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# NEGLIGENT HOMICIDE IN THE OPERATION OF AN AUTOMOBILE: KENTUCKY'S 1952 STATUTE

By ROBERT C. MOFFIT\*

By the great weight of authority in this country today, ordinary negligence is not sufficient to sustain a conviction of negligent manslaughter either under homicide statutes or as a common law crime.<sup>1</sup> That degree of negligence which is required for criminal responsibility is usually described as "gross negligence", "reckless conduct", or words of similar connotation.<sup>2</sup> While at common law the unintentional killing of a human being resulting from the failure to exercise the proper degree of care to avoid danger to others constituted manslaughter or even murder under certain circumstances,<sup>3</sup> the negligent homicide, as a crime, is of much greater frequency and resulting importance today than ever before due to the greatly increasing number of deaths caused by the careless operation of motor vehicles.

This pressing problem of traffic fatalities and the difficulty of securing convictions in such cases under existing law has been considered sufficiently important by sixteen states to warrant special legislation creating a new and lesser crime.<sup>4</sup> Apparently the purpose of these statutes is to obtain more convictions and consequently provide for punishment in cases where juries have been reluctant to convict the defendant of manslaughter because they have felt that both the crime and its punishment were too harsh to apply to the situation. While these statutes differ considerably in regard to the name of the offense, the maximum

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<sup>1</sup> MILLER, CRIMINAL LAW 287 (1934); MORELAND, RATIONALE OF CRIMINAL NEGLIGENCE 16 (1944); 65 COR. JUR. SECUN. 1270 (1950); 61 COR. JUR. SECUN. 774 (1949); 40 COR. JUR. SECUN. 924 (1944).

<sup>2</sup> *Ibid.*

<sup>3</sup> See 99 A. L. R. 756 (1935).

<sup>4</sup> 6 ARK. STAT. ANN. sec. 75-1001 (1947); COL. PEN. CODE sec. 193-3 (Deering 1941); CONN. GEN. STAT. sec. 492b (Supp. 1951); D. C. CODE sec. 40-606 (1940); 8 IND. STAT. ANN. sec. 47-2001 (Burns Replacement 1952); KANS. GEN. STAT. ANN. sec. 8-529 (Cum. Supp. 1947); LEGISLATIVE ACTS OF KY. c. 51 (1952); LA. CR. CODE ANN. art. 740-32 (1943); 1 MINN. STAT. sec. 169.11 (1945); 1 N. H. REV. LAWS c. 118 sec. 12 (1942); 1 N. J. REV. STAT. sec. 2:138-9 (1937); N. Y. CRIM. CODE sec. 1053a (Thompson 1939); 4A OHIO GEN. CODE ANN. sec. 6307-18 (1945); VT. PUB. LAWS sec. 10, 286 (1933); WIS. STAT. ANN. sec. 340.271 (1949); 4 WYO. COMP. STAT. ANN. sec. 60-413 (1945).

amount of punishment which can be inflicted and the degree of culpability required, they all have one common purpose, *viz.*, to obtain more convictions<sup>5</sup> and thus by punishment curb the most frequent "killer" of modern times—careless, negligent and reckless driving.

Concentrating upon this one ultimate object, to secure more convictions, and feeling that juries regard manslaughter as too harsh a crime for most negligent homicides resulting from traffic accidents, the state legislatures passing these statutes have given the offense a new name, usually terming it "Involuntary Homicide,"<sup>6</sup> "Negligent Homicide"<sup>7</sup> or words of similar import. It is conspicuous that the term "manslaughter" has been omitted from these statutes.<sup>8</sup>

Seven of the sixteen states which have passed such statutes have not only changed the name and reduced the punishment of the crime but have also lowered the degree of negligence required for a conviction.<sup>9</sup> These states have abandoned the requirement of the higher degree of negligence necessary for a conviction of involuntary manslaughter and require only ordinary negligence.<sup>10</sup> It seems probable that this is the most successful way to achieve the desired end—criminal convictions in a greater number of cases.

The 1952 Kentucky Legislature apparently placed Kentucky within this latter group of states by passing the following statute:<sup>11</sup>

"Any person who, by negligent operation of a motor vehicle, causes the death of another, under circumstances not otherwise punishable as a homicide, shall be imprisoned in the county jail for not more than one year."

<sup>5</sup> MORELAND, LAW OF HOMICIDE 249 (1952).

<sup>6</sup> LA. CR. CODE ANN. art. 740-32 (1943).

<sup>7</sup> ARK. STAT. ANN. sec. 75-1001 (1947).

<sup>8</sup> *Supra* note 4 with the exception of Ohio where it is termed second degree manslaughter. 4A OHIO GEN. CODE ANN. sec. 6307-18 (1945).

<sup>9</sup> CONN. GEN. STAT. sec. 492b (Supp. 1951); D. C. CODE sec. 40-606 (1940); KANS. GEN. STAT. ANN. sec. 8-529 (Cum. Supp. 1951); LEGISLATIVE ACTS OF KY. c. 51 (1952); 4A OHIO GEN. CODE ANN. sec. 6307-18 (1945); VT. PUB. LAWS sec. 10,286 (1947); WIS. STAT. ANN. sec. 340.271 (1949).

<sup>10</sup> *State v. Phelps*, 151 Kan. 199, 97 P. 2d 1105 (1940); *State ex rel. Shields v. Portman*, 242 Wis. 5, 6 N.W. 2d 713 (1942); Ohio's statute requires only that the defendant be "engaged in the violation of the laws of the state of Ohio applying to the use or regulations of traffic . . ." *State v. Yudick*, 155 Ohio St. 269, 98 N.E. 2d 415 (1951); While no cases could be found for Conn., D. C., or Vt., under the wording of their respective statutes it would appear that they only require ordinary negligence for a conviction.

<sup>11</sup> LEGISLATIVE ACTS OF KY. c. 51 (1952).

It will be noted not only that the statute does not mention the word manslaughter, but also that it requires only "negligent operation."

It would appear from an examination of the Kentucky law prior to the passing of this statute that the legislature intended to reduce the degree of negligence necessary for a conviction from "gross" to "ordinary negligence." Prior to the decision in *Marye v. Commonwealth*<sup>12</sup> handed down in 1951 the law had been that ordinary negligence in the operation of an automobile which caused the death of a human being was sufficient culpability to sustain a conviction of involuntary manslaughter,<sup>13</sup> which is a common law crime in this jurisdiction<sup>14</sup> and which, interestingly enough, carried the same maximum punishment as this new vehicle statute.<sup>15</sup> The *Marye* case, however, overruled this long line of cases and held that in order to convict one of involuntary manslaughter there has to be a finding of a higher degree of negligence—gross negligence—in order to authorize a conviction.<sup>16</sup> Within a year from the time of this decision we find the legislature passing the statute under discussion.<sup>17</sup> Since the amount of punishment has not been changed, apparently the only function which the statute could serve would be the lowering of the degree of negligence required from gross negligence to "negligence."<sup>18</sup>

There may well be framed a strong argument against making any kind of ordinary civil negligence grounds for a criminal prosecution. However, it is believed by the writer that the imperative necessity of taking some kind of action in order to minimize the number of traffic fatalities more than justifies the creation of this new offense.

An interesting and important problem raised by the group

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<sup>12</sup> 240 S.W. 2d 852 (Ky. 1951).

<sup>13</sup> *Lewis v. Com.*, 301 Ky. 268, 191 S.W. 2d 416 (1945); *Lowe v. Com.*, 298 Ky. 7, 181 S.W. 2d 409 (1944); *Com. v. Mullins*, 296 Ky. 190, 176 S.W. 2d 403 (1943); *Jones v. Com.*, 213 Ky. 356, 281 S.W. 164 (1926); *Held v. Com.*, 183 Ky. 209, 208 S.W. 772 (1919).

<sup>14</sup> *Sikes v. Com.*, 304 Ky. 429, 200 S.W. 2d 956 (1947).

<sup>15</sup> KY. REV. STAT. sec. 431.075 (1950).

<sup>16</sup> *Supra* note 12.

<sup>17</sup> *Supra* note 11.

<sup>18</sup> See Moreland, *A Suggested Homicide Statute for Kentucky*, 41 Ky. L. J. —, (1952) where Professor Moreland, in discussing the new Kentucky Statute, comes to the conclusion that it would be quite possible under the wording of the statute for the court in construing it to require a higher degree of negligence, *viz.*, recklessness, in order to support a conviction.

of vehicle statutes which only require ordinary negligence for a conviction is presented by the deep-seated rule of criminal law that contributory negligence is no defense to a criminal prosecution.<sup>19</sup> This is based upon the reasoning that the state, being the primary party interested in a criminal prosecution, punishes the defendant for *his* act, which is either criminal or not, regardless of the conduct of the other party.<sup>20</sup> It seems logical, however, that when social and public reasons necessitate the making of an essentially civil wrong a criminal offense, it is only fair and just to allow the defendant in such case to use that defense which has for so long a time been recognized in civil cases as a complete defense to actions based upon negligence.<sup>21</sup> It is believed that, in order to eliminate the possibility of one being guilty of a crime where under tort law he would have available a valid defense, the court in construing the new statute could avoid this anomaly by adopting the defense of contributory negligence<sup>22</sup> as a necessary corollary to the statute.<sup>23</sup>

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<sup>19</sup> *State v. Custer*, 129 Kan. 281, 282 P. 1071 (1929); *Held v. Com.*, 183 Ky. 209, 208 S.W. 772 (1919); *Thiede v. State*, 106 Neb. 48, 182 N.W. 570 (1921); *Copeland v. State*, 154 Tenn. 7, 285 S.W. 565 (1926); *State v. Busby*, 102 Utah 416, 131 P. 2d 510 (1942); *Maxon v. State*, 177 Wis. 379, 187 N.W. 753 (1922).

<sup>20</sup> See MAY'S, *CRIMINAL LAW* 22-24 (3rd ed. 1905).

<sup>21</sup> PROSSER, *TORTS* 393 (1941).

<sup>22</sup> The fact that the state is the primary party interested in a criminal prosecution might be pointed to as a reason for denying the defendant the use of such a defense as contributory negligence. However, it is felt that in as much as such a defense is only available against a charge of ordinary negligence and would avail the defendant nothing against a charge of a higher degree of negligence that it would be useful in balancing the argument against the general use of ordinary negligence as a basis for a criminal prosecution.

<sup>23</sup> In the *Mayre* case, *supra* note 12, the court held that the defendant was entitled to an instruction on "sudden emergency" as a defense to negligent manslaughter, saying: "Although we know of no criminal case directly in point there is ample authority for such an instruction in civil cases, and there is no valid reason why the same rule should not apply in a criminal case." 240 S.W. 2d 852, 856 (Ky. 1951). It is believed that the same reasoning could be adopted to allow the defendant the defense of contributory negligence.