

**REPORT OF THE
VIRGINIA STATE CRIME COMMISSION**

Criminally Negligent Homicide

**TO THE GOVERNOR AND
THE GENERAL ASSEMBLY OF VIRGINIA**



SENATE DOCUMENT NO. 34

**COMMONWEALTH OF VIRGINIA
RICHMOND
1994**



COMMONWEALTH of VIRGINIA

VIRGINIA STATE CRIME COMMISSION

General Assembly Building

FREDERICK L. RUSSELL
EXECUTIVE DIRECTOR

December 14, 1993

**TO: The Honorable L. Douglas Wilder, Governor of Virginia,
and Members of the General Assembly:**

MEMBERS:
FROM THE SENATE OF VIRGINIA:
ELMO G. CROSS, JR., VICE-CHAIRMAN
VIRGIL H. GOODE, JR.
EDGAR S. ROBB

FROM THE HOUSE OF DELEGATES:
ROBERT B. BALL, SR., CHAIRMAN
JAMES F. ALMAND
JEAN W. CUNNINGHAM
V. THOMAS FOREHAND, JR.
RAYMOND R. GUEST, JR.
CLIFTON A. WOODRUM

APPOINTMENTS BY THE GOVERNOR:
ROBERT C. BOBB
ROBERT F. HORAN, JR.
GEORGE F. RICKETTS, SR.

ATTORNEY GENERAL'S OFFICE
H. LANE KNEEDLER

Senate Joint Resolution 333, agreed to by the 1993 General Assembly, directed the Virginia State Crime Commission to study the necessity for a "standard of criminal negligence...where the degree of culpability is greater than simple negligence, but less than that required for involuntary manslaughter" and submit a report to the Governor and the 1994 session of the General Assembly."

In fulfilling this directive, a study was conducted by the Virginia State Crime Commission. I have the honor of submitting herewith the study report on criminally negligent homicide.

Respectfully submitted,

A handwritten signature in cursive script, appearing to read "Robert B. Ball, Sr.", written in black ink.

Robert B. Ball, Sr.
Chairman

RBB:sc

**Members of the
Virginia State Crime Commission
1993**

From the Virginia Senate:

Elmo G. Cross, Vice Chairman
Virgil H. Goode, Jr.
Edgar S. Robb

From The House of Delegates:

Robert B. Ball, Sr., Chairman
James F. Almand
Jean W. Cunningham
V. Thomas Forehand, Jr.
Raymond R. Guest, Jr.
Clifton A. Woodrum

Appointments by the Governor:

Robert C. Bobb
Robert F. Horan, Jr.
Rev. George F. Ricketts, Sr.

Attorney General's Office:

H. Lane Kneedler

**Crime Commission
Law Enforcement Subcommittee Studying
Criminally Negligent Homicide (SJR 333)**

Law Enforcement Subcommittee Members

Delegate Clifton A. Woodrum
Subcommittee Chairman

Robert C. Bobb
Senator Elmo G. Cross, Jr.
Robert F. Horan, Jr.
H. Lane Kneedler
George F. Ricketts, Sr.
Senator Edgar S. Robb

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**Study of Criminally Negligent Homicide
Senate Joint Resolution 333 (1993)**

TABLE OF CONTENTS

| | | |
|-------|---------------------------------|----|
| I. | Authority for Study | 1 |
| II. | Members Appointed to Serve..... | 1 |
| III. | Study Design..... | 2 |
| IV. | Executive Summary | 3 |
| V. | Issues | 5 |
| VI. | Discussion | 6 |
| VII. | Findings | 16 |
| VIII. | Recommendation | 17 |

Appendices:

| | |
|-------------|---------------------------------------|
| Appendix A: |Senate Joint Resolution 333 |
| Appendix B: |Virginia Jury Instructions |
| Appendix C: |Summary, Other State Statutes |
| Appendix D: |Representative Virginia Statutes |
| Appendix E: |Uniform Vehicle Code §11-906 |

Study of Criminally Negligent Homicide

Senate Joint Resolution 333 (1993)

I. Authority for Study

During the 1993 Session of the Virginia legislature, Senator Richard L. Saslaw sponsored Senate Joint Resolution No. 333 , acknowledging the existence of a “standard of criminal negligence. . .where the degree of culpability is greater than simple negligence, but less than that required for involuntary manslaughter” and requesting and authorizing the Virginia State Crime Commission to “study the need to adopt a standard of negligence to facilitate prosecutions [in cases involving, for example, accidental shootings or speed-related motor vehicle accidents].” (See, Appendix A.)

Sec. 9-125 of the Code of Virginia establishes and directs the Virginia State Crime Commission “to study, report, and make recommendations on all areas of public safety and protection.” Sec. 9-127 of the Code of Virginia provides that “the Commission shall have the duty and power to make such studies and gather information in order to accomplish its purpose, as set forth in Sec. 9-125, and to formulate its recommendations to the Governor and the General Assembly.” Sec. 9-134 of the Code of Virginia authorizes the Commission to “conduct private and public hearings, and to designate a member of the Commission to preside over such hearings.” The Virginia State Crime Commission, in fulfilling its legislative mandate, undertook the study of criminally negligent homicide as requested and authorized by SJR 333.

II. Members Appointed to Serve

At the April 20, 1993, meeting of the Crime Commission, Chairman, Robert B. Ball, Sr., Delegate from Henrico, selected Delegate Clifton A. Woodrum to serve as Chairman of the subcommittee (Law Enforcement Subcommittee) assigned to

study criminally negligent homicide.” The following members of the Crime Commission were also selected to serve on the subcommittee:

Robert C. Bobb

Senator Elmo G. Cross, Jr.

Robert F. Horan, Jr.

H. Lane Kneedler

George F. Ricketts, Sr.

Senator Edgar S. Robb

III. Study Design

In accordance with the implicit directives of SJR 333 (1993), the staff of the Crime Commission sought to develop a digest of the current status of the law re the elements of, and the penalties for, negligently committed homicide both in Virginia and elsewhere in the United States. An analysis of the Model Penal Code’s treatment of criminally negligent homicide was also undertaken (pursuant to the specific reference in the resolution to the Model Penal Code (MPC) as a resource). The subcommittee received extensive testimony from Professor Walter Felton, representing the Commonwealth’s Attorneys’ Assistance Council. Two members of the subcommittee with considerable expertise on the subject - Mr. Robert Horan and Mr. Lane Kneedler - also offered considerable input during the study.

Commission staff researched and offered for subcommittee consideration the practical implications of modifying the Virginia standards for criminally negligent homicide and of creating a lesser level of criminal conduct than now exists (e.g., the potential necessity for precise codification of the crime of involuntary manslaughter, now defined by caselaw). Because the creation of another, lesser standard for criminally negligent homicide (in addition to the crime of involuntary manslaughter) presents the possibility of increased numbers

of prosecutions and criminal convictions and more people behind bars, the subcommittee considered the social and fiscal impacts of such a departure from current law. The subcommittee carefully reviewed, with the full advice of those persons listed above, the full array of information before it and for the purpose of making findings and recommendations, as necessary and appropriate, to the full Commission. Meetings of, and reports to, the subcommittee were scheduled as follows:

Initial Report/Meeting May 25, 1993
Interim Report/Meeting July 27, 1993
Final Report/Meeting October 18, 1993

The subcommittee prepared its findings and recommendation for presentation to the full Commission on November 30, 1993. The Commission approved the findings and recommendation.

IV. Overview/Executive Summary

The purpose of Senate Joint Resolution 333 (1993), sponsored by Senator Richard L. Saslaw, was to study the need for adoption of a (lesser) standard for criminally negligent homicide in addition to that which currently exists in Virginia (involuntary manslaughter). The major issues discussed were:

A. Whether, if such a standard were adopted, it should be fashioned from the Model Penal Code definitions or based upon specific instances of negligent behavior (e.g., accidental shootings or speed-related motor vehicle accidents);

B. Whether, in light of recent Virginia appellate court decisions redefining the scienter requirements for involuntary manslaughter, a codified definition of both that crime and criminally negligent homicide would be necessary?

C. Whether the punishment for criminally negligent homicide should be a misdemeanor or a felony (and of what severity (class))?

D. Whether the creation of a “new crime” might occasionally result in a miscarriage of justice by creating the opportunity for 1) plea-bargaining manslaughter charges to the lesser crime in cases which might otherwise (and more appropriately) be tried and 2) convicting truly innocent defendants of a crime in some cases solely because of the imprecision of the “new” definition of criminal negligence, or misapprehension of its meaning.

The subcommittee considered various definitions of criminal negligence and vehicular homicide for possible incorporation into Virginia’s scheme. The Model Penal Code was most often referenced as a possible model for Virginia. In general terms, the definitions considered by the subcommittee were as follows:

Model Penal Code Criminal Negligence. (“Gross Negligence”)

A person acts negligently when he should be aware when his conduct creates a substantial and unjustifiable risk. His failure to perceive it is a gross deviation from the standard of care exercised by a reasonable person. He is guilty of criminally negligent homicide, a third degree felony.

Model Penal Code Involuntary Manslaughter. (Recklessness)

A person acts recklessly when he consciously disregards the fact that his conduct creates a substantial and unjustifiable risk and is a gross deviation from the standard of care exercised by a law-abiding person. He is guilty of involuntary manslaughter, a second degree felony.

Virginia Criminal Negligence/Involuntary Manslaughter.

A person is guilty of criminal negligence when he engages in negligence so gross, wanton and culpable as to show a reckless disregard of human life and he knows or should know the probable consequences of his conduct. He is guilty of involuntary manslaughter, a Class 5 felony.

Thus, where the Model Penal Code makes a distinction between awareness of conduct and lack of awareness of conduct and imposes a harsher penalty for conscious awareness, recent caselaw in Virginia has removed this distinction for the purposes of a conviction of involuntary manslaughter. If Virginia were to adopt a level of criminal culpability based on a lesser degree of negligence than is now the law, arguably involuntary manslaughter would have to be codified in order to avoid confusion and to assure its distinction from criminally negligent homicide. Because involuntary manslaughter would have to be codified and because this, itself, could lead to the necessity of codifying or recodifying other homicide laws and because erroneous interpretation of a new criminal negligence statute could result in a criminal conviction for mere negligence, the subcommittee voted to maintain the status quo, i.e., to allow Virginia courts to define the limits of criminal liability for a negligent homicide rather than attempt to legislate them.

V. Issues

A. Whether, if such a standard were adopted, it should be fashioned from the Model Penal Code definitions or based upon specific instances of negligent behavior (e.g., accidental shootings or speed-related motor vehicle accidents);

B. Whether, in light of recent Virginia appellate court decisions redefining the scienter requirements for involuntary manslaughter, a codified definition of both that crime and criminally negligent homicide would be necessary?

C. Whether the punishment for criminally negligent homicide should be a misdemeanor or a felony (and of what severity (class))?

D. Whether the creation of a “new crime” might occasionally result in a miscarriage of justice by creating the opportunity for 1) plea-bargaining manslaughter charges to the lesser crime in cases which might otherwise (and more appropriately) be tried and 2) convicting truly innocent defendants of a crime in some cases solely because of the imprecision of the “new” definition of criminal negligence, or misapprehension of its meaning.

VI. Discussion

A. Summary of Several States’ Treatment of Criminally Negligent Homicide (See, Appendix C for a state-by-state listing of the state statutes.)

1. General Criminal Negligence Statutes

A survey of 32 states yields the following information concerning the treatment of criminally negligent homicide.

Fifteen of the 32 states considered have a criminally negligent homicide statute in their codes. [*Alabama, Alaska, Arkansas, Connecticut, Delaware, Louisiana, Montana, New Hampshire, New York, North Dakota, Oregon, Tennessee, Texas, Utah, Wyoming*]. All of the fifteen use language similar to the Model Penal Code definition of negligence in defining the level of culpability required for conviction under these statutes, as follows:

A person acts with criminal negligence with respect to a result or circumstance which is defined by statute as an offense when he fails to perceive a substantial and unjustifiable risk that the result will occur or that the circumstance exists. The risk must be of such nature and degree that the failure to perceive it constitutes a gross deviation from the standard of care that a reasonable person would observe in the situation.

Of those states having a criminally negligent homicide statute, nine consider a violation of the statute to be a felony. [*Alaska, Delaware, Louisiana, Montana, New Hampshire, New York, North Dakota, Oregon, Tennessee*]. The remaining states classify the offense as a misdemeanor. [*Alabama, Arkansas, Connecticut, Texas, Utah, Wyoming*].

Among the states that consider the violation to be a felony, it is classified among those felonies that carry the most lenient penalties. And among those states that consider the violation to be a misdemeanor, the penalties imposed are among the greatest available for misdemeanors.

Several of these state codes contain statutes dealing with traffic-related homicides in addition to the more general criminally negligent homicide statutes. There are five with vehicular homicide statutes. [*Connecticut, Delaware, Louisiana, Tennessee, Wyoming*]. The degree of culpability required for conviction in four of them is simple negligence or criminal negligence. [*Connecticut, Delaware, Utah, Wyoming*]. The penalty is a felony in Connecticut, Delaware, and Utah, but remains a misdemeanor in Wyoming. However, Wyoming raises the offense to a felony if the vehicular homicide is the result of reckless conduct. In Tennessee, a conviction under the vehicular homicide statutes can only be sustained when the conduct involved is reckless. Louisiana's vehicular homicide statute deals only with homicides resulting from driving while intoxicated.

There are also two states, Alabama and New Hampshire, that provide enhanced penalties for driving while intoxicated under the negligent homicide statute itself. Alabama elevates the penalty in this case from a misdemeanor to a felony. In New Hampshire, such a violation is a higher class of felony.

As a general pattern, the severity of the penalty for these offenses increases from negligent homicide to manslaughter in order of least to most severe:

a . Negligent Homicide

b. Vehicular Homicide

c .Vehicular Homicide while intoxicated / Manslaughter

“Vehicular homicide while intoxicated” and manslaughter generally carry the same penalties though some states punish manslaughter more severely.

Examples:

Wyoming classifies criminally negligent homicide as a misdemeanor. Vehicular homicide, if due to criminal negligence carries a penalty of up to one year in jail and a \$20,000 fine. Aggravated vehicular homicide can be charged with the use of alcohol while driving or recklessness, and carries a prison term of up to 20 years. This is the same penalty as that prescribed for manslaughter.

Utah also classifies negligent homicide as a misdemeanor. Vehicular homicide is a third degree felony if accompanied by simple negligence and a second degree felony if the driver is criminally negligent. Manslaughter is also a second degree felony. Delaware has a similar statutory framework.

In Alabama, criminally negligent homicide is a misdemeanor but becomes a felony in alcohol-related traffic accidents. Manslaughter carries the same penalty.

Louisiana’s statutes are similar but the penalty for manslaughter is greater than the heightened penalty for homicide caused by an intoxicated driver.

2. Criminal Negligence Based on Dangerous Activities

An additional five states [*District of Columbia included here*] charge negligent homicide in the case of death resulting from certain dangerous activities. The District of Columbia, Hawaii, and Michigan have statutes that provide for a charge of negligent homicide solely in the case of traffic-related fatalities. In D.C. and Michigan, negligent homicide is a lesser included offense of manslaughter. In D.C. the offense is a felony. Hawaii classifies negligent homicide as a felony if the driver was negligent as defined by the Model Penal Code (MPC) and as a misdemeanor if the conduct in question was only simple negligence. In Michigan, the offense is a misdemeanor.

Ohio's negligent homicide statute applies to death negligently caused by means of a dangerous weapon or ordnance. This offense is classified as a misdemeanor in the first degree. Additionally, Ohio has a vehicular homicide offense that carries the same penalty as negligent homicide if the conduct of the driver is negligent; however, death caused by reckless conduct in driving is a felony.

Wisconsin provides for felony penalties for negligence in various dangerous activities including control of vicious animals, use of dangerous weapons and explosives, and intoxicated use of a vehicle or firearms.

3. Criminal Liability Based on Negligent Driving

Another approach taken by several states is to include some heightened form of negligence as a degree of culpability that subjects the offender to conviction under a general or vehicular manslaughter statute. [*California, Maine, Pennsylvania, South Carolina*]. These statutes usually require gross or culpable negligence to sustain a conviction for manslaughter.

4. Summary of Other States' Treatment

The several states reviewed here treat the issue of negligent homicide in hodge-podge fashion, with the largest contingent of them choosing the MPC definition for it, if any is codified at all. Of the 32 states researched, thirteen have no statute whatsoever punishing negligent homicide (as a crime of less consequence than involuntary manslaughter.)

B. Definitions of "Criminal Negligence"

1. Virginia

Involuntary manslaughter is an "accidental killing which, although unintended, is the proximate result of negligence so gross, wanton and culpable as to show a reckless disregard of human life." King v. Commonwealth, 217 Va. 601, 231 S.E.2d 312 (1977).

The standard for "criminal negligence" in Virginia as recently modified by the Court of Appeals is generally set forth in Keech v. Commonwealth, 9 Va. App. 272, 386 S.E.2d 813 (1989), paraphrased as follows: When a person engages in conduct which results in the death of another and which he knows or should know constitutes a callous act of indifference to the safety of others and constitutes conduct so gross, wanton and culpable as to show a reckless disregard of human life, he is guilty of involuntary manslaughter.

The risk of injury created by the defendant's conduct raises his degree of negligence to "criminal negligence" and supports a conviction for involuntary manslaughter. A higher degree of negligence is required to establish criminal liability (for involuntary manslaughter) than to establish liability in a civil action for ordinary or even gross negligence.

2. Elsewhere

A person is guilty of “criminal negligence” who fails to be aware of a substantial and unjustifiable risk which is of such a nature and degree that the failure to be aware of it constitutes a gross deviation from the standard of care that a reasonable person would observe in the same situation. (in those states recognizing a degree of criminal culpability for a homicide which is less than that required for a finding of involuntary manslaughter)

This standard in substantially identical form is observed in Oregon, Tennessee, Texas, and Wyoming and certainly more states. This was also the language used in HB 570 (Cunningham, R.K., 1992, carried over to 1993 and stricken in committee), to define “criminally negligent homicide,” a lesser included offense of involuntary manslaughter.

3. Model Penal Code definition of “Negligently”

“A person acts negligently with respect to a material element of an offense when he should be aware of a substantial and unjustifiable risk (emphasis added) that the material element exists or will result from his conduct. The risk must be of such and 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 person would observe in the actor’s situation.” Model Penal Code, Sec. 2.02 (2)(d).

This is the standard recognized by the Model Penal Code for “criminally negligent homicide,” a lesser crime than involuntary manslaughter. Per the Model Penal Code, one must act recklessly to be guilty of manslaughter. “Recklessly” is defined as follows: “A person acts recklessly with respect to a material element of an offense when he consciously disregards a substantial and unjustifiable risk (emphasis added) that the material element exists or will result from his conduct. The risk

must be of such and nature and degree that the actor's conduct and the circumstances known to him, involves a gross deviation from the standard of care that a law-abiding person would observe in the actor's situation." Model Penal Code, Sec. 2.02 (2)(c).

C. Relevant Case Summaries

1. Keech v. Commonwealth, 9 Va. App. 272 (1989).

Defendant Keech was charged with, among other things, second degree murder, which charges were reduced by the court to involuntary manslaughter on the defendant's motion to strike. He was found guilty of involuntary manslaughter and his conviction was upheld on appeal on the following facts.

Defendant entered a four-lane, divided highway travelling in the wrong direction and drove for five to seven minutes, passing oncoming traffic, oblivious to the warnings (by horns and flashing lights) of drivers on both sides of the highway. He ran head-on into a car and killed three people in it. His speed was estimated by witnesses at between 50 and 80 miles per hour.

Defendant asserted (and the facts support the conclusion) that he did not know that he was travelling in the wrong direction and, on appeal, argued that his lack of knowledge prevented a conviction of involuntary manslaughter. He said that he could not be guilty of a reckless disregard of human life without being consciously aware that he was travelling in the wrong direction. In short, Keech argued that to be criminally liable for his negligent conduct the Commonwealth would have to prove that he actually was aware that he was driving in the wrong lane of traffic and not merely that he should have been aware of his error.

The court framed the issue as follows: “Because the evidence supports Keech’s contention that he was not consciously aware of the risk created by his conduct, we must determine whether such circumstances relieve him of criminal responsibility under the Virginia definition of vehicular involuntary manslaughter articulated in King or whether an objective test of awareness of the risk is applicable to such cases.” 9 Va. App. at 272. (emphasis added.)

Relying on Bell v. Commonwealth, 170 Va. 597 (1938), and King v. Commonwealth, 217 Va. 601 (1977), (both cases involving whether the defendant was using headlights at the time of an accident) for the argument that an objective measure of risk awareness is appropriate, the court found that both King and Bell support it, even though implicitly. The test in each of the cases, reasoned the court, was whether the defendant knew or should have known that his headlights were not burning. The court made the finding that an objective standard is proper despite its own assertion, in Tubman v. Commonwealth, 3 Va. App. 267 (1986) (quoting Griffin v. Shively, 227 Va. 317, 321 (1984)) that, “[w]illful and wanton negligence is acting consciously in disregard of another person’s rights or acting with reckless indifference to the consequences, with the defendant aware, from his knowledge of existing circumstances and conditions, that his conduct probably would cause injury to another.” Id. at 271

Significantly, in Griffin v. Shively, a civil case involving the unintentional discharge of a firearm resulting in a death, the Supreme Court also observed that, “[w]illful and wanton negligence involves a greater degree of negligence than gross negligence, particularly in the sense that in the former an actual or constructive consciousness of the danger involved is an essential ingredient of the act or omission. . .” 227 Va. at 321-22. (emphasis added.)

The Court of Appeals, in reliance upon Bell, King and Griffin, found that an objective test for awareness of culpability of conduct is appropriate.

Regarding the level of negligence required for a manslaughter conviction, the court acknowledged that "the consistent thread that runs through [vehicular involuntary manslaughter] cases is that a higher degree of negligence in the operation of a motor vehicle is required to establish criminal liability for involuntary manslaughter than to establish liability for ordinary or even gross negligence. This higher degree of negligence has come to be known as 'criminal negligence.'" 9 Va. App at 277.

Two things are plain from a reading of Keech:

- 1) willful and wanton negligence is more than gross negligence and
- 2) the defendant's awareness of his conduct is judged objectively, i.e., by whether he knew or should have known the probable consequences of his behavior.

If, indeed, the standard for determination of the issue of the defendant's awareness is an objective one, arguably Virginia by caselaw already meets part of the Model Penal Code's definition of criminal negligence, that is, that the defendant was not, but should have been, aware of the probable consequences of his conduct. For a conviction under the Model Penal Code of the greater crime - involuntary manslaughter - the defendant must be consciously aware of the risk created by his conduct.

2. Hubbard v. Commonwealth, 243 Va. 1 (1992).

(decided January 10, 1992)

In this case involving a car crash in which two teenagers were killed in a head-on collision with a carful of classmates, the Supreme Court upheld the conviction

which was challenged, in part, on the basis of jury instructions proffered by the Commonwealth. Finding the instructions proper, the Court said, “[i]n granted Instructions 5 and 6, the trial court correctly told the jury that the crime of involuntary manslaughter ‘is predicated solely upon criminal negligence’ and that the Commonwealth must prove the killing was ‘the result of negligence so wanton and culpable as to show a reckless disregard of human life.’ In granted Instruction 7, the trial court properly told the jury that willful and wanton negligence ‘is acting consciously in disregard of another person’s rights with reckless indifference to the consequences, with the defendant aware, from her knowledge of existing circumstances and conditions that her conduct would cause injury to another.’” Id. at 15.

3. Cable v. Commonwealth, 243 Va. 236 (1992).

(decided February 28, 1992)

This case involved a hunting accident in which the defendant killed his friend while shooting, with impaired vision, at what he thought could be a squirrel and with what he thought was birdshot but, in fact, was double aught buckshot. The defendant’s conviction was upheld by the Supreme Court which reasoned that he should have known a person with bad eyesight should not fire a gun, that he should have known his target was not a squirrel and that he should have known he was not using birdshot in his weapon. His conviction was upheld because the “defendant’s conduct amounted to aggravated negligence evidenced by acts of omission of a wanton nature, showing an indifferent disregard of the rights of others, under circumstances which made it not improbable that injury would occur, the defendant being charged with knowledge of the probable result of his acts.” Id. at 242.

VII. Findings

- A. That the common law crime of involuntary manslaughter is punishable as a Class 5 felony. (See, Appendix D.)
- B. That a lesser crime of criminally negligent homicide would have to be punishable as either a Class 6 felony or a misdemeanor.
- C. That the punishments for Class 5 or 6 felony and for a Class 1 misdemeanor can be identical (12 months in jail and a \$2500 fine).
- D. That the crime of reckless driving is punishable as a Class 1 misdemeanor.
- E. That the appellate courts of Virginia have recently arguably “redefined” the crime of involuntary manslaughter to include behavior that the defendant “should have known” was culpable; actual awareness of culpability of behavior by the defendant is no longer necessary for a finding of guilt.
- F. That a major distinction in the crimes of involuntary manslaughter and criminal negligence per the Model Penal Code (MPC) is the defendant’s awareness of the culpability of his conduct (or his lack thereof).
- G. That any line between a Virginia criminal negligence statute and the law of involuntary manslaughter would have to be very carefully drawn to avoid the conviction of the greater crime when the actual crime was lesser, and vice versa.
- H. That, assuming the statutory creation of the crime of negligent homicide, involuntary manslaughter would arguably require codification to distinguish it from the “new” crime.
- I. That, despite precise codification of the crime, convictions of criminally negligent homicide could result from a draconian application of the code (or a too rigid interpretation of the facts) when the actual degree of negligence was “mere” negligence.
- J. That a lesser crime of criminally negligent homicide, while creating the opportunity for an appropriate use of plea bargaining, could result in an inappropriate abuse, as well.

K. That a civil remedy already exists for the wrong done by a person who negligently and without criminal intent (as currently defined) causes the death of another.

VIII. Recommendation

The Commission recommends that no change be made in the Virginia law of criminally negligent homicide.

Appendix A

SENATE JOINT RESOLUTION NO. 333

Offered January 26, 1993

AMENDMENT IN THE NATURE OF A SUBSTITUTE

(Proposed by the House Committee on Rules
on February 19, 1993)

(Patron Prior to Substitute--Senator Saslaw)

Requesting the Virginia State Crime Commission to study the need to adopt a criminally negligent homicide statute.

WHEREAS, every year too many Virginians are killed as the direct result of the negligent conduct of another; and

WHEREAS, under current law a criminal conviction for involuntary manslaughter can be obtained for an unintended killing only upon proof of negligence "...so gross, wanton and culpable as to show a reckless disregard of human life"; and

WHEREAS, the Model Penal Code establishes a standard of criminal negligence to facilitate prosecutions in cases involving, for example, accidental shootings or speed-related motor vehicle accidents, where the degree of culpability is greater than simple negligence, but less than that required for involuntary manslaughter; now, therefore, be it

RESOLVED by the Senate, the House of Delegates concurring, That the Virginia State Crime Commission be requested to study the need to adopt a standard of criminal negligence to facilitate prosecutions.

The Virginia State Crime Commission shall complete its work in time to submit its recommendations to the Governor and the 1994 Session of the General Assembly in accordance with the procedures of the Division of Legislative Automated Systems for processing legislative documents.

Appendix B

Instruction No. 34.6000 **Involuntary Manslaughter-General**

The defendant is charged with the crime of involuntary manslaughter. The Commonwealth must prove beyond a reasonable doubt each of the following elements of that crime:

(1) That the defendant killed (name of person); and

(2) That the killing, although unintended, was the direct result of [negligence; the unlawful performance of a lawful act, accompanied by carelessness; the performance of an unlawful, but not felonious, act, accompanied by carelessness] so gross, wanton and culpable as to show a callous disregard of human life.

[(1) That the defendant owed (name of person) a legal duty; and
(2) That the death of (name of person) was the direct result of the defendant's failure to perform the legal duty owed to (name of person); and
(3) That the defendant's failure to perform the duty constituted negligence so gross, wanton and culpable as to show a callous disregard for human life.]

If you find from the evidence that the Commonwealth has proved beyond a reasonable doubt each of the above elements of the offense as charged, then you shall find the defendant guilty and fix his punishment at:

(1) A specific term of imprisonment, but not less than one (1) year nor more than ten (10) years; or

(2) Confinement in jail for a specific time, but not more than twelve (12) months; or

(3) A fine of a specific amount, but not more than \$2,500.00; or

(4) Confinement in jail for a specific time, but not more than twelve (12) months, and a fine of a specific amount, but not more than \$2,500.00

If you find that the Commonwealth has failed to prove beyond a reasonable doubt any one or more of the elements of the offense, then you shall find the defendant not guilty.

NB: The instruction includes two different sets of elements. Only the set fitting the facts of the case should be used.

MEMORANDUM [Involuntary Manslaughter]

STATUTE: § 18.2-36

CASES: Goodman v. Commonwealth, 153 Va. 943, 151 S.E. 168 (1930); Bell v. Commonwealth, 167 Va. 526, 189 S.E. 441 (1937); Fadely v. Commonwealth, 208 Va. 198, 156 S.E.2d 773 (1967); Lewis v. Commonwealth, 211 Va. 684, 179 S.E.2d 506 (1971); Delawder v. Commonwealth, 214 Va. 55, 196 S.E.2d 913 (1973); Beck v. Commonwealth, 216 Va.1, 216 S.E.2d 8 (1975); King v. Commonwealth, 217 Va. 601, 231 S.E.2d 312 (1977); Mayo v. Commonwealth, 218 Va. 644, 238 S.E.2d 831 (1977); Williams v. Commonwealth, 228 Va. 347, 323 S.E.2d 73 (1984); Davis v. Commonwealth, 230 Va. 201, 335 S.E.2d 375 (1985); Bailey v. Commonwealth, 5 Va. App. 331, 362 S.E.2d 750 (1987); Darnell v. Commonwealth, 6 Va. App. 485, 370 S.E.2d 717 (1988); Hubbard v. Commonwealth, 243 Va. 1, 413 S.E.2d 875 (1992); Cable v. Commonwealth, 243 Va. 236, 415 S.E.2d 218 (1992).

CAVEAT: For an instruction on aggravated involuntary manslaughter, see Instruction No. 34.660.

COMMENT: Involuntary manslaughter may arise from any of the following circumstances:

- (1) the performance of an unlawful, but not felonious act; or
- (2) the improper performance of a lawful act; or
- (3) the omission to perform a legal duty owed to the decedent.

Lewis, *supra*; Bailey, *supra* (1 and 2); Davis, *supra* (3). When involuntary manslaughter is based on the performance of an unlawful act, such as the violation of a statute, the violation must be the proximate cause of the homicide. Goodman, *supra*. In all cases, the defendant's negligence must be gross enough to indicate a callous disregard for life. See Darnell, *supra* (performance of an unlawful but not felonious act); Beck, *supra* (improper performance of a lawful act); Davis, *supra* (omission to perform a legal duty). See also Instruction No. 34.610 defining criminal negligence. Falling asleep at the wheel was held not sufficient to support the offense in Hargrove v. Commonwealth, 10 Va. app. 469, 339 S.E.2d 905 (1986).

A statutory violation proximately causing death does not constitute involuntary manslaughter if the violation involves only simple negligence. King, *supra* (violation of safety statute); Darnell *supra* (reckless handling of firearm).

Generally when an involuntary manslaughter charge arises from the operation of a motor vehicle, there must be a showing of criminal negligence, regardless of whether the charge is based on the violation of a

statute or on the improper performance of a legal act. King, *supra*. King defined "involuntary manslaughter in the operation of a motor vehicle as the accidental killing which, although unintended, is the proximate result of negligence so gross, wanton, and culpable as to show a reckless disregard of human life, " 217 Va. at 607, 231 S.E.2d at 316. See also Keech v. Commonwealth, 9 Va. App. 272, 386 S.E.2d 813 (1989). But see Instruction Nos. 34.650 and 34.660, both based on § 18.2-36.1, where the cases involves driving under the influence of alcohol, drugs or a combination of alcohol and drugs.

Although reckless driving is often a factor when the defendant is charged with involuntary manslaughter, the court has held that they are each separate and distinct offenses. Ange v. Commonwealth, 217 Va. 861, 234 S.E.2d 64 91977).

If there is no evidence that the killing might be involuntary manslaughter, it is not error to refuse an instruction on this type of homicide. Bell, *Supra*.

Like voluntary manslaughter, involuntary manslaughter is a common law crime: § 18.2-36 only provides for punishment upon conviction.

Instruction No. 34.610
Criminal Negligence-Definition

The gist of involuntary manslaughter is criminal negligence. It must be shown that the negligence of the defendant was gross or culpable negligence. Gross or culpable negligence is that which indicates a callous disregard of human life and of the probable consequences of his act. Criminal liability cannot be predicated upon every act carelessly performed merely because such carelessness results in the death of another. In order for criminal liability to result from negligence, it must necessarily be reckless or wanton and of such a character as to show disregard of the safety of others under circumstances likely to cause injury or death. Unless you believe from the evidence beyond a reasonable doubt that the defendant was guilty of negligence so culpable or gross as to indicate a callous disregard of human life and of the probable consequences of his act, you cannot find him guilty of involuntary manslaughter.

MEMORANDUM [Criminal negligence]

STATUTE: None

CASE: Darnell v. Commonwealth, 6 Va. App. 485, 370 S.E.2d 717 (1988).

CAVEAT: None.

COMMENT: Criminal negligence must be defined when it is an element of involuntary manslaughter. Darnell, *supra*. This instruction should be used with Instruction No. 34.600.

Instruction No. 34.650
Involuntary Manslaughter-Under the Influence

The defendant is charged with the crime of involuntary manslaughter. The Commonwealth must prove beyond a reasonable doubt each of the following elements of that crime:

- (1) That the defendant was [driving; operating] a motor vehicle; and**
- (2) That at the time he was [under the influence of alcohol; under the influence of a narcotic drug or a self-administered intoxicant or drug of whatsoever nature; under the influence of a combination of drugs; under the combined influence of alcohol and a drug or drugs] to a degree which impaired his ability to [drive; operate] a motor vehicle safely; and**
- (3) That as a result of driving under the influence the defendant unintentionally caused the death of (name of person).**

If you find from the evidence that the Commonwealth has proved beyond a reasonable doubt each of the above elements of the offense as charged, then you shall find the defendant guilty and fix his punishment at:

- (1) A specific term of imprisonment, but not less than one (1) year nor more than ten (10) years; or**
- (2) Confinement in jail for a specific time, but not, more than twelve (12) months; or**
- (3) A fine of a specific amount, but not more than \$2,500.00; or**
- (4) Confinement in jail for a specific time, but not more than twelve (12) months, and a fine of a specific amount, but not more than \$2,500.00.**

If you find that the Commonwealth has failed to prove beyond a reasonable doubt any one or more of the elements of the offense, then you shall find the defendant not guilty.

MEMORANDUM [Involuntary Manslaughter - DUI]

STATUTE: §18.2-36.1

CASES: None

CAVEAT: For an instruction on aggravated involuntary manslaughter, see Instruction No. 34.660.

COMMENT: The presumptions set forth in § 18.2-269 pertaining to blood alcohol content are applicable to prosecutions for violations of § 18.2-36.1.

Instruction No. 34.660

Aggravated Involuntary Manslaughter-Under the Influence

The defendant is charged with the crime of aggravated involuntary manslaughter. The Commonwealth must prove beyond a reasonable doubt each of the following elements of that crime:

- (1) That the defendant was [driving; operating] a motor vehicle; and**
- (2) That at the time he was [under the influence of alcohol; under the influence of a narcotic drug or a self-administered intoxicant or drug of whatsoever nature; under the influence of a combination of drugs; under the combined influence of alcohol and a drug or drugs] to a degree which impaired his ability to [drive; operate] a motor vehicle safely; and**
- (3) That as a result of driving under the influence the defendant unintentionally caused the death of (name of person); and**
- 4) That the defendant's conduct was so gross, wanton and culpable as to show a reckless disregard for human life.**

If you find from the evidence that the Commonwealth has proved beyond a reasonable doubt each of the above elements of the offense as charged, then you shall find the defendant guilty of aggravated involuntary manslaughter and fix his punishment at a specific term of imprisonment, but not less than one (1) year nor more than twenty (2) years.

If you find that the Commonwealth has failed to prove beyond a reasonable doubt any one or more of the elements of the offense, then you shall find the defendant not guilty of aggravated involuntary manslaughter.

MEMORANDUM [Aggravated Involuntary Manslaughter -DUI]

STATUTE: §18.2-36.1

CASES: None.

CAVEAT: For an instruction on involuntary manslaughter, see Instruction No. 34.650. For an example on how to draft an instruction with involuntary manslaughter as a lesser included offense of aggravate involuntary manslaughter, see Instruction No. 34.700 (incorporating elements and punishments for first degree murder, second degree murder, and voluntary manslaughter).

COMMENT: The presumptions set forth in § 18.2-269 pertaining to blood alcohol content are applicable to prosecutions for violations of § 18.2-36.1.

Representative Virginia Civil Jury Instructions

**Instruction No. 4.030
Definition of Gross Negligence**

“Gross negligence” is that degree of negligence which shows such indifference to others as constitutes an utter disregard of caution amounting to a complete neglect of the safety of another person [another person’s property]. It is such negligence as would shock fair-minded people, although it is something less than willful recklessness.

**Instruction No. 4.040
Definition of Willful and Wanton Conduct**

“Willful and wanton conduct” is acting consciously in disregard of another person’s rights or acting with a reckless indifference to the consequences to another person when the defendant is aware of his conduct and is also aware, from his knowledge of existing circumstances and conditions, that his conduct would probably result in injury to another.

Appendix C

State-by-State Summary of Criminally Negligent Homicide Statutes

MPC = Model Penal Code definition; See Section VI-Discussion for Text.

1. Alabama

§13A-6-4 Criminally Negligent
Homicide

Criminal negligence = MPC
CLASS A MISDEMEANOR
CLASS C FELONY if death
occurs while DUI.

§13A-6-3 Manslaughter
Recklessly = MPC
CLASS B FELONY

2. Alaska

§11.41.130 Criminally Negligent
Homicide

Criminal negligence = MPC
CLASS C FELONY

§11.41.120 Manslaughter
**Knowingly, intentionally,
recklessly = MPC**
CLASS A FELONY

3. Arkansas

§5-10-105 Negligent Homicide
Criminal negligence = MPC
CLASS A MISDEMEANOR

§5-10-104 Manslaughter
Recklessly = MPC
CLASS C FELONY and
CLASS C FELONY if death occurs
during the operation of a vehicle,
aircraft or watercraft while
intoxicated.

4. California

No Negligent Homicide

§191.5 Gross Vehicular
Manslaughter While
Intoxicated

Penalty 4,6,10 YRS.

§192 Manslaughter
Involuntary, Penalty 2,3,4 YRS.
Vehicular

1. unlawful act done
w/ gross negligence
Penalty 2,4,6 YRS.

2. unlawful act or lawful
act which might

produce death done

w/o gross negligence
NOT MORE THAN 1 YR.

3. Lawful act done in
an unlawful manner
w/o gross negligence
16 MOS./ 2,4 YRS.

4. California, Cont'd.

5. Connecticut

§53a-58 Criminally Negl. Homicide
Manslaughter

Criminal negligence = MPC
CLASS A MISDEMEANOR

§53a-55 First Degree

CLASS B FELONY

§53a-55a First Degree Manslaughter
with a Firearm

CLASS B FELONY

§53a-56 Second Degree Manslaughter
CLASS C FELONY

§53a-56a Second Degree Manslaughter
with a Firearm

CLASS C FELONY

§53a-56b Second Degree Manslaughter
with a Vehicle

CLASS C FELONY
§53a-57 Misconduct with
a Motor Vehicle
* with criminal negligence
CLASS D FELONY

6. District of Columbia

§40-713 Negligent Homicide
applies to death caused by
operation of a vehicle in a
careless, reckless, or negligent
manner
deemed to be included within
manslaughter
FELONY - not more than five
yrs./ \$5000 fine - either or both

§22-2405 Manslaughter
includes voluntary
and involuntary
NO MORE THAN 1 YR
/\$1000 FINE OR BOTH

7. Delaware

11 §631 Criminally Neg. Homicide
Criminal negligence = MPC
MPC
CLASS E FELONY

11 § 632 Manslaughter
Recklessly, intentionally =
CLASS C FELONY
11 § 630 Second Degree Vehicular
Homicide
with **criminal negligence** or
only negligence if intoxicated
CLASS F FELONY
11 § 630A First Degree Vehicular

Homicide
with **criminal negligence** while
intoxicated
CLASS E FELONY

8. Florida

No Negligent Homicide

§782.07 Manslaughter
culpable negligence =
conduct so flagrant as to provide
presumption of conscious
indifference to the consequences
of the conduct
FELONY IN THE SECOND DEGREE
§§782.071/ 782.072

Vehicle/ Vessel Homicide
operation in a reckless manner
lesser included offenses of
manslaughter
FELONY IN THE THIRD DEGREE
if fail to stop
FELONY IN THE SECOND DEGREE

9. Georgia

No Negligent Homicide

§16-5-3 Involuntary Manslaughter
without intending to cause death
during the commission of an
unlawful act not amounting to a
felony or a lawful act committed in
an unlawful manner
Penalty 1-10 YRS.

10. Hawaii

§707-702.5 Negligent Homicide in the First Degree

operating a vehicle in a negligent manner while intoxicated

negligent = MPC*

CLASS B FELONY

§707-703 Negligent Homicide in the Second degree

operating a vehicle in a negligent manner

CLASS C FELONY

§707-704 Negligent Homicide in the Third degree

Operating a vehicle in a manner which is simple negligence

MISDEMEANOR IN THE THIRD DEGREE

§707-702 Manslaughter

Recklessly or intentionally = MPC*

CLASS B FELONY

11. Illinois

No Negligent Homicide

§5/9-3 Involuntary Manslaughter and Reckless Homicide

1. death caused by reckless conduct=
Involuntary Manslaughter

CLASS 3 FELONY

2. death caused by reckless conduct in driving a motor vehicle=
Reckless Homicide

CLASS 3 FELONY

3. death caused by reckless conduct in driving a motor vehicle while intoxicated=
Reckless Homicide

CLASS 2 FELONY

12. Kentucky

No Negligent Homicide

§507.030 Manslaughter
First Degree

CLASS B FELONY

§507.040 Manslaughter
Second Degree

CLASS C FELONY

§507.050 Reckless Homicide
recklessness =MPC
CLASS D FELONY

13. Louisiana

14 §32 Negligent Homicide
criminal negligence = MPC*
FELONY 5 YRS./ \$5000
OR BOTH

14 §31 Manslaughter

Penalty up to 40 YRS.

14 §32.1 Vehicular Homicide
involving alcohol or drugs

Penalty 2-15 YRS./ \$2- 15,000 FINE

14. Maine

No Negligent Homicide

17-A §203 Manslaughter

recklessly or with **criminal negligence** causes the death of another= MPC*

CLASS A CRIME

if **recklessly** or with **criminal negligence** operates a motor vehicle = MPC*

CLASS B CRIME

15. Maryland

No Negligent Homicide

§387 Manslaughter

includes both voluntary and

includes both voluntary and involuntary
FELONY- UP TO 10 YRS. (or \$500 and/or 2 yrs. in jail)
§388 Manslaughter by Automobile
MISDEMEANOR-UP TO 5 YRS./
\$3000 OR BOTH
§388A Homicide by MotorVehicle or Vessel While Intoxicated
MISDEMEANOR- UP TO 10 YRS./
\$5000 OR BOTH

16. Michigan

§750.324 Negligent Homicide
Applies to death caused by operation of a vehicle in a careless, reckless, or negligent

§750.321 Manslaughter
includes both voluntary and involuntary
FELONY- up to 15 yrs./ \$7500

16. Michigan, Cont'd.

manner.
Deemed to be included within manslaughter
MISDEMEANOR - not more than 2 yrs./
\$2,000 fine - either or both

fine-either or both

17. Mississippi

No Negligent Homicide

§97-3-25 Manslaughter
1. homicide while in commission or attempted commission of a felony

Penalty 2-20 YRS

2. homicide while in commission
or attempted commission of
a crime not amounting to a felony
Penalty 1YR./ \$500 - either or
both

18. Montana

§45-5-104 Negligent Homicide
Negligently = MPC*
Penalty up to 10 yrs. and \$50,000

§45-5-102 **Deliberate Homicide**
Purposefully, knowingly = MPC
Penalty LIFE or 10-100 YRS.

19. New Hampshire

§630:3 Negligent Homicide
Negligently = MPC*
CLASS B FELONY
if death caused by operation of
a vehicle, boat while intoxicated
CLASS A FELONY

§603:2 Manslaughter
Recklessly = MPC
Penalty NOT MORE THAN 30YRS.

20. New York

§125.10 Criminally Negligent Homicide
Criminal negligence = MPC*
CLASS E FELONY

§125.12 Vehicular Manslaughter
Criminal negligence = MPC
CLASS D FELONY

§125.15 Second Degree
Manslaughter
Recklessly = MPC

20. New York, Cont'd.

CLASS C FELONY
§125.20 First Degree
Manslaughter
with intent to cause serious

injury or death to third party
CLASS B FELONY

21. North Carolina

No Negligent Homicide

§14-18 Manslaughter

1. Voluntary

CLASS F FELONY

2. Involuntary

CLASS H FELONY

22. North Dakota

§12.1-16-03 Negligent Homicide

Negligence = MPC*

CLASS C FELONY

§12.1-16-02 Manslaughter

Recklessly = MPC*

CLASS B FELONY

23. Ohio

§2903.05 Negligent Homicide

Negligently= substantial lapse of due

care if negligently cause that death of

another by means of a deadly weapon

or dangerous ordnance

MISDEMEANOR IN THE

FIRST DEGREE

§2903.03 Voluntary

Manslaughter

heat of passion

AGGRAVATED FELONY IN THE

FIRST DEGREE

§2903.04-Involuntary

Manslaughter

1. while committing or

attempting to commit a felony

AGGRAVATED FELONY IN THE

FIRST DEGREE

2. while committing or

attempting to commit a misde-

meanor

AGGRAVATED FELONY IN THE

THIRD DEGREE

additional penalties if the underlying offense has as one of its elements driving while intoxicated

23. Ohio, Cont'd.

§2903.06 Aggravated Vehicular Homicide
Recklessly
AGGRAVATED FELONY IN THE THIRD DEGREE
§2903.07 Vehicular Homicide
negligently
MISDEMEANOR IN THE FIRST DEGREE

24. Oregon

§163.145 Criminally Negligent Homicide
Criminal Negligence = MPC
CLASS C FELONY

§163.118 -First Degree Manslaughter
Recklessly with extreme indifference
CLASS A FELONY
§163.119- Second Degree Manslaughter
Recklessly
CLASS B FELONY

25. Pennsylvania

No Negligent Homicide

§2504 Involuntary Manslaughter
Reckless or culpably negligent conduct
MISDEMEANOR IN THE FIRST DEGREE
§2503 Voluntary Manslaughter

heat of passion
FELONY IN THE SECOND DEGREE

26. South Carolina

No Negligent Homicide

§16-3-60 Involuntary
Manslaughter- Criminal
Negligence Defined
Criminal negligence =
reckless disregard for the
safety of others
§16-3-50 Manslaughter
1. Voluntary
Penalty 2-30 YRS.
2. Involuntary
Penalty 3 MOS.- 3 YRS.

27. Tennessee

§39-13-212 Criminally Negligent
Homicide
Criminal Negligence = MPC
replaces involuntary manslaughter

§39-31-211 Voluntary
Manslaughter
CLASS C FELONY
§39-13-213 Vehicular
Homicide
CLASS E FELONY
Recklessly = MPC
CLASS C FELONY

28. Texas

§19.07 Criminally Negligent Homicide
Criminal negligence = MPC
CLASS A MISDEMEANOR

§19.04 Voluntary Manslaughter
heat of passion
SECOND DEGREE FELONY
§19.05 Involuntary Manslaughter
Recklessly = MPC
THIRD DEGREE FELONY

29. Utah

§76-5-206 Negligent Homicide
Criminal negligence = MPC*
included within manslaughter
CLASS A MISDEMEANOR

§76-5-207 Automobile Homicide
negligence
THIRD DEGREE FELONY
criminal negligence
SECOND DEGREE FELONY

§76-5-205 Manslaughter
Recklessly, heat of passion
FELONY IN THE SECOND
DEGREE

30. West Virginia

No Negligent Homicide

§61-2-4 Voluntary Manslaughter
Penalty 1-5 YRS.
§61-2-5 Involuntary

Manslaughter
MISDEMEANOR up to 1 Yr./
\$1000- either or both

31. Wisconsin

§940.07 Homicide Resulting from
Negligent Control of Vicious Animal
knows of viciousness
keeps without ordinary care
CLASS C FELONY

§940.08 Homicide by Negligent Use
of Dangerous Weapon, Explosive or Fire

§940.05 Second Degree
Intentional Homicide
causing the death of another
without intent to kill and
while in the heat of passion
CLASS B FELONY
§940.06 Second Degree

high degree of negligence- act which a person should realize creates a situation of unreasonable risk and high probability of death or great bodily harm to another

CLASS D FELONY

§940.09 Homicide by Intoxicated User of a Vehicle/ Firearm

conduct which demonstrates a conscious disregard for the safety of another and a willingness to take known chances of perpetrating an injury

Reckless Conduct

act which creates a situation of unreasonable risk and high probability of death or great bodily harm to another

CLASS C FELONY

32. Wyoming

§6-2-107 Criminally Negligent Homicide

Criminal Negligence = MPC*
MISDEMEANOR - not more than 1 YR./ \$2000 fine or both

§6-2-105 Manslaughter

includes voluntary and involuntary
FELONY not more than 20 YRS.

§6-2-106

1. Homicide by Vehicle

Criminal negligence

Penalty 1YR./ \$20,000

2. Aggravated Homicide by Vehicle

Recklessness

Penalty not more than 20 YRS.

Appendix D

Virginia Code §18.2-36 with annotations

**§18.2-36. How involuntary manslaughter punished.--
Involuntary manslaughter is punishable as a Class 5 felony.**
(Code 1950, § 18.1-25; 1960, c. 358; 1975, cc. 14, 15; 1982, c. 301.)

Involuntary manslaughter is the killing of one accidentally contrary to the intention of the parties, in the prosecution of some unlawful, but not felonious act; or in the improper performance of a lawful act. *Commonwealth v. Jones*, 28 Va. (1 Leigh) 598 (1829); *Souther v. Commonwealth*, 48 Va. (7 Gratt.) 673 (1851). See also *M'Whirt's Case*, 44 Va. (3 Gratt.) 594 (1846); *Byrd v. Commonwealth*, 89 Va. 536, 16 S.E. 727 (1893); *Fadely v. Commonwealth*, 208 Va. 198, 156 S.E.2d 773 (1967); *Lewis v. Commonwealth*, 211 Va. 684, 179 S.E.2d 506 (1971); *Gooden v. Commonwealth*, 226 Va. 565, 311 S.E.2d 780 (1984).

Intentional, willful and wanton violation of safety statutes, resulting in death, will justify conviction of involuntary manslaughter. *King v. Commonwealth*, 217 Va. 601, 231 S.E.2d 312 (1977).

Involuntary manslaughter in operation of motor vehicle defined. - Involuntary manslaughter arising from the operation of a motor vehicle should be predicated solely upon criminal negligence proximately causing death. **Accordingly, involuntary manslaughter in the operation of a motor vehicle is defined as the accidental killing which, although unintended, is the proximate result of negligence so gross, wanton and culpable as to show a reckless disregard of human life.** *King v. Commonwealth*, 217 Va. 601, 231 S.E.2d 312 (1977).

In order for driving an automobile at an excessive speed to constitute the basis for a manslaughter conviction the act must be so flagrant, culpable, and wanton as to show utter disregard of the safety of others under circumstances likely to cause injury. *Shrader v. Commonwealth*, 2 Va. App. 287, 343 S.E.2d 375 (1986).

In a prosecution for involuntary manslaughter, the manner of operation and speed of the appellant's automobile was material to the issue of whether his conduct was willful or wanton or showed a total disregard of the safety and well-being of others. *Shrader v. Commonwealth*, 2 Va. App. 287, 343 S.E.2d 375 (1986).

In a prosecution for involuntary manslaughter, evidence which tends to prove the rate of speed at which the automobile was driven, if

competent, is relevant. *Shrader v. Commonwealth*, 2 Va. App. 287, 343 S.E.2d 375 (1986).

The "improper" performance of a lawful act, to constitute involuntary manslaughter, must amount to an unlawful commission of such lawful act, not merely a negligent performance. The negligence must be criminal negligence. *Gooden v. Commonwealth*, 226 Va. 565, 311 S.E.2d 780 (1984).

The accidental killing must be the proximate result of a lawful act performed in a manner so gross, wanton, and culpable as to show a reckless disregard of human life. *Gooden v. Commonwealth*, 226 Va. 565, 311 S.E.2d 780 (1984).

The improper performance of a lawful act proximately causing an accidental killing is insufficient to support a conviction for involuntary manslaughter unless that improper performance constitutes criminal negligence. *King v. Commonwealth*, 217 Va. 601, 231 S.E.2d 312 (1977).

Showing necessary where charge predicated on improper performance of lawful act. - When the Commonwealth predicates the charge upon an improper performance of a lawful act, it must show that the performance was so improper as to constitute negligence so gross and culpable as to indicate a callous disregard of human life. But the negligence need not be so gross as to raise the presumption of malice. *Beck v. Commonwealth*, 216 Va. 1, 216 S.E.2d 8 (1975).

Where intentional violation of statute involves inherently dangerous act which is the proximate cause of the resulting homicide, the killing is involuntary manslaughter. *Bailey v. Commonwealth*, 5 Va. App. 331, 362 S.E.2d 750 (1987).

Malice is element of murder but not manslaughter. - Malice, a requisite element for murder of any kind, is unnecessary in manslaughter cases and is the touchstone by which murder and manslaughter cases are distinguished. *Essex v. Commonwealth*, 228 Va. 273, 322 S.E.2d 216 (1984).

Reckless conduct must amount to unlawful conduct in order to sustain a charge of involuntary manslaughter; it is immaterial whether the unlawful act was unlawful in its inception - that is, an inherently unlawful act, such as discharging a deadly weapon into a crowded street - or became unlawful after it was begun, such as lawfully operating a vehicle in a public street but so accelerating its speed that it may cause death or serious bodily harm to persons in that street. *Gooden v. Commonwealth*, 226 Va. 565, 311 S.E.2d 780

(1984).

Degree of intoxication is a circumstance relevant to a determination of the question whether, in light of all other circumstances, the act of driving an automobile was such an improper performance of a lawful act as to constitute negligence so gross and culpable as to indicate a callous disregard of human life. *Beck v. Commonwealth*, 216 Va. 1, 216 S.E.2d 8 (1975).

Ordinary negligence is insufficient to convict of involuntary manslaughter. *Lewis v. Commonwealth*, 211 Va. 684, 179 S.E.2d 506 (1971).

The degree of negligence must be more than ordinary negligence in order for negligent violation of a safety statute to justify conviction of involuntary manslaughter. *King v. Commonwealth*, 217 Va. 601, 231 S.E.2d 312 (1977).

In the operation of motor vehicles violation of a safety statute amounting to mere negligence proximately causing an accidental death is not sufficient to support a conviction of involuntary manslaughter. *King v. Commonwealth*, 217 Va. 601, 231 S.E.2d 312 (1977).

Where evidence in a criminal prosecution showed at most only an inadvertent failure by the defendant to turn on her white headlights rather than her amber running or parking lights, this act of omission was no more than ordinary negligence, an insufficient predicate for a conviction of involuntary manslaughter. *King v. Commonwealth*, 217 Va. 601, 231 S.E.2d 312 (1977).

When the proximate cause of a death is simply ordinary negligence, i.e., the failure to exercise reasonable care, the negligent party cannot be convicted of involuntary manslaughter. To constitute criminal negligence essential to a conviction of involuntary manslaughter, an accused's conduct must be of such reckless, wanton or flagrant nature as to indicate a callous disregard for human life and of the probable consequences of the act. *Davis v. Commonwealth*, 230 Va. 201, 335 S.E.2d 375 (1985).

A higher degree of negligence in the operation of a motor vehicle is required to establish criminal liability for involuntary manslaughter than to establish liability in a civil action for ordinary or even gross negligence. This higher degree of negligence has come to be known as "criminal negligence." *Keech v. Commonwealth*, 9 Va. App. 272, 386 S.E.2d 813 (1989).

In determining the degree of negligence sufficient to support a conviction of vehicular involuntary manslaughter, the accused's conscious awareness of the risk of injury created by his conduct is necessarily a significant factor. Obviously, when the driver proceeds in the face of a known risk, the degree of the negligence is increased, and may turn that which would have been ordinary negligence into gross, willful or wanton negligence. *Keech v. Commonwealth*, 9 Va. App. 272, 386 S.E.2d 813 (1989).

Reckless driving and involuntary manslaughter are two separate and distinct offenses, although arising out of the same occurrence. The lesser offense is not included within the other. *Delawder v. Commonwealth*, 214 Va. 55, 196 S.E.2d 913 (1973).

Distinction between reckless driving and involuntary manslaughter. - What distinguishes a speeding violation from the misdemeanor of reckless driving, and the misdemeanor from the felony of involuntary manslaughter, is the likelihood of injury to other users of the highways. And the degree of the hazard posed by a speeding automobile depends upon the circumstances in each case. *Mayo v. Commonwealth*, 218 Va. 644, 238 S.E.2d 831 (1977).

Evidence that defendant, after drinking enough beer to affect his behavior, knowingly drove an overcrowded, defective vehicle and attempted to negotiate a curve at a speed in excess of the posted speed limit during unfavorable weather conditions was a sufficient basis for the jury to conclude that defendant's negligence was so gross, wanton, and culpable as to show a reckless disregard of human life. *Jetton v. Commonwealth*, 2 Va. App. 557, 347 S.E.2d 141 (1986).

Evidence insufficient to convict. - In a prosecution for involuntary manslaughter, where the evidence showed that the defendant drove down the center of a narrow, unlighted, unmarked, rural, secondary road in the early morning hours at a time when he was unlikely to encounter other traffic or pedestrians, and that he was driving at a speed well within the posted speed limit, and there was no evidence of drinking or of recklessness in the operation of his truck, the evidence, at most, showed ordinary negligence and not such gross, wanton, and culpable negligence as to show a reckless disregard of human life necessary to sustain a conviction of involuntary manslaughter. *Jenkins v. Commonwealth*, 220 Va. 104, 255 S.E.2d 504 (1979).

Appendix E

Uniform Vehicle Code and Model Traffic Ordinance

§11-906 - Homicide by vehicle

(a) Whoever shall unlawfully and unintentionally cause the death of another person while engaged in the violation of any state law or municipal ordinance applying to the operation or use of a vehicle or to the regulation of traffic shall be guilty of homicide when such violation is the proximate cause of said death.

(b) Any person convicted of homicide by vehicle shall be fined not less than \$500 nor more than \$2,000, or shall be imprisoned in the county jail not less than three months nor more than one year, or may be so fined and so imprisoned, or shall be imprisoned in the penitentiary for a term not less than one year nor more than five years.