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Automobile Deaths and Involuntary Manslaughter in West Virginia

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The recent enactment of a comprehensive body of motor vehicle laws¹ and the frequent deaths occurring during the violation of these laws has raised some problems of the definition of involuntary manslaughter in West Virginia. Before the advent of the automobile, involuntary manslaughter arose most frequently in murder trials and as often as not it was the defendant in such trials who assumed the burden of proving he was guilty of such a misdemeanor in order to escape conviction on the murder charge. In such cases, an involuntary manslaughter conviction was often considered a victory by the defendant and consequently the West Virginia Supreme Court of Appeals had few occasions to review closely the elements of that offense until fairly recently. Such are the reasons why a clearly erroneous definition of the offense announced by the court in reviewing a murder conviction in 1906 was not challenged until a 1945 appeal by a motorist convicted of involuntary manslaughter.

The offense of involuntary manslaughter is not defined by statute in West Virginia,² and the Supreme Court of Appeals has accordingly adopted the common law definition. This holds that the offense is an unintentional killing resulting from an unlawful act on the part of the accused, not amounting to a felony, or from a lawful act performed in an unlawful manner.³ It is noted that under this dichotomic definition the death may be caused either (a) by a lawful act performed in an unlawful manner or (b) by an unlawful act. The questions arise in determining just what "unlawful manner" and "unlawful act" mean.

The West Virginia Supreme Court of Appeals in a review of the history of this offense rather exhaustively interpreted the meaning of "unlawful manner" in *State v. Lawson*.⁴ In this case the

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¹ W. Va. Acts, ch. 129 (1951).

² W. VA. CODE, ch. 61, art. 2 § 5 (Michie 1955) merely provides that involuntary manslaughter is a misdemeanor and establishes the penalty therefor.

³ *State v. Lough*, 143 W. Va. 838, 105 S.E.2d 538 (1958); *State v. Craig*, 131 W. Va. 714, 51 S.E.2d 283 (1948); *State v. Lawson*, 128 W. Va. 136, 36 S.E.2d 26 (1945).

⁴ 128 W. Va. 136, 36 S.E.2d 26 (1945).

defendant was operating his car on the left side of the road causing a collision resulting in a death. It was pointed out that driving on the left side of the highway was not in itself an unlawful act. Thus the problem before the court was to define in what manner must a lawful act be done before the resulting death would furnish a basis for an involuntary manslaughter conviction. The court noted that the decided cases in referring to the performance of a lawful act used the words "unlawful," "negligently," "without due caution and circumspection," "in a grossly careless manner," and similar terms. The trial court had given an instruction to the effect that the defendant could be found guilty if he proximately caused the death of another by performing a lawful act in a "negligent manner," basing this instruction on the earlier case of *State v. Clifford*.⁵ The court followed the law announced in the Virginia cases on the subject and held that where the act which produces death is lawful, it must have been performed in an improper, unlawful and wanton manner, in disregard of the safety of others. The court overruled *State v. Clifford* to the extent that the "mere negligent" performance of a lawful act could form the foundation of an involuntary manslaughter charge. In so holding the court followed the nearly universal rule requiring some degree of recklessness or criminal negligence in order to support an involuntary manslaughter conviction.

However, a more difficult question is presented when attempting to define what is an "unlawful act" with reference to this offense. Many texts and encyclopedia state that it is any violation of a statute, ordinance or any positive rule of law.⁶ It is the application of this definition, particularly with reference to motor vehicle rules of the road, which creates the difficulty.

For example, the West Virginia Legislature in 1951, in a comprehensive reorganization and amendment of the motor vehicle laws, adopted the following provision:

"No person shall drive a vehicle on a highway at a speed greater than is reasonable and prudent under the conditions and having regard to the actual and potential hazards then existing. In every event speed shall be so controlled as may be necessary to avoid colliding with any person, vehicle, or

⁵ 59 W. Va. 1, 52 S.E. 981 (1906).

⁶ See, CLARK & MARSHALL, CRIMES § 10.12 (6th ed. Wingersky 1952); 26 AM. JUR. *Homicide* § 188 (1940); 40 C.J.S. *Homicide* § 55 (1944).

other conveyance on or entering the highways in compliance with legal requirements, and the duty of all persons to use due care.”⁷

A subsequent provision of the same act states that a violation of this section as well as any other road law set forth in chapter 17C constitutes a misdemeanor and authorizes both fine and imprisonment.⁸

Reduced to its simplest terms the above statute provides that the negligent operation of an automobile is prohibited. The question then arising is whether the violation of this and similar road laws resulting in a death may properly be the basis for an involuntary manslaughter conviction since such violations are misdemeanors. Thus, is the violation of such road laws an “unlawful act” within the definition of involuntary manslaughter.

This situation was squarely before the Supreme Court of Appeals in the recent case of *State v. Lough*.⁹ The defendant was operating a truck down a steep hill at a fast speed when the rear of the truck slid sideways across the center line striking an oncoming car, causing the death of its operator. The state relied to a great extent on the violation of the above quoted code provision to secure and sustain a conviction. Defense counsel’s appellate brief sums up the principal objections to using such road law violations as a basis for involuntary manslaughter convictions.¹⁰ These arguments are: (1) simple negligence suffices to show a violation; (2) the acts condemned are simply *malum prohibitum*, and not inherently dangerous; (3) the terms of the statute are stringent, allowing no leeway for mere inadvertance or even slight miscalculation; (4) permitting homicide convictions to rest on violations of such road laws shifts, in effect, the burden to the defendant to prove his innocence in any accident involving a fatality. The court was not impressed and without much discussion of the question pointed out that chapter 17C provides that road law violations are crimes and punishable as such, and, consequently, such violations constitute an “unlawful act” with reference to involuntary manslaughter.

⁷ W. VA. CODE, ch. 17C, art. 6 § 1 (Michie 1955).

⁸ W. VA. CODE, ch. 17C, art. 18 § 1 (Michie 1955).

⁹ 143 W. Va. 838, 105 S.E.2d 538 (1958).

¹⁰ Brief for Appellant, pp. 16-25, *State v. Lough*, 143 W. Va. 838, 105 S.E.2d 538 (1958).

This view is contrary to the weight of authority on this question and to most of the text writers who hold that not every violation of law or unlawful act in the operation of a motor vehicle will render the operator criminally liable for a death caused thereby.¹¹ The violation must be intentional, or grossly negligent and careless, or in a reckless disregard or heedless indifference to the rights and safety of others, or an act which is dangerous and likely to result in death or great bodily harm, and in violation of a statute designed to prevent injury and protect human life. The mere unintentional or inadvertent violation of law, not accompanied by recklessness, is not sufficient under the more widely accepted view.¹²

While it could be argued that violation of any road law is dangerous and its violation likely to result in death or great bodily harm, the courts have generally restricted the equation of such violations to the unlawful act part of the manslaughter formula to those violations which are "fraught with the potential" of causing death—such as driving while intoxicated.¹³

In a 1939 Utah case where a motorist was killed in an intersection collision and the surviving operator charged with involuntary manslaughter, the court discussed the problem in detail as follows:

"There are many other rules for driving mentioned in Title 57, the infraction of which may constitute a misdemeanor, but not all which would constitute the basis for a conviction for manslaughter if death should result from the infraction. Infractions of rules of traffic may run the gamut from mere inadvertence or slight omissions to 'an act greatly dangerous to the lives of others and evidencing a depraved mind, regardless of human life', which is first degree murder. Concretely illustrated, the gamut of infractions of the traffic laws may range from all but completely stopping at a stop sign before entering a sparsely travelled portion of an arterial highway to a drunken driver's madly careening down a traffic-laden street. Death from the former would only give rise to a civil action; from the latter perhaps a charge of murder. Where is the line

¹¹ *People v. Lynn*, 385 Ill. 165, 52 N.E.2d 166 (1944); *State v. Kellison*, 233 Iowa 1274, 11 N.W.2d 371 (1943); *Cain v. State*, 55 Ga. App. 376, 190 S.E. 371 (1937); 61 C.J.S. *Motor Vehicles* § 657(d)(1) (1949); BERRY, *AUTOMOBILES* § 5368 (7th ed. 1935); MICHIE, *AUTOMOBILES* § 298C (1947).

¹² *Ibid.*

¹³ *State v. Lingman*, 97 Utah 180, 91 P.2d 457 (1939).

at which the infraction becomes more than civil negligence, that is, criminal negligence? It is not possible to draw it mathematically. The accordian words like 'mere negligence' and 'gross negligence' or 'wanton negligence' suggest comparisons only and give not absolute rule for guidance. We think the [unlawful act] that is, the infraction, must be done in such a manner as to more than constitute a mere thoughtless omission or slight deviation from the norm of prudent conduct. It must be reckless or in marked disregard for the safety of others. When it does that, it passes the stage of mere *malum prohibitum* and approaches the unsocial aspects of *malum in se*. And the spirit of the person while committing the infraction is not a test. A truck driver seriously bent on meeting a schedule of his rounds who shoots through an intersection as if he were driving the only car extant, is just as guilty of reckless conduct as the driver of a car full of revelers joyously celebrating a football victory. Criminal negligence therefore sufficient to satisfy [the unlawful act portion of the statutory definition of manslaughter] means more than mere thoughtlessness or slight carelessness. It means reckless conduct or conduct evincing a marked disregard for the safety of others."¹⁴

An Illinois case illustrates the difficulty the West Virginia court would encounter in holding that a road law violation in and of itself resulting in death constitutes involuntary manslaughter. There the defendant allowed his truck to stand at night on a public highway without lights contrary to an Illinois motor vehicle law. (West Virginia has a similar statute prohibiting such parking of motor vehicles.)¹⁵ A car ran into the rear of the truck throwing a passenger from the car which resulted in his death. The Illinois court in reversing a manslaughter conviction stated that "a violation of a statute may be conceded in that no lights were visible on or near the truck at nighttime, but not every violation of a statute constitutes criminal negligence as not all such negligence is reckless or wanton and of such character as shows an utter disregard for the safety of others."¹⁶

Under present West Virginia law announced in *State v. Lough* it would be immaterial that there was no reckless nor wanton dis-

¹⁴ *Id.* at 197-98, 91 P.2d at 465-66.

¹⁵ W. VA. CODE, ch. 17C, art 15 § 15 (Michie 1955).

¹⁶ *People v. Lynn*, 385 Ill. 165, 52 N.E.2d 166 (1944).

regard for the safety of others if the death resulted from the violation of the statute. While of course, even in West Virginia, the defendant could successfully defend on the ground that the statutory violation was brought about by a sudden emergency, it would still seem the more reasonable course would be to allow the defendant to show all the facts and circumstances surrounding the violation and to require some reckless conduct to attend the violation in order to satisfy the "unlawful act" requirement of involuntary manslaughter.

One reason for following the majority rule of requiring recklessness arises from the doctrine of contributory negligence. To illustrate, take the parked truck fact situation and suppose the motorist who operates the car into the parked truck is killed. Truck owners have in such cases successfully defended civil actions on the ground of contributory negligence.¹⁷ However, since contributory negligence is no defense to an involuntary manslaughter charge in West Virginia and most other jurisdictions, the truck owner or operator could in such case be convicted.¹⁸ It would seem that civil liability should be visited before criminal responsibility in road death cases.

However, while the West Virginia court has ostensibly announced that any road law violation may form the foundation for an involuntary manslaughter conviction, as a practical matter the court has reached the same results as the majority of courts which require gross, criminal and culpable negligence in such cases.

For example, in the West Virginia case of *State v. Craig*,¹⁹ a defendant was convicted of involuntary manslaughter where he operated his car into the rear of a State Road Commission truck parked on the public highway for the purpose of spreading cinders, striking an employee who was standing at the rear of the truck. A large light was mounted on the truck shining in the direction from which the defendant came. The state contended that colliding with the truck was a violation of the statutory road law requiring reasonable and prudent speed controlled so as to prevent collision

¹⁷ *Wolfe v. Beatty Motor Express, Inc.*, 143 W. Va. 238, 101 S.E.2d 81 (1957).

¹⁸ *State v. Kellison*, 233 Iowa 1274, 11 N.W.2d 371 (1934); *State v. Weisengoff*, 85 W. Va. 271, 101 S.E. 450 (1919); *Cain v. State*, 55 Ga. App. 376, 190 S.E. 371 (1937).

¹⁹ 131 W. Va. 714, 51 S.E.2d 283 (1948).

with other vehicles.²⁰ While it would seem pretty clear that for a person to operate an automobile into the rear of a State Road Commission truck spreading cinders, even if there were some fog and slippery roads, would be a technical violation of the road laws, the court found as a matter of fact that "his inability [to stop the automobile] was not due to failure on his part to control it within the meaning of the statute."²¹ Conviction in the trial court was reversed on this ground and also for the reason that there was serious question whether death resulted from the collision or from pneumonia brought on from unrelated causes.

The West Virginia court was again faced with the violation of a road law in *State v. Corely*.²² There an intoxicated person got on the back of defendant's turtle-back coupe instead of in the car without defendant's knowledge and while making a turn, defendant threw the passenger to the ground causing death. The state proceeded on the theory that the defendant violated a motor vehicle law requiring reduced speed in making sharp curves. The court said the evidence wasn't sufficient to show such a violation since it would depend on the width of the road and the angle of the curve and reversed the case on an erroneous instruction.

Thus, in both the *Craig* case and the *Corley* case where it appears there was a technical violation resulting in death, the West Virginia Supreme Court of Appeals did not hesitate to reverse convictions in the trial court where it appeared from the facts recited in the opinion that there was no actual recklessness involved. However, in both cases, the court paid lip service to its announced position that a road law violation in and of itself resulting in death could sustain a conviction. The *Corley* case particularly illustrates that harsh and unjustified results may follow if a court strictly followed the rule that a road law violation in itself resulting in death furnishes a basis for manslaughter. There the defendant, if actually ignorant that a person was sitting on the outside of his car, instead of in the seat, would have no possible reason to suspect that his negotiating the curve at something more than a "reduced speed" could bring about the death which actually occurred. And again the factual situation in the *Corley* case illustrates that the "reckless-

²⁰ The statute then in effect was W. VA. CODE, ch. 17, art. 8 § 18(a) (Michie 1949) which was repealed and substantially re-enacted by the 1951 legislation (see note 1, *supra*).

²¹ 131 W. Va. at 725, 51 S.E.2d at 289.

²² 116 W. Va. 630, 182 S.E. 794 (1935).

ness" requirement may partially offset the sometimes unfair disadvantage of a defendant being denied the defense of contributory negligence in an involuntary manslaughter case.

Also as a practical matter, most defendants in involuntary manslaughter cases, in the West Virginia trial courts, receive the benefit of instructions exculpating them in the absence of reckless conduct even where the state proceeds on the theory of a technical violation of a road law. It happens in this manner. The state usually attempts to prove several different acts on the part of the defendant such as exceeding the speed limit and driving on the wrong side of the road. The former is an "unlawful act" and the latter is a lawful act performed in an "unlawful manner."²³ Since the evidence embraces lawful acts performed in an unlawful manner, defense counsel are entitled to and usually secure instructions based on *State v. Lawson* telling the jury that the lawful act, even though resulting in death, must have been performed in a wanton, grossly negligent manner in disregard of the safety of others, and that simple negligence is not sufficient. The end result is that juries most generally get the impression that some recklessness on the part of the defendant must be proved before they should convict, even though the evidence may unquestionably show a technical road law violation.

Thus, while justice has been done in involuntary manslaughter cases both in the Supreme Court of Appeals and in the trial courts, it would probably be reached in a less circuitous manner by adopting the more popular and probably sounder view that under involuntary manslaughter charges, the act causing death whether it be lawful or unlawful must be performed in a reckless manner in disregard for the lives and safety of others.

²³ *State v. Lawson*, 128 W. Va. 136, 36 S.E.2d 26 (1945).