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Criminal Law - Implied Repeal by Section 31-232 (Negligent Homicide Law) of That Part of Section 6-58 (Involuntary Manslaughter Statute) That States or by Any Culpable Neglect or Criminal Carelessness, insofar as It Affects Deaths Resulting from the Operation of a Motor Vehicle - Thomas v. State

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CASE NOTES

CRIMINAL LAW—Implied repeal by Section 31-232 (Negligent Homicide Law) of that part of Section 6-58 (Involuntary Manslaughter Statute) that states "or by any culpable neglect or criminal carelessness", insofar as it affects deaths resulting from the operation of a motor vehicle. Thomas v. State, 562 P.2d 1287 (Wyo. 1977).

On July 13, 1974 an auto driven by Lewis Wilson Thomas skidded into the left lane of the Casper Mountain highway and collided with an oncoming motorcycle. Killed in the crash were the motorcycle driver, his passenger, and a passenger in the car driven by Thomas.

In a trial arising from this accident, Thomas was charged and convicted in the District Court of Natrona County on three counts of manslaughter.[1] Thomas appealed from the judgment, his main contention being that Section 31-232 (the negligent homicide law) and earlier related enactments had impliedly repealed that part of Section 6-58 (the involuntary manslaughter statute) which stated "or by any culpable neglect or criminal carelessness", insofar as it affected deaths resulting from the operation of a motor vehicle.[2] The Wyoming Supreme Court held that because Section 31-232 proscribed substantially the same behavior as the questioned portion of Section 6-58, and the penalty provided in Section 31-232 was substantially less, the two statutes were repugnant and conflicted insofar as the latter portion of the involuntary manslaughter statute was concerned.[3] Because of this repugnancy, the court held Section 31-232 had impliedly repealed the contested phrase in Section 6-58 insofar as it was applied to deaths occasioned by negligent operation of a motor vehicle.[4]

THE STATUTES IN QUESTION

Section 6-58 of the Wyoming Statutes[5] provides:

> Whoever unlawfully kills any human being without malice, expressed or implied, either voluntarily, upon a sudden heat of passion, or involuntarily, but in the commission of some unlawful act, or by any culpable

1. WYO. STAT. § 6-58 (1957).
2. Thomas v. State, 562 P.2d 1287, 1288 (Wyo. 1977).
3. *Id.* at 1291.
4. *Id.*
5. WYO. STAT. § 6-58 (1957).

> neglect or criminal carelessness, is guilty of manslaughter, and shall be imprisoned in the penitentiary not more than twenty years.

This statute, without any change, has been the definition of manslaughter in Wyoming since it was first enacted in 1890.[6]

In 1913 the legislature passed the automobile act[7] which provided for the regulation of automobiles. Included in the act was a penalty provision[8] which stated the violation of any provisions of the automobile act would be a misdemeanor except:

> [I]f any person operating a motor vehicle in violation of the provisions of this Act shall by so doing seriously maim or disfigure any person or cause the death of any person or persons, he shall upon conviction thereof be fined not less than $200.00 nor more than $500.00 or be imprisoned in the penitentiary for not less than one year or more than ten years.

This statute was the first of Wyoming's so-called "special statutes"[9] relating to vehicular homicide.[10]

In 1939 the legislature passed another act designed to regulate auto traffic. One purpose of this new law was to define "certain crimes in the use and operation of vehicles."[11] Among the crimes covered by the 1939 act was one new to Wyoming —negligent homicide. Classified as a misdemeanor, the newly-created crime of negligent homicide was defined by the act as:

> When the death of any person ensues within one year as a proximate result of injury received by the driving of any vehicle in reckless disregard of the safety of others, the person so operating such vehicle shall be guilty of negligent homicide.[12]

6. 1890 WYO. SESS. LAWS Ch. 73., § 17 [hereinafter referred to as the involuntary manslaughter law].
7. 1913 WYO. SESS. LAWS Ch. 95.
8. 1913 WYO. SESS. LAWS Ch. 95, § 9 [hereinafter referred to as the penalty statute].
9. State v. Cantrell, 64 Wyo. 132, 186 P.2d 539, 548 (1947).
10. This statute remained in effect without change (except for minor increases in penalty) until 1957 when it was altered drastically by the deletion of the paragraph quoted in the text. Its mild-mannered successor, Section 31-29 of the Wyoming Statutes, has nothing to do with auto homicide.
11. 1939 WYO. SESS. LAWS Ch. 126.
12. 1939 WYO. SESS. LAWS Ch. 126, § 24(a) [hereinafter referred to as the negligent homicide law].

The penalty for negligent homicide was given as imprisonment for not more than one year and/or a fine of not more than one thousand dollars.[13] This statute, now known as Section 31-232 of the Wyoming Statutes,[14] was Wyoming's second "special statute"[15] dealing with vehicular homicide. It remains in effect today with only minor changes.[16]

Thus, until 1913 any vehicular homicide was prosecuted under the involuntary manslaughter law[17] (today's Section 6-58) since that was the only applicable statute then in existence. After 1913 and until 1939, a vehicular homicide might be prosecuted under one of two statutes—the involuntary manslaughter law[18] or the penalty statute[19] created by the 1913 Wyoming legislature. After 1939 and until 1957 one charged with vehicular homicide might be prosecuted under one of three statutes—the involuntary manslaughter law,[20] the penalty statute[21] or the negligent homicide law[22] (today's Section 32-232). After 1957 and until the decision in *Thomas v. State*,[23] a vehicular homicide could be prosecuted under one of two statutes—the involuntary manslaughter law[24] or the negligent homicide law.[25]

With anywhere from two to three statutes dealing with vehicular homicide in existence at any one time, it is easy to understand the confusion that consequently pervaded this area of Wyoming law. In the 1925 case of *State v. McComb*,[26] the defendant, who had killed another driver while speeding, was charged and convicted under the involuntary manslaughter law.[27] The defendant appealed on the ground that an instruction given to the jury led them to believe the defendant was being tried under the automobile act and the accompanying penalty statute rather than under the involuntary man-

13. 1939 WYO. SESS. LAWS Ch. 126, § 24(b).
14. WYO. STAT. § 31-232 (1957).
15. State v. Cantrell, *supra* note 9.
16. Thomas v. State, *supra* note 2, at 1288 n. 1.
17. WYO. COMP. STAT. § 5793 (1910).
18. WYO. REVIS. STAT. § 32-205 (1931).
19. WYO. REVIS. STAT. § 72-208 (1931).
20. WYO. COMP. STAT. § 9-205 (1945).
21. WYO. COMP. STAT. § 60-138 (1945).
22. WYO. COMP. STAT. § 60-413 (1945).
23. Thomas v. State, *supra* note 2.
24. WYO. STAT. § 6-58 (1957).
25. WYO. STAT. § 31-232 (1957).
26. State v. McComb, 33 Wyo. 346, 239 P. 526, 527 (1925).
27. *Id.*

slaughter law.[28] The court reversed in his favor, noting the same act could be punished under both statutes concurrently.[29] The defendant in *McComb*, by exceeding the speed limit, violated the automobile act.[30] By killing a human being while in violation of the automobile act, the defendant made himself liable for punishment under the penalty statute.[31] At the same time, however, he had become susceptible to punishment under the involuntary manslaughter law since he had killed a human being involuntarily while in commission of an unlawful act (speeding) and/or while driving in a culpably negligent or criminally careless manner.[32] The court mentioned this apparent conflict but gave no directions to enforcement officials prescribing the situations in which each statute was to be applied. As a result, four years later and on facts which offered no basis for distinction from *McComb*, the defendant in *Thompson v. State*[33] was charged and convicted under the penalty statute. The involuntary manslaughter law was not even mentioned.

Jurors and prosecutors were not the only ones befuddled by the multiplicity of laws relating to vehicular homicide. The courts themselves were confused and said so on several different occasions.[34] Indeed, the Wyoming statutory thicket in this area was such a classic in its field, one criminal law hornbook[35] refers the reader to the Wyoming case of *State v. Wilson*[36] for a judicial criticism of the conflict between involuntary manslaughter laws and "special statutes"[37] enacted specifically to deal with vehicular homicide.

THE COURT'S REASONING IN THOMAS V. STATE

Implied repeal of an earlier statute by a later statute is founded:

28. *Id.* at 528.
29. *Id.* at 529, 530.
30. *Id.* at 530.
31. *Id.*
32. *Id.* at 529, 530.
33. Thompson v. State, 41 Wyo. 72, 283 P. 151, 152 (1929).
34. State v. Cantrell, *supra* note 9. Justice Blume pointed out that not only did Wyoming have three different statutes dealing with the killing of a human being as a result of negligent driving of an automobile but that it was "impossible to determine . . . whether or not the legislature when it passed these special statutes intended that they should govern in all cases when a death occurs as the result of improper driving of an automobile."
35. CLARK & MARSHALL, CRIMES § 10.13 n. 19 (7th ed. 1958).
36. State v. Wilson, 76 Wyo. 297, 301 P.2d 1056 (1956).
37. State v. Cantrell, *supra* note 9.

> [O]n the reasonable inference that the legislature cannot be supposed to have intended that there should be two distinct enactments embracing the same subject matter in force at the same time, and that the new statute, being the most recent expression of legislative will, must be deemed a substitute for previous enactments and the only one which is to be regarded as having the force of law.[38]

Most of the opinion in *Thomas v. State* was devoted to demonstrating that the conduct made criminal by the "culpable neglect or criminal carelessness"[39] phrase of the involuntary manslaughter statute was identical to the conduct prohibited by the "reckless disregard of the safety of others"[40] phrase of the negligent homicide statute. To prove this point, *i.e.*, that both statutes defined and dealt with the same crime, the court relied heavily on the statutory construction it had assigned these phrases in earlier cases. In *State v. McComb* "culpable neglect" and "criminal carelessness" of the phrase "by any culpable neglect or criminal carelessness"[41] were construed as synonymous.[42] The court also said if a conviction was to be obtained under the "culpable neglect or criminal carelessness"[43] clause of the involuntary manslaughter statute, the negligence relied on must be culpable or criminal in nature.[44] In defining culpable or criminal negligence, the court equated it with gross negligence[45] and cited with approval a definition of gross negligence that characterized it as "such negligence as evinces a reckless disregard of human life or bodily injury"[46]—almost the exact phrasing found in the negligent homicide statute.

The *Thomas* court also cited *State v. Catellier*,[47] in which the criminal negligence required by the Wyoming involuntary manslaughter statute was equated with "a reckless disregard of human life or the safety of others"[48]—again, the wording used in the negligent homicide statute. On the basis of these

38. Knight v. Aroostook River R.R., 67 Me. 291, 293 (1877).
39. WYO. STAT. § 6-58 (1957).
40. WYO. STAT. § 31-232(a) (1957).
41. WYO. STAT. § 6-58 (1957).
42. State v. McComb, *supra* note 26.
43. WYO. STAT. § 6-58 (1957).
44. State v. McComb, *supra* note 26, at 528.
45. *Id.* at 529.
46. Wright v. State, 90 Tex. Cr. R. 435, 235 S.W. 886, 887 (1921).
47. State v. Catellier, 63 Wyo. 123, 179 P.2d 203 (1947).
48. *Id.* at 227.

statutory constructions, the *Thomas* court concluded the statutes in question were directed at substantially the same subject matter and were thus inconsistent and repugnant.[49]

The court in *Thomas v. State* recognized repeals by implication are not favored[50] but noted it has not hesitated to find such a repeal under the proper circumstances.[51] "Proper circumstances" have been held to be where a later statute covers the whole subject matter of an earlier statute[52] or where a later law is repugnant or inconsistent with a prior law.[53] Also, if a later statute does not cover the entire field of the earlier statute but is inconsistent or repugnant to some of its provisions, a repeal by implication takes place to the extent of the inconsistency.[54]

The *Thomas* court felt the conflict between the involuntary manslaughter statute and the negligent homicide statute fell within the boundaries of these rules and that as a result the negligent homicide statute had impliedly repealed the "culpable neglect or criminal carelessness"[55] phrase of the involuntary manslaughter statute, insofar as it affected deaths resulting from a motor vehicle.[56] To support this conclusion, the court turned to outside authority, looking with particular favor on the cases of *Atchley v. State*[57] and *State v. Hagge*.[58] In *Atchley*,[59] the involuntary manslaughter statute, like Wyoming's, required "culpable negligence" as the basis for a conviction. Its negligent homicide statute—also like Wyoming's—stated the vehicle must be driven "with reckless disregard of the safety of others."[60] The *Atchley* court determined these statutes did not contain different elements, and that they both defined and dealt with the same crime.[61] The court found because the two statutes provided different punishments for identical acts they were therefore repugnant and inconsistent.[62] The *Atchley* court held the negligent

49. Thomas v. State, *supra* note 2, at 1291.
50. State v. Cantrell, *supra* note 9, at 542.
51. Thomas v. State, *supra* note 2, at 1290.
52. Tucker v. State *ex rel.* Snow, 35 Wyo. 430, 251 P. 460, 465 (1926).
53. State v. Cantrell, *supra* note 9, at 542.
54. Longaure v. State, 448 P.2d 832, 833 (Wyo. 1968).
55. WYO. STAT. § 6-58 (1957).
56. Thomas v. State, *supra* note 2, at 1291.
57. Atchley v. State, 473 P.2d 286 (Okla. Crim. App. 1970).
58. State v. Hagge, 224 N.W.2d 560 (N.D. 1974).
59. Atchley v. State, *supra* note 57, at 289.
60. *Id.*
61. *Id.*
62. *Id.*

homicide statute had impliedly repealed that part of the involuntary manslaughter statute with which it conflicted.[63]

The situation in *State v. Hagge*,[64] was much the same. In that case, the North Dakota court concluded "where a later statute imposes a different punishment, either more or less severe, for the same or substantially the same offense, the later statute is ordinarily held to repeal the earlier one."[65]

EVALUATION OF THE DECISION

The key to *Thomas v. State* is whether the legislature intended to create two separate offenses to deal with vehicular homicide or whether it intended there be only one offense—negligent auto homicide—to be governed by one statute—Section 31-232.[66] Determining the specific legislative intent behind a particular law is somewhat akin to searching for the Loch Ness monster; submerged, lurking beneath the surface of the statute, the intent might be there—but then again, probably not. This is the situation in Wyoming in the area of vehicular homicide. Statutes in this field seem to be the result of legislative oversight rather than legislative foresight, for the legislature has never attempted to reconcile any of the conflicting statutes or give directions describing the situation in which each is to be applied. However, while specific legislative intent seems to be lacking, or at least invisible, a comparison of the negligent homicide law with the "culpable neglect or criminal carelessness"[67] phrase of the involuntary manslaughter statute provides a clue as to what role the legislature intended the negligent homicide law to play.

The legislature, by limiting liability under the negligent homicide law to those persons who drive with "reckless disregard of the safety of others,"[68] apparently did not intend to extend the scope of liability downward, *i.e.*, to make, as a matter of public policy, accidents involving only ordinary negligence subject to criminal prosecution in the hope that the threat of criminal liability would induce greater care in driving and consequently result in fewer accidents. On the

63. *Id.*
64. State v. Hagge, *supra* note 58, at 562-63.
65. *Id.* at 565.
66. WYO. STAT. § 31-232 (1957).
67. WYO. STAT. § 6-58 (1957).
68. WYO. STAT. § 31-232(a) (1957).

contrary, by limiting liability under the negligent homicide law to those persons who drive with "reckless disregard of the safety of others"[69] the legislature apparently intended to require the same degree of culpability for conviction under the negligent homicide law as was required under the "culpable neglect or criminal carelessness"[70] clause of the involuntary manslaughter statute. As *State v. McComb*[71] and *State v. Catellier*[72] pointed out, the negligence required to convict under the involuntary manslaughter statute must be culpable or criminal (these two are synonymous).[73] Culpable or criminal negligence was defined as that negligence evincing a reckless disregard of human life or the safety of others[74]—almost the exact phrasing used by the legislature in the negligent homicide statute. Wyoming is not alone in equating a reckless disregard for the safety of others with culpable or criminal negligence.[75] By requiring the same degree of culpability for conviction under the negligent homicide statute as was required by the "culpable neglect or criminal carelessness"[76] phrase of the involuntary manslaughter statute, it would seem the legislature did not intend the offense defined by the negligent homicide law should be one distinct from that defined by the "culpable neglect or criminal carelessness"[77] clause of the involuntary manslaughter law. On the contrary, by making the requisite degree of culpability for a conviction identical under both statutes, the legislature demonstrated the offense defined by the negligent homicide law was intended to be identical to that defined by the "culpable neglect or criminal carelessness"[78] clause of the involuntary manslaughter statute.[79]

From the above analysis (admittedly very similar to that used in *Thomas*) it appears the *Thomas* court was justified in concluding both statutes were "directed at substantially the

69. WYO. STAT. § 31-232(a) (1957).
70. WYO. STAT. § 6-58 (1957).
71. State v. McComb, *supra* note 26.
72. State v. Catellier, *supra* note 47, at 227.
73. State v. McComb, *supra* note 26, at 528.
74. State v. McComb, *supra* note 26, at 529; State v. Catellier, *supra* note 47, at 227.
75. "Negligence to the culpable . . . must . . . indicate a reckless or other disregard for human life." State v. Simler, 350 Mo. 646, 167 S.W.2d 376, 382 (1943); "Culpable negligence is reckless disregard of human life or of safety of persons exposed to its dangerous effects. . . ." Masey v. State, 64 So. 2d 677, 678 (Fla. 1953).
76. WYO. STAT. § 6-58 (1957).
77. WYO. STAT. § 6-58 (1957).
78. WYO. STAT. § 6-58 (1957).
79. Support for this view is found in the fact that in the early days of the automobile, many juries were reluctant to convict a negligent auto driver of manslaughter be-

same conduct."[80] The *Thomas* court held the "culpable neglect or criminal carelessness"[81] phrase of the involuntary manslaughter statute had been impliedly repealed (insofar as it affected deaths by operation of an auto) by the negligent homicide statute. In so holding, the Wyoming court joined a number of states which, when faced with the same problem, had interpreted their negligent homicide statutes in the same way.[82] The reasoning in *Atchley v. State*[83] and *State v. Hagge*,[84] *supra*, is representative of this group of cases.[85]

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cause of a popular feeling that the manslaughter label was inappropriate. In some states, by providing for a different name and a lesser penalty, the negligent homicide statute was presented as an involuntary manslaughter "substitute" that made the crime more palatable to jurors and thus enabled the state to more effectively punish those who abused its highways. State v. Collins, 55 Wash. 2d 469, 348 P.2d 214, 215 (1960).

80. Thomas v. State, *supra* note 2, at 1291.
81. WYO. STAT. § 6-58 (1957).
82. The following states found that their negligent homicide law had impliedly repealed the "negligence" portion of their involuntary manslaughter law, insofar as it affected deaths by operation of a motor vehicle: State v. Biddle, 45 Del. 244, 71 A.2d 273 (1950); State v. Morf, 80 Ariz. 220, 295 P.2d 842 (1956); State v. Davidson, 78 Idaho 553, 309 P.2d 211 (1957); State v. Collins, 55 Wash. 2d 469, 348 P.2d 214 (1960); State v. London, 156 Me. 123, 162 A.2d 150 (1960); Atchley v. State, 473 P.2d 286 (Okla. Crim. App. 1970); State v. Hagge, 224 N.W.2d 560 (N.D. 1974).
83. Atchley v. State, *supra* note 57.
84. State v. Hagge, *supra* note 58.
85. However, not every state which has been confronted with a negligent homicide law —involuntary manslaughter law conflict has resolved it as *Thomas* did. The following states found that their negligent homicide law had not impliedly repealed the "negligence" portion of their involuntary manslaughter law, insofar as it affected deaths by operation of a motor vehicle: State v. Porter, 176 La. 673, 146 So. 465 (1933); State v. Gloyd, 148 Kan. 706, 84 P.2d 966 (1938); Phillips v. State, 204 Ark. 205, 161 S.W.2d 747 (1942); State v. Barnett, 218 S.C. 415, 63 S.E.2d 57 (1951); People v. Garman, 411 Ill. 279, 103 N.E.2d 636 (1952).

In People v. Garman, the Illinois court decided that their negligent homicide law had been intended by the legislature to create a crime of lesser degree than manslaughter in the specific instance of a death occurring from the act of another while driving "with reckless disregard of the safety of others." The court reasoned that the legislature intended negligent homicide and involuntary manslaughter to be separate and distinct offenses because it provided that different allegations were necessary to courts charging manslaughter than were required in courts charging negligent homicide. Garman also argued, as did State v. Porter, that the offenses were intended to be separate because the negligent homicide statute in "specific terms, defines and denounces a separate and distinct crime . . . involuntary homicide, which is in a sense, akin to manslaughter but which is not manslaughter." Kansas, in State v. Gloyd, rejected a contention that the negligent homicide laws had impliedly repealed the culpable negligence section of the involuntary manslaughter statute by finding a distinction between common-law crimes (manslaughter) and statutes denouncing certain conduct that might have been manslaughter at common law (negligent homicide).

The reasons offered in these cases for rejecting "implied repeal" challenges to involuntary manslaughter statutes are neither clear nor compelling. The "different allegations" required for the statutes in Garman seem to be a matter of form rather than substance and the contention in that case and Porter that the two statutes were intended to be separate offenses because the negligent homicide statute was "akin to manslaughter" but was not manslaughter says in effect that negligent homicide is not manslaughter because it is not manslaughter. The Gloyd approach, by rejecting or approving of an implied repeal on the basis of whether the law was originally common-law or statutory, seems irrelevant to determining whether or not it is desirable to have two statutes dealing with something that is, essentially, one crime.

EQUAL PROTECTION AND THE NEGLIGENT HOMICIDE LAW —INVOLUNTARY MANSLAUGHTER LAW CONFLICT

In *State v. Barnett*,[86] South Carolina rejected the contention that the "negligence" section of its involuntary manslaughter statute had been impliedly repealed (insofar as it affected deaths by auto) by the negligent homicide law. While *Barnett*[87] was decided on somewhat different grounds than *Thomas*, the practical effect of the rejection of the "implied repeal" challenge in *Barnett* was that South Carolina had two statutes (the involuntary manslaughter law and the negligent homicide law) that provided different punishments for identical acts. Indeed, *State v. Barnett*,[88] illustrates a serious drawback inherent in any judicial determination that the legislature intended the crime of vehicular homicide be governed by both the "negligence" portion of the involuntary manslaughter statute and the negligent homicide law. In South Carolina the maximum penalty for the former is not more than three years in prison[89] while the maximum under the latter is a five thousand dollar fine and/or five years in prison.[90] The degree of negligence required to obtain a conviction for negligent auto homicide under the "negligence" portion of the involuntary manslaughter law is "ordinary" negligence.[91] However, a greater degree of negligence—"willful or reckless disregard of consequences"[92] — is necessary for a conviction of negligent auto homicide under the negligent homicide law.[93] The effect of this arrangement is that proof which can sustain a charge of involuntary manslaughter under the "negligence" section of the involuntary manslaughter law is not

86. State v. Barnett, 218 S.C. 415, 63 S.E.2d 57 (1951).
87. *Id.* at 62. In Barnett, unlike State v. Thomas, the legislative intent was clear-cut for included in the negligent homicide law was a section providing that the negligent homicide law was not intended to affect, impair or repeal the "negligence section" of the involuntary manslaughter law. The Barnett court made the "no-repeal" clause the basis of its rejection of the "implied" repeal challenge to S. Carolina's involuntary manslaughter statute. But absent the "no-repeal" clause, the Barnett situation is exemplary of what can happen where both the negligent homicide law and the "negligence section" of the involuntary manslaughter statute are held to be applicable to the same crime.
88. State v. Barnett, *supra* note 86.
89. *Id.* at 59.
90. *Id.* at 61.
91. *Id.* Where the instrument involved is not inherently dangerous, South Carolina follows the general rule requiring more than ordinary negligence to support a conviction for involuntary manslaughter, but holds that simple negligence causing the death of another is sufficient if the instrumentality is of such character that its negligent use under the surrounding circumstances is necessarily dangerous to human life or limb. The South Carolina court is committed to the view that firearms and motor vehicles fall within the latter category.
92. *Id.* at 62.
93. *Id.*

sufficient to sustain a charge of negligent homicide under the negligent homicide law—even though both statutes are, in reality, "directed at substantially the same course of conduct."[94] As a result, the discretion allowed the state's prosecutor in deciding whether to charge a negligent motorist under the negligent homicide law or the involuntary manslaughter law can be the determinative factor in whether that motorist will be imprisoned or set free. For example, negligent motorist A, who is charged under the negligent homicide law, could be set free because his degree of negligence was not sufficient to satisfy the "willful or reckless disregard of consequences" standard required by the negligent homicide law. However, negligent motorist B, who is charged under the "negligence" portion of the involuntary manslaughter law and who committed the identical act for which A was prosecuted, could be convicted and jailed because his degree of negligence was sufficient to satisfy the lower "ordinary" negligence standard of the involuntary manslaughter law.

This entire problem was neatly summarized in *State v. Collins*[95] in which the state of Washington was confronted with the identical situation described in *Barnett*. In holding the negligent homicide statute had impliedly repealed the questioned portion of the involuntary manslaughter law in regard to death by auto,[96] the *Collins* court concluded an implied repeal was not only desirable but was:

> [N]ecessary to satisfy the requirements of the fourteenth amendment to the Federal constitution requiring equal protection of the law for all persons. The principle of equality before the law is inconsistent with the existence of a power in a prosecuting attorney to elect, from person to person committing this offense, which degree of proof shall apply to his particular case.[97]

This is the flaw of *Barnett*[98] and others of its ilk. In those states where it has been held both the negligent homicide law and the "negligence" portion of the involuntary manslaughter laws are applicable to the crime of vehicular homicide and

94. Thomas v. State, *supra* note 2, at 1291.
95. State v. Collins, *supra* note 79.
96. *Id.*
97. *Id.*
98. The fact that the legislative intent in Barnett was express (the no-repeal clause) does not banish the equal protection problem.

these statutes are, in effect, "directed at substantially the same course of conduct,"[99] the stage will always be set for substantial injustice resulting from equal protection violations.

BARTLETT V. STATE AND THE MALUM IN SE-MALUM PROHIBITUM DISTINCTION

Much of the progress made in the field of negligent auto homicide as a result of the *Thomas* decision was nullified by the holding in *Bartlett v. State*,[100] a vehicular homicide case decided subsequent to *Thomas*.

In *Bartlett v. State*,[101] the defendant was involved in an auto accident which killed two men that occurred while defendant was driving in violation of a misdemeanor speeding statute. The defendant was tried and convicted on a charge of involuntary manslaughter arising from the alleged operation of a motor vehicle in excess of the posted speed limit[102] Bartlett appealed from the judgment, his main contention being Section 31-232 (the negligent homicide law) had impliedly repealed the "unlawful act" portion of Section 6-58 (the involuntary manslaughter statute).[103] The Wyoming court held that in cases where death resulted from the operation of a motor vehicle, Section 31-232 had impliedly repealed the "unlawful act" portion of Section 6-58 with regard to unlawful acts described as malum prohibitum.[104] However, where the unlawful act involved was classified as malum in se (such as driving while intoxicated)[105] the court held that the offense was to be governed by the "unlawful act" portion of Section 6-58.[106] The ultimate effect of *Bartlett* on the field of vehicular homicide is that where an alleged offender has been either criminally negligent or criminally negligent while in the commission of an unlawful act classified as malum prohibitum,[107] he can only be charged and convicted under the negligent homicide law. However, where

99. Thomas v. State, *supra* note 2, at 1291.
100. Bartlett v. State, 569 P.2d 1235 (Wyo. 1977).
101. *Id.*
102. *Id.*
103. *Id.*
104. *Id.*
105. *Id.*
106. *Id.*
107. *Id.* A conviction under the negligent homicide law cannot be sustained by a showing of a malum prohibitum act alone; there must also be a showing equivalent to criminal negligence and that death resulted as a proximate cause thereof.

the alleged offender has committed an unlawful act classified as malum in se, he can be charged and convicted under the negligent homicide law or under the "unlawful act" portion of the involuntary manslaughter law.[108]

The Wyoming court was faced with an issue similar to that presented by *Bartlett* in an earlier case, *State v. Cantrell*.[109] In *Cantrell*, the court held the negligent homicide law had not impliedly repealed the "unlawful act" portion of the involuntary manslaughter law.[110] At first glance *Bartlett* would seem to overrule *Cantrell* except the court in *Bartlett* specifically distinguished *Cantrell* on the basis that the unlawful act relied upon there was malum in se (driving while intoxicated) while the unlawful act relied upon in *Bartlett* was only malum prohibitum.[111]

In *Bartlett* the court claimed the importation of the malum in se-malum prohibitum distinction into the field of vehicular homicide was necessary to alleviate the confusion caused by the conflict between the negligent homicide law and the involuntary manslaughter statute.[112] The court based this claim on "the concept that unlawful acts which are mala prohibitum do not supply the requisite criminal intent . . . while unlawful acts which are mala in se do supply the necessary criminal intent."[113] It is widely recognized that "an offense malum in se is properly defined as one which is naturally evil as judged by the sense of a civilized community whereas as act malum prohibitum is wrong only because made so by statute.[114] Clearly the heart of the *Bartlett* decision is the distinction drawn by the court between unlawful acts malum prohibitum and unlawful acts malum in se. However, it seems the malum in se - malum prohibitum distinction does nothing to clarify the vehicular homicide situation in Wyoming. One can only theorize what caused the court to believe the malum

108. *Id.* In this situation, the commission of an unlawful act classified as malum in se is in itself sufficient to provide the requisite criminal intent. Thus, according to Bartlett, there is no need to show criminal negligence to sustain an involuntary manslaughter conviction premised on an unlawful act malum in se.
109. *Id.*
110. State v. Cantrell, *supra* note 9, at 543. The exact issue in State v. Cantrell was whether the negligent law had impliedly repealed the entire manslaughter statute. The court held that the negligent homicide law had not impliedly repealed the entire manslaughter statute.
111. Bartlett v. State, *supra* note 100.
112. *Id.*
113. *Id.*
114. State v. Horton, 139 N.C. 588, 592, 51 S.E. 945, 946 (1905).

in se - malum prohibitum distinction was the solution to the negligent homicide - involuntary manslaughter law conflict. It seems likely the adoption of the distinction was a feeble attempt by the court to recognize and implement a distinction between two levels of culpability within "unlawful act" vehicular homicide—inherently dangerous and possibly dangerous—and to punish the former more severely. What appears certain is the opportunity gained in *Thomas* for a reasonably clear delineation of vehicular homicide was lost by the court in *Bartlett* as a result of its adoption of the malum in se - malum prohibitum distinction. Indeed, vehicular homicide might well be called the "tarbaby" of Wyoming criminal law; for just as Brer Rabbit struggled in vain to free himself from the sucking grasp of the tarbaby, so the Wyoming court fought fruitlessly—until *Thomas*—to free itself from the tenacious clutches of contradictory vehicular homicide legislation. And when it finally did free itself—or nearly so—in *Thomas*, it apparently was not enough, for the court in *Bartlett* had to take one final swing at the remnants of the negligent homicide law - involuntary manslaughter law conflict. However, it was a costly attempt, for the court only succeeded in miring itself up to the elbows in nitpicking distinctions and inconsistencies engendered by adoption of the malum in se - malum prohibitum distinction.

There is substantial authority for the abandonment of the malum in se - malum prohibitum distinction.[115] In *State v. Hupf*,[116] the court faced a situation very similar to that in *Bartlett* but arrived at a quite different result. The *Hupf* court said:

> Some courts have imported into the law of involuntary manslaughter a distinction, in respect of unlawful acts, between one *malum prohibitum* and one *malum in se*. Such a distinction has never been recognized in our cases, and we see no reason to adopt it. To do so would be to introduce confusion and uncer-

115. Note, *The Distinction Between Mala Prohibition and Mala In Se In Criminal Law*, 30 COLUM L. REV. 74, 86 (1930); LAFAVE & SCOTT, CRIMINAL LAW 31 (1972). In the law review article, it is noted that the malum in se - malum prohibition distinction is a vestige of the law's ecclesiastical heritage—a vestige which is characterized as "that acute distinction between mala in se, and mala prohibitum which being so shrewd and sounding so pretty, and being in Latin, has no sort of an occasion to have any meaning to it; accordingly it has none."

116. State v. Hupf, 48 Del. 254, 101 A.2d 355 (1953).

tainty into a rule of law now plain and understandable.[117]

The difficulty of classifying particular acts as malum in se or malum prohibitum is a serious drawback which will generate a great deal of future litigation.[118] Each offender convicted of involuntary manslaughter on the basis of an unlawful act classified as malum in se will contend that he could only be convicted under the negligent homicide law since the unlawful act in question should have been classified malum prohibitum. The designation of particular acts or sets of circumstances as either malum in se or malum prohibitum is completely arbitrary in the sense the sole source and basis for the classifications will be the situations present in those particular vehicular homicide cases which happen to be appealed to the Wyoming Supreme Court. This delineation of the malum in se - malum prohibitum distinction on a case by case basis, rather than according to some broad logical framework, will eventually result in a "fossilization" of the law very similar to that which crippled the old common law forms of action. Under the old common law forms of action, plaintiffs, often tried to force the circumstances of their case into an unsuitable existing action in order to win a day in court. In much the same way, stare decisis and the passage of time will force future vehicular homicide offenders, who hope to avoid the harsher penalty of the involuntary manslaughter law, to attempt to shove their facts into one of the malum prohibitum pigeonholes that will be engendered by the court's case by case approach. This process will drain the flexibility from the law because the court, in order to prevent the substantial injustice that will result in the malum in se - malum prohibitum distinction, will be forced to draw petty distinctions that will further cloud the malum in se - malum prohibitum distinction, in particular, and vehicular homicide law in general.

RECOMMENDATIONS

The escape hatch from the malum in se - malum prohibitum dilemma of *Bartlett* would seem to be the abandonment

117. *Id.* at 360.
118. Bartlett v. State, *supra* note 100. Justice Raper, in his special concurring opinion, said that no one should "have to go through some tenuous line of reasoning to determine what is *malum prohibitum*, what is *malum in se* or try to decide what Supreme Court case, drawing some slender line, applied to move negligent homicide to manslaughter or vice versa."

of the distinction and the adoption of an approach similar to that advocated by the Model Penal Code. Rather than label a particular act as either malum in se (inherently dangerous) or malum prohibitum (possibly dangerous), the approach more conducive to justice would be to judge each alleged criminal act within the context of the circumstances present in that particular situation, using as guidelines broad standards of recklessness[119] and negligence[120] similar to those supplied by the Model Penal Code. The importation of Model Penal Code standards of recklessness and negligence into the field of vehicular homicide would have the effect of preserving the flexibility of the law in this area and recognizing that there should be two levels of culpability—recklessness and negligence—within the crime of vehicular homicide. Surely there is a difference in the culpability of the driver of an auto who, while in the process of taking an injured person to the hospital, exceeds the speed limit in a non-residential area and negligently kills a pedestrian and the culpability of a driver who speeds through a school zone at a time when he knows school is letting out. As was noted earlier, the adoption of the malum in se - malum prohibitum distinction in *Bartlett* may have been an attempt by the Wyoming court to recognize this difference in culpability.[121]

What is needed now is legislative action in the field of vehicular homicide. The best response of the legislature to this challenge would be the creation of a separate crime of vehicular homicide with two clearly defined levels of culpability—

119. MODEL PENAL CODE § 2.02(2)(c) (Proposed Official Draft, 1962). "A person acts recklessly with respect to a material element of an offense when he consciously disregards a substantial and unjustifiable risk that the material element exists or will result from his conduct. The risk must be of such a nature and degree that, considering the nature and purpose of these actor's conduct and the circumstances known to him, its disregard involves a gross deviation from the standard of conduct that a law-abiding person would observe in the actor's situation."

120. MODEL PENAL CODE § 2.02(2)(d) (Proposed Official Draft, 1962). "A person acts negligently with respect to a material element of an offense when he should be aware of a substantial and unjustifiable risk that the material element exists or will result from his conduct. The risk must be of such a nature and degree that the actor's failure to perceive it, considering the nature and purpose of his conduct and the circumstances known to him, involves a gross deviation from the standard of care that a reasonable man would observe in the actor's situation."

121. Indeed, there is a feeling in some quarters that the negligent homicide law and the involuntary manslaughter statute were intended by the Wyoming legislature to be integral parts of a two-tier scheme of culpability which would differentiate between recklessness and negligence in the field of vehicular homicide. However, if such a statutory plan was intended by the legislature, that body failed to effectively communicate such an intent, since, as Thomas rightly concluded, the wording of the culpability requirement of the negligent homicide law (reckless disregard for the safety of others) clearly indicates that both that law and the contested portion of the involuntary manslaughter statute were "directed at substantially the same course of conduct."

recklessness and negligence. A modification of the existing scheme which would eliminate the malum in se - malum prohibitum distinction of *Bartlett* and provide for two-tier culpability along the lines recommended by the Model Penal Code would also be acceptable.[122] A statutory scheme involving two-tier culpability would not raise the equal protection problems discussed earlier in this Note if the parts of the proposed "vehicular homicide" statute or the modifications of the existing statutes were carefully drafted so they clearly punished distinct offenses and were plainly not directed at punishing "substantially the same course of conduct."

CONCLUSION

In view of the wording of the culpability requirement of the negligent homicide law, the court's decision in *Thomas v. State* that the negligent homicide law had impliedly repealed the "culpable neglect or criminal carelessness" phrase of the involuntary manslaughter statute, insofar as it affected deaths resulting from the operation of a motor vehicle, was clearly correct. *Thomas v. State* did a great deal to clarify the requirements of vehicular homicide in Wyoming. For the first time since the passage of the first automobile act in 1913, the law of vehicular homicide began to assume some semblance of order and rationality. However, with the subsequent decision in *Bartlett v. State*, the field of vehicular homicide has returned to its customary state of hopeless confusion. One can only hope the legislature will act swiftly and reasonably to remedy the situation.

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122. MODEL PENAL CODE § 210.3-210.4 (Proposed Official Draft, 1962).