Criminal Law: Involuntary Manslaughter: Defense of Unavoidable Accident

Gaylord L. Henry
Involuntary Manslaughter—Defense of Unavoidable Accident—
While driving in an intoxicated condition defendant killed a child, and was prosecuted under 340.271 (1), Wis. Stats. The trial court would not allow the defense to bring in evidence that the accused was blinded by bright lights at the time of the accident and that the accident and that the accident was unavoidable. Defendant was convicted, and he, appealed. Held, Conviction affirmed. The elements of the crime of negligent homicide under section 340.271 (1), Stats., are that the operator of a motor vehicle was under the influence of alcoholic beverages, and that he caused the death of another while so operating a motor vehicle. Evidence that the accident could not have been avoided by a sober driver was not competent because, even if proved, the fact would not constitute a defense. State v. Peckham, 263 Wis. 239, 56 N.W. 2d 835 (1953).

The effect of the principal case is to remove the requirement of a causal connection between the unlawful act of the accused and the ensuing death to sustain a conviction under 340.271, Wis. Stats. This refinement of the law is startling to those who are familiar with the civil law of negligence.

Under the law of torts the defendant is not liable for his negligence if the injury would have occurred without it. Thus one who negligently fails to fence a hole in the ice is not liable for the death of runaway horses when a fence would not have stopped the runaway. The differences between tort and criminal law, as to the requirement of causation, can be explained by an examination of the basic purposes of the two fields of law. A civil action for tort is intended to compensate the injured person for the injury he has suffered at the hands of a wrongdoer. Therefore one of the basic questions involved is: Have the defendant’s actions caused the plaintiff’s loss? If the answer is negative, the defendant cannot be held liable to compensate the plaintiff for his loss. Thus one who acts negligently is not civilly liable unless his actions have harmed someone. The criminal law, on the other hand, is not concerned with redressing injuries, but seeks to punish those whose actions violate the criminal law. Of course, where the unlawful acts of the accused cause injury or death to a person, this additional fact usually denominates the act as a higher crime. But a criminal act is an offense against the state, and injury to a third person is not necessary to constitute a crime.

Therefore the legislature may denominate as a separate crime unlawful acts which concur with the death of a person but do not cause

1 Stacy v. Knickerbocker Ice Co., 84 Wis. 614, 54 N.W. 1091 (1893).
2 Prosser on Torts §10 (1941).
such death. Convictions are more easily obtained under such statutes. The difficulty of proving the causal connection in some cases of involuntary manslaughter by automobile has led legislatures to enact statutes like 340.271. Results of the removal of the causal element from the statutory definition of the crime seem harsh in a case where the accident was unavoidable.

Whether a driver accused of involuntary manslaughter can disprove his guilt by showing that the accident was unavoidable is not an entirely settled question. Of course, where a driver's criminal negligence created a situation in which his last-second efforts to avoid the accident were unavailing, he cannot defend by saying that the accident was unavoidable. Nor can the contributory negligence of the deceased ever be used as a defense to an action for unlawful homicide. The accused, being charged with an offense against the state, cannot justify the crime by showing that the deceased, a third party, also violated the law. However, the actions of the deceased may be considered to determine whether the accused was criminally negligent.

Several states have held that a negligent driver has a good defense if he can prove that the accident was one which even a prudent driver could not have avoided. These cases are decided on theory that the negligence of the accused cannot be the proximate cause of the homicide if, under the circumstances, the deceased would have been killed even though the driver was exercising all the care required by law. This requirement of causation is analogous to the civil law of torts.

However, in the principal case, the Wisconsin Court held that the defense of unavoidable accident was not available to the accused. The court stated:

"...In a prosecution under sec. 340.271 Stats., (Negligent Homocide statute) the state is not required to prove that de-

3 State v. Moore, 129 Iowa 514, 106 N.W. 16 (1929). "...contributory negligence, if shown is never a defense or excuse for crime, nor can it in any degree serve to purge an act otherwise constituting a public offense of its criminal character." Maxon v. State, 177 Wis. 379, 187 N.W. 753 (1922). The court after holding that the contributory negligence of the deceased was not a defense said: "The reason is plain, owing to the substantial difference between a criminal action prosecuted on behalf of the state and a civil action instituted to recover damages resulting from the same accident."

4 State v. Bolsinger, 221 Minn. 154, 21 N.W. 2d 480 (1946).

5 In the leading case on the question, People v. Barnes, 182 Mich. 179, 148 N.W. 400 (1914) the court said: "An unavoidable crime is a contradiction. Whatever is unavoidable is no crime. As in the law of civil wrongs, so in the criminal law, to render one answerable for an offense, it must result from his act as an effect not too remote but sufficiently proximate thereto." Accord: Jackson v. State, 101 Ohio St. 152, 127 N.E. 879 (1929); State v. Martin, 62 Utah 69, 217 Pac. 966 (1923); Crisp v. State, 6 Div. 500, 109 So. 282 (Ala. Court of App. 1925); Sheffield v. State, 126 Tex. Cr. Rep. 370, 72 S.W. 2d 245 (1934); Chandler v. State, 146 P. 2d 598 (Okla. Cr. 1944); Prezzi v. U.S., 62 A. 2d 196 (Mun. Court of App. D.C. 1948).

6 RESTATEMENT, TORTS §§431, 432 (1934); PROSSER ON TORTS §46 (1941).
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fendant's operation of the car was so affected by his intoxica-
tion that the accident would not have happened if he had been sober. 7

This is clearly a correct interpretation of the statute and other courts have so construed similar statutes. 8 An additional factor in the Wisconsin Supreme Court's decision in the principal case was a statement by the attorney general that to require proof of a causal connection between the defendant's intoxication and the death would impose an impossible burden upon the prosecution. This burden would be considerably lessened in a prosecution under 340.271(2), Wis. Stats. because of the difference in circumstances. Usually, it would be easier to prove that negligent driving caused the death than to prove that intoxicated driving caused the death. Whether the Wisconsin Court would apply the rule of the principal case to a conviction under 340.271(2) is not known. 9

It might be suggested that section 340.30, which defines excusable homicide, has some application to the general problem. That section provides:

"Such homicide is excusable when committed by accident and misfortune in doing any other lawful act by lawful means with usual and ordinary caution and without any unlawful intent." 10

Since driving while intoxicated is unlawful, it is obvious that one who so operates an automobile cannot allege that a death occurring while the car was being unlawfully operated was accidental in a legal sense. Courts have repeatedly held, in cases involving the use of firearms, that the essential elements of homicide by misadventure are lawfulness of the act from which death results, proper precaution to avoid harm, and lack of intent to cause death. 10 All of these elements must concur to set up a good defense by misadventure. If the accused was negligent in his use of the firearm causing death, misadventure is not a good defense. That a court would similarly hold that an intoxicated or criminally negligent driver could not rely on misadventure as a defense is fairly obvious.

7 Wis. Stats. (1951) §340.271 (1).
9 The wording of the two subsections is slightly different. 340.271 (1) provides: "Any person who by the operation of any vehicle while under the influence . . . shall be deemed guilty of negligent homicide." Contrast this to the wording of 340.271 (2): "Any person who, by the operation of any vehicle . . . in a careless, reckless, or negligent manner constituting or amounting to a high degree of negligence . . ., shall cause the death of another, shall be deemed guilty of negligent homicide . . ." It is submitted that the use of the word "in" within 340.271 (2) indicates a legislative intent that the negligence be included with the operation of the vehicle as part of the causal element. The word "while" in 340.271 (1) precludes such construction of that subsection.
10 Eckman v. State, 191 Wis. 63, 209 N.W. 715 (1926); Com. v. Flox, 331 Pa. 145, 200 Atl. 632 (1938); Embry v. Com. 236 Ky. 204, 32 S.W. 2d 979 (1931).
It is interesting to note that the proposed criminal code provides. "The actor has a defense if it appears by a preponderance of the evidence that the accident causing death would have been unavoidable even if he had not been under the influence of an intoxicant."\(^{11}\)

This provision has the effect of liberalizing the Wisconsin law and would change the result of the principal case.

A more difficult question is raised by Sec. 340.05 of the proposed Criminal Code which states:

"Whoever causes the death of another human being by a high degree of negligence in the operation or handling of a vehicle, firearm, or bow and arrow may be fined not more than $1000 or imprisoned not more than one year in county jail or both."

Under the above statute it would seem that the ultimate question would be: Was the accused criminally negligent, and, if so, did his criminal negligence cause the death of the deceased? Under the rule of the Barnes case,\(^{12}\) proof that the accident would have happened even if the accused was driving carefully would be a good defense since it would show that the negligent driving was not the cause of the accident.

Gaylord L. Henry
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\(^{11}\) Criminal Code, Bill No. 100, A §340.06 (2).
\(^{12}\) State v. Barnes, *supra*, note 5.