

1943

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Recommended Citation

Stephenson, Helen C. (1943) "Negligent Involuntary Manslaughter in Kentucky: Standard of Care Required," *Kentucky Law Journal*: Vol. 31 : Iss. 3 , Article 7.
Available at: <https://uknowledge.uky.edu/klj/vol31/iss3/7>

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STUDENT NOTES

NEGLIGENT INVOLUNTARY MANSLAUGHTER IN KENTUCKY: STANDARD OF CARE REQUIRED

John Jones, a farmer, was driving a horse and buggy on a country road in Kentucky at nine o'clock, November 5, 1941. It was raining steadily, the night was dark, and he was driving approximately twenty miles an hour. The wheel of his buggy struck and killed James Cobb, a pedestrian, who was walking along the side of the road. Jones was indicted for involuntary manslaughter and after the above evidence was in, the judge, over the defendant's objection, instructed as follows:

"If the jury believe from the evidence and beyond a reasonable doubt that the defendant carelessly and negligently, and in the absence of such care as an ordinary prudent person would exercise under similar circumstances, ran into and killed the deceased, they should find him guilty of involuntary manslaughter."

The defendant was found guilty and now appeals, alleging that the instructions were erroneous. (Hypothetical case.)

The above instruction, which is similar to one used in a number of Kentucky cases,¹ employs what would appear to be the tort standard of care in the case of involuntary manslaughter. The question naturally arises then: Is the test applied in Kentucky in involuntary manslaughter cases arising from negligence that of ordinary negligence, or is it necessary that the defendant be guilty of a greater degree of negligence in order to sustain a conviction for this offense?

While involuntary manslaughter includes several aspects, the one in which we are interested in the present case is the killing of someone while the defendant is doing a lawful act in a negligent manner.² Although at common law,³ it was necessary for the defendant to be guilty of gross negligence in such cases before he could be convicted of involuntary manslaughter, it is possible that the decisions in Kentucky have adopted a different rule so that a lesser degree of negligence is all that is required.

¹ *Infra*, footnotes 2 and 4.

² The actual language of the courts is that the act must be a lawful one done in an unlawful manner, but the cases are actually negligence cases. *Brown v. Commonwealth*, 219 Ky. 406, 293 S. W. 975 (1927), *Jones v. Commonwealth*, 213 Ky. 356, 281 S. W. 164 (1926); *Commonwealth v. Owens*, 198 Ky. 655, 249 S. W. 792 (1923), *Westrup v. Commonwealth*, 123 Ky. 95, 93 S. W. 646 (1906).

³ *Held v. Commonwealth*, 183 Ky. 209, 208 S. W. 772 (1919); *Jones v. Commonwealth*, 213 Ky. 356, 281 S. W. 164 (1926).

In the case of *Jones v. Commonwealth*,⁴ the defendant, driving an automobile on the streets of a city about the time school was out, struck and killed a school child. The court, because of the alleged confusion of the Kentucky law on the subject of manslaughter, proceeded to set out instructions to be used by the lower courts when trying cases similar to the one therein being considered. On the subject of voluntary manslaughter, the instruction set up that the defendant must be guilty of operating an automobile in a manner reasonably calculated to endanger the lives of persons on the street, i.e., driving recklessly or wantonly and in a grossly negligent manner. But the instruction for involuntary manslaughter reads:

“ if they (the jury) further believe from the evidence, to the exclusion of a reasonable doubt that the defendant carelessly and negligently ran his machine upon or against D.S. or that at said time or place he operated his car upon the streets of the city of Pikeville at a speed greater than is reasonable and proper, having due regard to the traffic and use of the highway, or so as to endanger the life and limb, or injure the property of any person they should find him guilty of involuntary manslaughter. ”

Since that decision, instructions to the same effect in involuntary manslaughter cases have been upheld by the court as a correct statement of the law.⁵

There is another case, however, decided earlier than the Jones case which has a definite bearing upon the subject. In *Held v. Commonwealth*,⁶ in which the defendant, while driving an automobile upon a crowded street, killed a boy, the court said that at common law it was necessary that one performing a lawful act should be guilty of gross negligence before he could be convicted of involuntary manslaughter. But, continued the court, where one employs an instrumentality at a time and place in which its careless or negligent

⁴ 213 Ky. 356, 281 S. W. 164 (1926).

⁵ *Jones v. Commonwealth*, 273 Ky. 444, 116 S. W. (2d) 984, 988 (1938), *Dublin v. Commonwealth*, 260 Ky. 412, 86 S. W. (2d) 136, 139 (1935), *Colvin v. Commonwealth*, 247 Ky. 480, 57 S. W. (2d) 487, 488 (1933), *Elkins v. Commonwealth*, 244 Ky. 583, 51 S. W. (2d) 916, 918 (1932).

⁶ 183 Ky. 209, 208 S. W. 772 (1919). At page 774, the court said: “ carelessness or negligence or recklessness in the performance of a lawful act which results in the death of another, is always unlawful and criminal if the agency employed was at the time and place of a character that its negligent or reckless use was necessarily dangerous to human life or limb or property; and this dangerous character of the agency employed has been accepted in this state in a long line of decisions, as sufficient to render reckless or negligent or careless use criminal, upon the theory no doubt, that a want of ordinary care in the use of such an instrumentality in the presence of others or on a crowded thoroughfare in a city or where others were naturally expected to be, is gross negligence for there are many instrumentalities of death with reference to which a want of ordinary care in proximity to others is carelessness of the greatest kind.”

use might be dangerous to human life, what would otherwise be ordinary negligence amounts to gross negligence. The Kentucky cases can be reconciled on the ground that ordinary negligence under certain circumstances may be gross negligence where the element of a dangerous instrumentality is added. The language, however, is unfortunate since it is misleading to the jury to say that ordinary negligence becomes gross negligence when a dangerous instrumentality is involved.

The Kentucky standard of care has been applied in several types of cases; for example, where the defendant was driving an automobile on a crowded city street or used a dangerous weapon such as a gun.⁷ In such cases, it may be argued, the *dangerous instrumentality* under the circumstances raises ordinary negligence to the same plane as gross negligence and makes it possible to sustain a conviction for involuntary manslaughter.

The question then arises: Should the same rule apply if the defendant, while driving a horse and buggy on a country road where the traffic was light, killed a pedestrian? Would ordinary negligence be sufficient to make him guilty of the crime of involuntary manslaughter, or would gross negligence be required? Although there are no cases wherein the defendant has been accused of involuntary manslaughter in such a situation, since Kentucky follows the common law rule in all other respects, it seems gross negligence would be necessary.

In the light of the cases discussed, the instruction in the hypothetical case is incorrect unless it can be shown that a horse and buggy driven on a country road at night at twenty miles an hour is a dangerous instrumentality. It is submitted that minus a dangerous instrumentality defendant must be guilty of gross negligence before he can be charged with the crime of involuntary manslaughter.⁸

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⁷ *Speaks v. Commonwealth*, 149 Ky. 393, 149 S. W. 850, 852 (1912) (Careless use of gun sufficient for involuntary manslaughter), *McGeorge v. Commonwealth*, 145 Ky. 540, 140 S. W. 691, 693 (1911); *Lewis v. Commonwealth*, 140 Ky. 652, 131 S. W. 517, 519 (1910) (If defendant failed to exercise reasonable care in handling his gun, he is guilty of involuntary manslaughter).

⁸ In all other states of the United States, in cases involving death by automobiles, if as a reasonable man, defendant might have seen or realized the danger of killing someone, but did not because of "gross" or "culpable" negligence, he should be guilty of involuntary manslaughter. Mere ordinary negligence is not enough for a criminal prosecution. *Hammell v. State*, 21 Ala. App. 633, 111 So. 191 (1927); *People v. Allen*, 321 Ill. 11, 151 N. E. 675 (1926), *Schutz v. State*, 89 Neb. 34, 130 N. W. 972 (1911), *Commonwealth v. McLaughlin*, 293 Pa. 218, 142 Atl. 213 (1928), *State v. Hopkins*, 147 Wash. 198, 265 Pac. 481 (1928), *Christie v. State*, 212 Wis. 136, 248 N. W. 920 (1933).

In Kentucky (perhaps because of the strange rule here) in most automobile cases involving the killing of a person, the jury has found the defendant guilty of voluntary manslaughter. That means that in