

## Careless v. Reckless Driving in NM by Diane Albert, Esq.

After the tragic deaths of James Quinn and Roy Sekreta, many bicyclists have questioned why motorists who kill bicyclists on New Mexico's public roadways are not charged with, much less convicted of, homicide. For example, the young woman responsible for the James Quinn fatality that occurred on old Rt. 66 just west of Tijeras in 2007 was cited solely for failure to maintain lane, a "careless driving" citation. We know that these drivers did not *intend* to go out and kill a bicyclist, but kill they did. We also know that these drivers were not charged with or convicted of homicide, yet kill they did. The reason for this seeming contradiction lies in the wording of New Mexico statutes and the precedence set by case law.

First, a few definitions are in order. "Manslaughter" is the unlawful killing of a human being without malice.<sup>1</sup> "Involuntary manslaughter" is defined as manslaughter committed in the commission of an unlawful act not amounting to a felony, or in the commission of a lawful act which might produce death in an unlawful manner or without due caution and circumspection. The "lawful act" portion of the involuntary manslaughter statute includes the statutory phrase "without due caution and circumspection," which involves the concept of "criminal negligence." Criminal negligence includes conduct which is reckless, wanton, or willful. Thus, a showing of criminal negligence is required for conviction of involuntary manslaughter, whether based on the "unlawful act" or "lawful act" portion of the statute, and irrespective of the underlying statutory basis for the conviction. Careless driving in NM is defined as "mere imprudence."<sup>2</sup> Reckless driving requires a "willful or wanton disregard of the rights or safety of others."<sup>3</sup>

Careless drivers who kill bicyclists or pedestrians in NM cannot be convicted of involuntary manslaughter. The general crime of involuntary manslaughter cannot be based upon violation of a careless driving statute, which requires a showing of only civil negligence. The mental state needed for a conviction of involuntary manslaughter comprehends evidence of an utter irresponsibility on the part of the defendant or of a conscious abandonment of any consideration for safety.<sup>4</sup> Therefore, reckless (not careless) driving is required to convict a motorist of manslaughter.

In the case where a driver of a vehicle commits involuntary manslaughter, the NM legislature has preempted this crime with the specific crime of "homicide by vehicle," as the predicate offence is a violation of the Motor Vehicle Code. The New Mexico

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<sup>1</sup> N.M. Stat. Ann. § 30-2-3 (1994)

<sup>2</sup> New Mexico's careless driving statute states: A. Any person operating a vehicle on the highway shall give his full time and entire attention to the operation of the vehicle. B. Any person who operates a vehicle in a careless, inattentive, or imprudent manner, without due regard for the width, grade, curves, corners, traffic, weather, and road conditions and all other attendant circumstances is guilty of a misdemeanor. N.M. Stat. Ann. § 66-8-114 (1994)

<sup>3</sup> New Mexico's reckless driving statute states: A. Any person who drives any vehicle carelessly and heedlessly in willful or wanton disregard of the rights or safety of others and without due caution and circumspection and at a speed or in a manner so as to endanger or be likely to endanger any person or property is guilty of reckless driving. N.M. Stat. Ann. § 66-8-113 (1994)

<sup>4</sup> *State v. Yarborough*, 122 N.M. 596 (N.M. 1996)

homicide by vehicle statute sets forth only four predicate offenses for conviction as third degree felonies:<sup>5</sup> (1) driving under the influence of intoxicating liquor, (2) driving under the influence of any drug, (3) reckless driving, or (4) willfully refusing to come to a stop when so directed by a uniformed officer in a marked police vehicle. As you can see from the wording of the statute, in New Mexico, careless driving cannot be used as a predicate for a homicide conviction. There is no such crime in the New Mexico Motor Vehicle Code as "homicide by vehicle by careless driving."

In NM, a conviction for the specific crime of homicide by vehicle must be based upon more than ordinary negligence: reckless behavior must be found. The conduct of a driver of a vehicle must be proven sufficient to establish, beyond a reasonable doubt, to have been so reckless, wanton, and willful as to show an utter disregard for the safety of bicyclists, in order to convict the driver who kills a bicyclist of homicide by vehicle. Currently in NM, courts have deemed that certain driving behaviors such as failure to maintain lane do not rise to "reckless" conduct, even when it leads to the death of a bicyclist: this behavior is merely "careless."

Other states have recognized there is a problem with their state statutes and are changing the law to reflect that careless vehicle operators who kill bicyclists have committed homicide and should be punished comparable to any other person who commits a homicide. If you are interested in changing New Mexico's laws, please contact me so BikeABQ can start planning on how to do just that.

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<sup>5</sup> N.M. Stat. Ann. § 66-8-101(C)-(F)