often exonerated. Consequently, a number of states, led by Michigan, now have statutes punishing such reckless or grossly negligent killings as a special and lesser offense, usually designated as "involuntary homicide."⁷ Under these special statutes, convictions have become more frequent. Unfortunately, these statutes apply only to cases of "negligent" operation of "vehicles." Most courts find it difficult to make any distinction between involuntary homicide and manslaughter, and some of them make no attempt to do so.⁸

The Michigan involuntary homicide statute reads:

"... 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 wilfully or wantonly. . . ."⁹

Louisiana now has a similar statute,¹⁰ also containing the proviso, "but not wilfully or wantonly." The Michigan courts have construed their statute as requiring any negligence between slight and gross negligence. They have interpreted "wilfully or wantonly" to mean "gross negligence."¹¹ On the other hand, most jurisdictions have held "gross negligence" to mean something different from "wilful or wanton."¹² There is much confusion and inconsistency in the interpretations of the terms in the involuntary homicide statutes, but it is almost universally held that these statutes require something more than ordinary or tort negli-

advertence, but falls short of intentional wrong. It consists of a reckless or indifferent omission to do what a reasonable person would do, or a similar reckless or indifferent doing of what such a person would not do under same circumstances. *Carbe v. State*, 4 Ga. App. 583, 62 S.E. 140 (1908); *State v. Wright*, 128 Me. 404, 148 Atl. 141 (1929); *Commonwealth v. Pierce*, 138 Mass. 165 (1884); *Schultz v. State*, 89 Neb. 34, 130 N.W. 972 (1911); *State v. O'Brien*, 32 N.J.Law 169 (1867); *Nail v. State*, 33 Okla. Cr. 100, 242 Pac. 270 (1926). *Miller*, *Handbook of Criminal Law* (1934) 287, § 93.

7. Mich. Comp. Laws (1929) c. 380, § 16743; N.H. Laws (1931) c. 81, §§ 1-2; D.C. Code (Supp. 1939) tit. 6, § 246a; Vt. Pub. Laws (1933) §§ 5149, 5152. See note 1, *supra*.

8. Lack of due caution and circumspection is equivalent to criminal negligence in manslaughter statute. *People v. Hurley*, 13 Cal. App. (2d) 208, 56 P. (2d) 978 (1936).

9. Mich. Comp. Laws (1929) c. 280, § 16743.

10. La. Act 64 of 1930, § 1 [*Dart's Crim. Stats.* (1932) §§ 1047-1052]. This Louisiana statute has recently been superseded by Article 32 of the new Louisiana Criminal Code (La. Act 43 of 1942).

11. *People v. Campbell*, 237 Mich. 424, 212 N.W. 97 (1927).

12. The terms wilful and negligent are inconsistent. *State v. Porter*, 176 La. 673, 146 So. 465 (1933); *State v. Lockwood*, 119 Mo. 463 (1894).

gence.¹³ It may be said that criminal negligence is fundamentally the same in kind as that giving rise to civil liability, the only difference being one of degree. A few courts hold that mere violation of a statute is criminal negligence,¹⁴ while it is generally held that violation of a statute alone shall not be sufficient to constitute criminal negligence.¹⁵

Similar to statutes in other states, the Louisiana involuntary homicide statute was a little clearer than its Michigan pattern and provided for punishment of "any person who, by operation or use of any vehicle in a grossly negligent or grossly reckless manner, but not wilfully or wantonly, causes the death of another person."¹⁶ In *State v. Dean*¹⁷ the court declared "... 'gross negligence' and recklessness should be interpreted to mean something more, or a greater degree of negligence and recklessness than a mere omission of duty, or a rashly negligent, careless, and heedless act." In *State v. Linam*¹⁸ the court interpreted the same to mean "excessive negligence, or negligence or recklessness of an exaggerated character."¹⁹ These interpretations indicate that "grossly negligent" and "grossly reckless" mean an appreciable amount more than is ordinarily understood by the words "negligent" and "reckless." However, the Louisiana decisions interpreting the involuntary homicide statute had left important questions confused and unsettled. In *State v. Flattman*²⁰ the court in-

13. Criminal negligence is gross negligence or reckless disregard of consequences and rights of others, and not mere failure to exercise ordinary care. *State v. McMahan*, 57 Idaho 240, 65 P. (2d) 156 (1937). It requires gross negligence. *People v. Barnes*, 182 Mich. 179, 148 N.W. 400 (1914). There must be gross negligence, i.e., a reckless or indifferent omission to do what a reasonable person would do, or a similar reckless or indifferent doing of what such a person would not do under the same circumstances. See note 6, supra.

14. *People v. Gibson*, 253 Mich. 475, 235 N.W. 225 (1931); *People v. Beauchamp*, 260 Mich. 491, 245 N.W. 784 (1932); *Haynes v. State*, 88 Tex. Crim. Rep. 42, 224 S.W. 1100 (1920); *Young v. State*, 120 Tex. Crim. Rep. 39, 47 S.W. (2d) 320 (1932).

15. The mere violation of a speed regulation does not, without more, amount to criminal negligence. *People v. Hopper*, 69 Colo. 124, 169 Pac. 152 (1917); *State v. Schutte*, 88 N.J. Law 396, 96 Atl. 659 (1916). Driving at a greater rate of speed than set out by statute shall be considered presumptive evidence of negligence, but may be rebutted by proper evidence. *People v. Falkovich*, 280 Ill. 321, 117 N.E. 398 (1917); *People v. Anderson*, 310 Ill. 389, 141 N.E. 727 (1923).

16. See note 1, supra.

17. 154 La. 671, 98 So. 82 (1923).

18. 175 La. 865, 144 So. 600 (1932).

19. The Louisiana court in *State v. Wilbanks*, 168 La. 861, 123 So. 600 (1929) declared that the violation of a safety statute was criminal negligence. The following year this holding was overruled by an express provision in the involuntary homicide statute. La. Act 64 of 1930, § 4 [Dart's Crim. Stats. (1932) § 1050].

20. 172 La. 620, 185 So. 3 (1931). Involuntary homicide, as defined in the first section of this act, is nothing more nor less than involuntary manslaughter-

terpreted the statute to mean that the elements of manslaughter and involuntary homicide were the same, and that it was to be left to the discretion of the jury to determine for which crime the defendant should be punished. *State v. Porter*²¹ and the present case may be definite steps towards unraveling the confusion. In *State v. Porter* the court distinguished between "grossly negligent and grossly reckless" and "wilful and wanton."²² In the present case the court went still further, declaring that the words "wilfully and wantonly" are not synonymous with the words "negligently and recklessly," the former implying intention or deliberation and the latter mere carelessness or lack of due and reasonable care.²³ The court further explained that the crime of involuntary homicide was a lesser crime than that of manslaughter, that the elements of involuntary homicide are "gross negligence" or "gross recklessness," and that if the acts were "wilful and wanton" the crime would be manslaughter or possibly murder.

In the new Louisiana Criminal Code the draftsmen have hit upon a simpler and more workable definition of criminal negligence. Article 12²⁴ defines "criminal negligence" as follows:

"Criminal negligence exists when, although neither specific nor general criminal intent is present, there is such disregard of the interest of others that the offender's conduct amounts to a *gross deviation* below the standard of care expected to be maintained by a reasonably careful man under like circumstances."

This definition is a simple statement of the generally accepted concept of criminal negligence, phrased in language which should not give rise to confusing and conflicting judicial interpretation.

ter, committed by the grossly negligent use or operation of a vehicle. All the legislature did by the provisions of Sections 3 and 5 of Act 64 of 1930 was to leave it to the discretion of the jury, trying a person for manslaughter committed by the grossly negligent use or operation of a vehicle to say whether the penalty should be imprisonment at hard labor for a term not exceeding twenty years, or imprisonment with or without hard labor, at the discretion of the judge, for a term not exceeding five years.

21. 176 La. 673, 146 So. 465 (1933).

22. *Ibid.* Here the court explained that the clause "but not wilfully or wantonly" written into Act 64 of 1930 immediately following the definition of the crime, was intended merely as an exception, for most assuredly one who causes the death of another wilfully and wantonly, as those words are used in criminal law, is guilty of manslaughter or more. They constitute no element of the crime of involuntary homicide. Accord: *State v. Vinzant*, 200 La. 301, 7 So. (2d) 917 (1942).

23. *State v. Vinzant*, 200 La. 301, 7 So. (2d) 917 (1942).

24. Art. 12, La. Crim. Code.

It should also be noted that the Negligent Homicide Article²⁵ in the new Criminal Code is broader than the prior involuntary homicide statute in that it covers *all* negligent killings and thus will include homicides caused by the grossly negligent handling of a firearm or poison. It also follows a sound rule enunciated in the old involuntary homicide statute by expressly providing that "the violation of a statute or ordinance shall be considered only as presumptive evidence of such negligence."²⁶ The congruence of the present case and the new Louisiana Criminal Code creates a supposition that there will be no further lengthy disputes about the elements of criminal negligence or of negligent homicide in Louisiana. For other jurisdictions, whose courts have been in utter confusion as to the interpretations of the heterogeneous terms and language of their negligent homicide statutes, it is suggested that they follow the clear distinction now set out in the present case and so ably expressed in the Louisiana Criminal Code.

J. J. C.

ENCROACHING WALLS—BALANCING EQUITIES—Plaintiff and defendant acquired adjacent lots from a common vendor. Defendant constructed a brick building on the property purchased by him. Afterwards plaintiff decided to erect a building on his lot. When a survey was made it was ascertained that the entire northern wall of defendant's building, which was sixteen inches in width, was located on plaintiff's land. Plaintiff sued to have the boundary line established in accordance with a description of the property and to have the encroaching wall removed. The court found that the defendant had been fully cognizant, previous to the erection of his building, that such building would encroach on plaintiff's property. *Held*, under the provisions of Article 508 of the Civil Code,¹ plaintiff had a clear and legal right to demand the

25. Art. 32, La. Crim. Code.

26. La. Act 64 of 1930, § 4 [Dart's Crim. Stats. (1932) § 1050] provides: "In all prosecutions under this Act or under the manslaughter law, as it now exists, whether or not the defendant is guilty of gross negligence or gross recklessness shall be a question of fact for the jury, and shall not depend upon the rate of speed fixed by law for operating such vehicle."

1. Art 508, La. Civil Code of 1870: "When plantations, constructions and works have been made by a third person, and with such person's own materials, the owner of the soil has a right to keep them or to compel this person to take away or demolish the same.

"If the owner requires the demolition of such works, they shall be demolished at the expense of the person who erected them, without any com-