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Criminal Law—Homicide—Prosecutions for Motor Vehicle Homicide

The advent of the automobile brought into existance another means by which a person can be killed and homicide committed. In 1952 there were 38,000 deaths from motor vehicle accidents in the United States, 319 of them occurring in Nebraska. Add these deaths to another 1,350,000 injuries, many later resulting in death, and it is obvious that the law of homicide must be adjusted to meet the social problem created by the culpable driver.

The purpose of this comment is to examine the history of criminal prosecutions for deaths arising out of automobile accidents and to compare prosecutions under the manslaughter statute with those under the Motor Vehicle Homicide Act which was enacted by the Nebraska Legislature in 1949.

Except in the rare instance where a driver intentionally kills another, using an automobile as a weapon, the crime of murder is inapplicable even though the driver was reckless or violating the law. Although theoretically the common law concept of malice aforethought is elastic enough to include wanton misconduct or an act which is immently dangerous to others and which evinces a depraved mind, in actual practice the homicidal motorist has been charged with manslaughter.

Manslaughter is usually defined as the unlawful killing of another without malice aforethought and generally involves either criminal negligence or a killing which occurs during the course of the commission of an otherwise unlawful act. The inherent difficulty in applying a manslaughter statute to automobile accidents arises due to the fact that traffic violations and negligent driving are ubiquitous, and such conduct is engaged in by otherwise reputable citizens. Moreover, the ambiguities of the negligence formula and the vagaries of proximate cause have added confusion and uncertainty to manslaughter prosecutions for negligent homicide.

Another difficulty in charging homicide in accident cases arises due to the usual rule that contributory negligence on the part of the victim is no defense for the accused in a criminal prosecution. In order to mitigate the rigors of this rule, or to get around it, many courts have sought refuge in the ambiguities of "proximate cause." This is done

4 Holmes, Common Law 60 (1938).
5 In Nebraska, due to the wording of the manslaughter statute, the killing must be done "...purposely and of deliberated and premeditated malice."
6 1 Wharton, Criminal Law 637 (12th ed. 1932).
8 9 Huddy, Cyclopedia of Automobile Law 83 (9th ed. 1931).
9 Note, 32 Neb. L. Rev. 72 (1953).
by paying lip service to the rule that contributory negligence is no
defense in a criminal prosecution, but insisting that the unlawful con-
duct of the accused must be the proximate cause of the death and
instructing the jury so that it may find that it was the victim's own
negligence, rather than the violation, which brought about con-
sequences. If the jury so finds, there is an acquittal even though in theory
contributory negligence was not in issue and even though the violation
of law in fact may have been a substantial factor in causing death.
In many instances this is no more than double talk. For usually the
conduct of both the accused and victim were indispensible factors in
the sequence preceding the death.

In order for there to be a rational analysis of this problem it is
essential that proximate cause be distinguished from causation in
fact. If there is no causal relation between the violation and the death
—if the death would have occurred anyway—an accused who is con-
victed of manslaughter is subjected to the most severe accountability.
Law breakers then act at their peril. The driver whose license plates
have expired or whose trunk is over loaded and who carefully runs
over a pedestrian would be guilty of manslaughter even though there
is no—or slight—causal relation between the offense and the death.
The speeder who is but a fraction over the speed limit and whose
automobile would have gone in the ditch anyway due to a blowout,
commits homicide when his passenger is killed. Because of the harsh-
ness of such a rule, which might send a man to jail even though he
could obtain a favorable verdict in a damage suit, it is understandable
that courts have insisted that there be a causal relation between the
violation and the death before the crime of manslaughter is made out.

Over and beyond insistance upon a causal relation, however, the
prosecution also may be required to establish that the violation which
caused the death was as well the legal or proximate cause of that
consequence. For example, although the violation was a substantial
factor in the concatenation of events, and but for the violation, death
would not have ensued, the connection may be exceedingly remote or
a person in the position of the accused might have been unable to fore-
see the presence of his victim or the risk involved. In such a case,
causation is present but due to policy considerations it may seem un-
just to impose a criminal sanction. Even though a death was caused
by the defendant's illegal conduct, it may not have been a natural and
probable consequence.

Thus it would seem that any one of three alternative approaches
to the problem may be taken. First, it may be held that a person takes
his chances when he violates the laws and is criminally responsible
even though the violation was neither an actual nor a proximate cause

10 Prosser, Torts 311, 321 (1941).
of the death, and even though the victim was contributorily negligent. Second, a court may insist that there be a causal relation, in fact, between the violation and the death, but hold that remoteness and foreseeability are not factors to be considered, and hence proximate cause is not a prerequisite. Third, a court may insist that not only must the violation be an actual cause of the death but further that it be the proximate cause in that the death was a natural and probable consequence of the violation.

The Nebraska court has wavered inconsistently in its choice of one of the above alternatives. Prior to 1949, prosecutions for motor vehicle homicide were brought under the manslaughter statute.\textsuperscript{11} The first case decided by the court held that the contributory negligence of a deceased which would be a bar to a civil action, was no defence to a criminal prosecution for manslaughter. Moreover, the court held that negligence, which must be criminal in its character, was the gist of the offense.\textsuperscript{12}

In a later case, the court in effect modified its holding on contributory negligence by requiring that the prosecution prove that the death was a natural and probable consequence of the unlawful conduct. In this manner, it was held that if the conduct of the deceased or another was the proximate cause of the death, then the defendant would not be criminally liable for the death.\textsuperscript{13}

In another case the court said it was proper for the county attorney to embody in the information any “unlawful” act on the part of the offender which was the proximate cause of the death, meanwhile leaving unanswered the question of what constitutes an “unlawful” act.\textsuperscript{14} In attempting to distinguish between an “unlawful” act which would afford a basis for a manslaughter prosecution and an “unlawful” act which would be disregarded, the court said that the mere failure to have a driver’s license would not be such a violation as would replace the criminal intent necessary to constitute manslaughter; but where it is shown that a defendant had had his license revoked for an earlier offense, the “unlawful” act is serious enough to justify conviction.\textsuperscript{15} This would seem to mean that it would be unnecessary for the prosecution to establish that the illegal driving was the proximate cause of the death.

To sum up the Nebraska cases, it appears that if a driver, by operating his vehicle with a reckless disregard for the safety of others, proximately causes the death of another due to such criminal negligence, he might be convicted under the manslaughter statute. More-

\textsuperscript{11} Neb. Rev. Stat. § 28-403 (Reissue 1948).
\textsuperscript{12} Schultz v. State, 89 Neb. 34, 130 N.W. 972 (1911).
\textsuperscript{13} Fielder v. State, 150 Neb. 80, 33 N.W.2d 451 (1948).
\textsuperscript{14} Crawford v. State, 116 Neb. 125, 216 N.W. 294 (1927).
\textsuperscript{15} Benton v. State, 124 Neb. 485, 247 N.W. 21 (1933).
over, in some cases it is indicated that as long as there is a slight causal relation between the violation and the accident, the death need not be the natural and probable consequence of the unlawful conduct.\textsuperscript{16}

In other states there have been two common approaches taken with regard to motor vehicle homicides. In some states prosecutions are under involuntary manslaughter statutes,\textsuperscript{17} while in others a negligent homicide statute controls.\textsuperscript{18}

Typical of the first approach is a California statute which states that the death must be the proximate result of the unlawful operation of a motor vehicle. With regard to the unlawful act, it is said that its commission must be accompanied by gross negligence. Although the emphasis is upon the unlawfulness of the act, nonetheless negligence is required.\textsuperscript{19} Ostensibly, a somewhat different approach is taken in states where there is a negligent homicide statute which expressly states that gross or criminal negligence must be proved to establish the offense. Here the emphasis is upon negligence rather than upon the unlawful character of the defendant's conduct and authority is found in the statute to apply familiar rules of proximate cause. In reality, the net result may be the same under either type of statute, for courts may supply the requirement of proximate cause even though the legislature did not so specify.

In 1949, the Nebraska legislature passed the Motor Vehicle Homicide Act.\textsuperscript{20} Instead of approaching the problem in terms of negligent homicide, the legislature directed its attention to unlawful acts. In substance the offense requires that: (1) the defendant must cause the death, (2) without malice, (3) while engaged in the unlawful operation of a motor vehicle.

The act not only leaves open the question as to whether the unlawful operation must be the proximate cause of the death, but also, by its literal wording, the law extends liability to all situations where


\textsuperscript{17}Smith v. State, 197 Miss. 802, 20 So.2d 701 (1945); Chandler v. State, 79 Okl. Cr. App. 323, 146 P.2d 598 (1944); People v. Lymn, 385 Ill. 165, 52 N.E.2d 166 (1943); State v. Adamson, 101 Utah 534, 125 P.2d 429 (1942); State v. Vinzant, 200 La. 301, 7 So.2d 917 (1942); State v. Hintz, 61 Idaho 411, 102 P.2d 639 (1940); State v. Graff, 223 Iowa 159, 290 N.W. 97 (1940); State v. Elliott, 1 Terry 250, 8 A.2d 873 (Del. 1939); Commonwealth v. Williams, 133 Pa. Super. 104, 1 A.2d 812 (1938); State v. Long, 186 S.C. 439, 195 S.E. 624 (1938); Largent v. Commonwealth, 265 Ky. 598, 97 S.W.2d 538 (1937); Keller v. State, 155 Tenn. 668, 289 S.W. 603 (1927).

\textsuperscript{18}Ex Parte Whitlatch, 60 Cal. App.2d 189, 140 P.2d 457 (1943); State v. Yanny, 244 Wis. 342, 12 N.W.2d 45 (1943); People v. Young, 20 Cal.2d 332, 129 P.2d 353 (1942); Cockrell v. State, 135 Tex. Cr. Rep. 218, 117 S.W.2d 1105 (1938).

\textsuperscript{19}People v. Mitchel, 27 Cal.2d 673, 166 P.2d 10 (1946).

a driver is unlawfully operating his automobile. At first blush it might appear that strict liability has been imposed upon drivers unlawfully operating their automobiles, no matter what the violation may be, and irrespective of any causal relation between the unlawfulness and the death. In other words, a literal interpretation of the statute might mean that a driver who is in technical violation of some traffic law but is otherwise driving carefully, or one whose unlawful conduct was not the proximate cause of the death, nonetheless may be prosecuted under the statute.

The legislative history of the act is not too helpful. The committee report on the bill does not clarify or illuminate the problem. However, the Chairman of the Judiciary Committee in reporting the bill said, "This bill seeks to provide broader scope of punishment for cases in which death results in connection with unlawful motor vehicle operation." 21

If the above comment is taken at face value, it would seem that the new law was intended to have a broader and more flexible application than that which had been possible under the manslaughter statute. Assuming, arguendo, that the law was not intended to cover a case where there is no causal relation in fact between the unlawful operation and the death, there remains the problem of whether the statute requires that the death be a natural and probable consequence of the unlawful operation. If it does not, then one would assume that there is a broader coverage than under some interpretations of the manslaughter statute, and more convictions might be predicted. However, the reverse is true. In the law's four years of existance, not one case has reached the Nebraska Supreme Court. Out of 57 surviving drivers from January 1, 1953 to September 15, 1953, only one was convicted under the statute.22 Superficially, it would appear that prosecutors are not resorting to the new legislation.

This dearth of prosecutions and convictions, however, in part may be due to the jury instructions which are being given. The standardized instructions adopted by the Association of District Judges of Nebraska are similar to those given in the past in some manslaughter prosecutions.23 In effect, the jury is told that the prosecution must prove gross negligence as distinguished from mere ordinary negligence;24 that proof of violation of a traffic law is not conclusive but is a circumstance bearing on the issue of gross negligence;25 that un-

24 Ibid.
25 Ibid.
lawful operation must be established; and also that it be shown "... that such unlawful operation was the proximate cause of the death. In other words, such death must be shown to have been the natural and probable consequence of such unlawful operation of a motor vehicle, and not of any independent cause." It remains to be seen whether or not the Nebraska Supreme Court will concur with this interpretation of the new law and make the gist of the offense negligence rather than unlawful conduct.

Moreover, it would seem that ultimately there should be more prosecutions under the new law than under the manslaughter statute. Prosecutors may be more willing to prosecute and juries to convict when the offense is characterized as "motor vehicle homicide" rather than stigmatized as "manslaughter." But of much greater importance is the change in sanctions. The manslaughter statute prescribes a penalty of imprisonment for one to ten years. The new act as alternatives provides for (1) fines not exceeding five hundred dollars, (2) imprisonment in the county jail not to exceed six months, (3) imprisonment in the penitentiary for one to ten years, or (4) both fine and imprisonment. The opportunity to choose between light and stiff penalties is desirable due to the extreme differences which may be presented by divers fact situations which have in common only the circumstance that there was a violation of law which was a contributing factor in causing death. The flexibility of the sanctions should promote and encourage prosecutions and convictions of culpable drivers.

There is also the problem of whether or not, in a flagrant case, a prosecutor might choose to prosecute under the manslaughter statute rather than under the motor vehicle homicide act. Under ordinary rules of statutory construction, the later statute, which specifically covers culpable driving, supercedes the older more general statute, and by implication limits prosecution to the new act. However, if the motor vehicle homicide act is construed as being limited to cases where criminal negligence occurs and the manslaughter statute is interpreted as extending to unlawful acts, regardless of negligence, there might be an area where a prosecutor could choose the statute to be utilized, depending upon the facts of the case.

It would appear that the transition from manslaughter to motor vehicle homicide and construction of the latter offense as requiring proof of a relation of cause and effect between the violation and the death, and the further requirement that the death be a natural and

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26 Ibid.
29 1 Sutherland, Statutory Construction 490 (3d ed. 1943); 2 Sutherland, Statutory Construction 542 (3d ed. 1943).
probable consequence of the unlawful operation, is in accord with the values of our times and complements the corresponding denouement in tort law, which has progressed to the point where today a defendant may be held liable only if his act is the proximate cause of the plaintiff's damages. Certainly, the factors which worked for amelioration in the law of torts take on added significance in criminal law where the sanction to be applied is imprisonment rather than the payment of damages. It also might be in the public interest to abandon the rule that contributory negligence of the victim is no defense in a criminal case because in reality it is a good defense if such fault was a substantial cause of the death, and reiteration of the empty phrase is a source of confusion for the jury.

Finally, the availability of a less drastic penalty than that prescribed in the manslaughter statute should eventually lead to a more certain enforcement of the criminal law when a driver culpably causes the death of another. If reckless driving can be deterred by law, certainty of punishment should be more efficacious than severity of punishment, for stringency may defeat its own ends.

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