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California's Ineffective Reckless Driving Statute

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COMMENTS

CALIFORNIA'S INEFFECTIVE RECKLESS DRIVING STATUTE

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LEGISLATIVE amendment and judicial interpretation of section 23103 of the California Vehicle Code have limited the applicability of this statute to conduct which exceeds even gross negligence. It is the purpose of this comment to examine the basis of this limitation and to question the desirability of its retention.

Driving in wilful or wanton disregard for the safety of persons or property constitutes the public offense of reckless driving in California.[1] An inquiry into the nature of the offense and the elements needed for conviction discloses that the lack of appeals from convictions under this statute can be traced to the small number of prosecutions under it.[2] Law enforcement agencies prefer to prosecute misconduct on the highway under more specific statutes the violation of which requires no proof of any special mental element accompanying the unlawful conduct.[3] Much of the reported judicial interpretation of the statute is contained in cases where the prosecution relied on the reckless driving statute as an afterthought because the evidence would not support the charge actually filed against the defendant.[4] The most striking fact

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[1] CAL. VEH. CODE § 23103: "Any person who drives any vehicle upon a highway in wilful or wanton disregard for the safety of persons or property is guilty of reckless driving. . . ."

[2] Only .18 per cent of the total citations issued for vehicle code violations in 1961 were for reckless driving. California Highway Patrol, Annual Statistical Report (1961).

[3] Officers of the California Highway Patrol will issue citations for those violations which are capable of observation, such as failure to observe a stop sign or stop light, exceeding speed limits or driving while intoxicated, even though the driver's conduct may warrant more serious punishment. Only if the driver's actions have been so extreme as to allow no possible contradiction does the officer feel certain enough to issue a citation for reckless driving. But short of driving along San Francisco's Market Street at five o'clock in the afternoon at a speed of eighty miles per hour, no such certainty exists. Telephone conversation with Lt. Vance, California Highway Patrol, San Francisco, November 5, 1962.

[4] People v. Schumacher, 194 Cal. App. 2d 335, 14 Cal. Rptr. 924 (1961); People v. Clenney, 165 Cal. App. 2d 241, 331 P.2d 696 (1958); People v. McGrath, 94 Cal. App. 520, 271 Pac. 549 (1928).

is that cases concerned solely with reckless driving were most numerous in the early days of the statute.[5] No leading appellate case involving a prosecution and conviction for reckless driving bears a date later than 1941. An examination of the legislative development and judicial interpretation of the statute reveals the probable causes of the diminished importance of the reckless driving statute.

Origin and Legislative History

The origin of the reckless driving statute was a simply worded enactment in 1915 which merely required users of the highway to drive carefully and to stay on the right side of the road whenever possible.[6] Subsequent statutes continued to be broadly worded in describing the offense. By 1923 driving without due caution and circumspection was considered reckless.[7] "Due caution and circumspection" imports negligence, that is, negligence of so great a character as to be criminal in nature.[8] The 1929 amendment was directed against driving in so negligent a manner as to indicate either a wilful or wanton disregard for the safety of persons or property.[9] The legislature seemed to be narrowing the scope of the offense.[10] The 1935 amendment eliminated the word "negligent,"[11] and in 1939 the statute presently in force was adopted.[12]

During the course of the statute's legislative history attacks on its constitutionality were consistently unsuccessful.[13] The statute does not

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[5] People v. Peet, 108 Cal. App. 775, 288 Pac. 44 (1930); People v. Nowell, 45 Cal. App. 2d Supp. 811, 114 P.2d 81 (App. Dep't, Super. Ct., Los Angeles 1941); People v. Thompson, 41 Cal. App. 2d Supp. 965, 108 P.2d 105 (App. Dep't, Super. Ct., San Diego 1940); People v. McNutt, 40 Cal. App. 2d Supp. 835, 105 P.2d 657 (App. Dep't, Super. Ct., Los Angeles 1940); People v. Smith, 36 Cal. App. 2d Supp. 748, 92 P.2d 1039 (App. Dep't, Super. Ct., Los Angeles 1939); People v. Steel, 35 Cal. App. 2d Supp. 748, 92 P.2d 815 (App. Dep't, Super. Ct., San Diego 1939).

[6] Cal. Stat. 1915, c. 188 § 20, p. 406.

[7] Cal. Stat. 1923, c. 266 § 121, p. 557.

[8] People v. Crossnan, 87 Cal. App. 5, 261 Pac. 531 (1927).

[9] Cal. Stat. 1929, c. 253 § 49, p. 539.

[10] People v. Marconi, 118 Cal. App. 683, 5 P.2d 974 (1931).

[11] Cal. Stat. 1935, c. 764, p. 2141.

[12] Cal. Stat. 1939, c. 658 § 3, p. 2107.

[13] People v. Smith, 36 Cal. App. 2d Supp. 748, 92 P.2d 1039 (App. Dep't, Super. Ct., Los Angeles 1939); People v. Steel, 35 Cal. App. 2d Supp. 748, 92 P.2d 815 (App. Dep't, Super. Ct., San Diego 1939). The statute's constitutionality was attacked in both cases on the ground that the word *indicate*, not being followed by explicit words establishing to whom the manner of driving had to indicate wilfulness or wantonness, resulted in unconstitutional ambiguity. The court held that the procedural framework of other statutes envisioned a weighing of the evidence by judge or jury and that the reckless driving statute embodied the same implied procedure.

deprive a defendant of due process of law by failing to establish a clearly recognizable standard of guilt. The description of the conduct to be punished is sufficiently clear to inform drivers what acts or manner of driving would exceed the bounds of permitted conduct.[14] Neither does the statute punish a mere state of mind. Its purpose is to punish a manner of driving which necessarily includes a series of overt acts capable of observation and narration by witnesses. The reference to a state of mind is merely for a description of the prohibited acts.[15]

The Mental Element

Judicial definition of the state of mind requisite to the act was rather unsuccessful in the earlier cases. The search for a precise interpretation of the reckless driving statute ended abruptly with *People* v. *McNutt*.[16]

McNutt's auto struck the back of a car which had backed up to make a left turn. The appellate court reversed a conviction for reckless driving by holding that the evidence suggested *negligence*, but not reckless driving. In the course of its opinion the court defined the phrase "wilful or wanton disregard." "Wilful," said the court, meant intentional, but this was understood to be the intentional *disregard for safety* and not intentional *doing of the act*.[17] "Wanton" included the elements of consciousness of one's conduct, intent to do or omit the act in question, realization of the probable injury to another, and reckless disregard of the consequences.[18] These definitions were not new. They had been used many times, but not to define *reckless driving*. Until then their application had been limited to the interpretation of "wilful misconduct," which term was the criterion establishing a driver's liability for injury to guests in his automobile.[19] The *McNutt* case established the rule that there was no difference between wilful misconduct under the so-called "guest statute," and "wanton or wilful disregard" under the reckless driving statute.[20] The terms were synonymous.

By restating the definition and interpretation of "wilful misconduct," *McNutt* and subsequent cases encountered no difficulty in holding

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[14] People v. McNutt, 40 Cal. App. 2d Supp. 835, 105 P.2d 657 (App. Dep't, Super. Ct., Los Angeles 1940); People v. Smith, *supra* note 13.

[15] *Ibid.*

[16] 40 Cal. App. 2d Supp. 835, 105 P.2d 657 (App. Dep't, Super. Ct., Los Angeles 1940).

[17] *Ibid.*

[18] *Ibid.*

[19] CAL. VEH. CODE § 403; now § 17158.

[20] 40 Cal. App. 2d Sup. 835, 105 P.2d 657 (App. Dep't, Super. Ct., Los Angeles 1940).

negligence, even gross negligence, insufficient to sustain a conviction for reckless driving.[21] The wilful misconduct necessary under guest statute cases had established this rule many years earlier.[22]

Two years after *McNutt,* in *People* v. *Young,*[23] the court considered the elements of "negligent homicide," another vehicle code violation.[24] This law contemplated a state of mind which consisted of *reckless disregard and wilful indifference to the safety of others.* The court, relying on *McNutt,* held that the mental element necessary for conviction of negligent homicide was the same as that required for reckless driving.[25] Thus, three statutory violations (reckless driving, wilful misconduct, and negligent homicide) required the same mental element for guilt.

Wilful Misconduct

The definition which has received the most careful analysis is the term "wilful misconduct" as used in the guest statute. Without regard to the problem of liability to guests it is helpful to investigate the term in order to see how it is applied to reckless driving cases.

In 1914 a Massachusetts court defined "wilful misconduct," under a Workmen's Compensation Act,[26] as "conduct of a *quasi* criminal nature, the intentional doing of something either with the knowledge that it is likely to result in serious injury, or with a wanton and reckless disregard of its possible consequences."[27] While the word, "intentional," is a necessary element throughout, the definition really established two separate and distinctive states of mind. One is the state of mind necessary to do an act with knowledge that injury to others may occur. The other refers to the doing of an act, perhaps without knowledge that injury will occur, with reckless abandonment to its eventual outcome. This concept of wilful misconduct was used by a California court in 1919.[28] Several years later, in *Howard* v. *Howard,*[29] it was held

[21] People v. Schumacher, 194 Cal. App. 2d 335, 14 Cal. Rptr. 924 (1961); People v. Allison, 101 Cal. App. 2d Supp. 932, 226 P.2d 85 (App. Dep't, Super. Ct., San Diego 1951); People v. Thompson, 41 Cal. App. 2d Supp. 965, 108 P.2d 105 (App. Dep't, Super. Ct., San Diego 1940); People v. McNutt, 40 Cal. App. 2d Supp. 835, 105 P.2d 657 (App. Dep't, Super. Ct., Los Angeles 1940).

[22] Kastel v. Stieber, 215 Cal. 37, 8 P.2d 474 (1932); Helme v. Great Western Milling Co., 43 Cal. App. 416, 185 Pac. 510 (1919).

[23] 20 Cal. 2d 832, 129 P.2d 353 (1942).

[24] CAL. VEH. CODE § 500, repealed 1943.

[25] People v. Young, 20 Cal. 2d 832, 129 P.2d 353 (1942).

[26] Mass. Stat. 1911, c. 751, Part II, § 3.

[27] *In re* Burns, 218 Mass. 8, 10, 105 N.E. 601, 602 (1914).

[28] Helme v. Great Western Milling Co., 43 Cal. App. 416, 185 Pac. 510 (1919).

[29] 132 Cal. App. 124, 22 P.2d 279 (1933).

that the difference between the two states of mind was that in the former the driver has knowledge that a serious injury would be a *probable* result, while in the latter the driver's acts have to occur in reckless disregard of their *possible* result.[30]

Application of "Wilful Misconduct" to Reckless Driving

In *People* v. *Thompson*[31] the defendant was weaving back and forth between traffic lanes. His conviction for reckless driving was reversed because he did not have knowledge or an appreciation of the fact that danger was likely to result therefrom. It appears that the court did not consider the second mental element, as it was defined by the Massachusetts court, which did not require knowledge as a necessary ingredient for the offense. In *People* v. *Nowell*[32] defendant was convicted for driving at a speed of from 80 to 85 miles per hour and passing 21 cars in a 4.3 mile stretch of highway. Relying on *Thompson*, the appellant argued that unless the prosecution could prove that he knew that his driving would result in disaster, the conviction could not be sustained. Proof of such knowledge was one way to sustain the conviction, the court agreed, but not the only one. If the defendant were driving so as to show a wanton and reckless disregard of the possible consequences to persons and property, although he did not know as a fact that his driving would probably injure someone, his guilt would, nevertheless, be established.[33] The two alternative mental elements first analyzed by the Massachusetts court in 1914 were being fully applied by the California courts.

Proof of the defendant's awareness that his acts might result in probable injury is a difficult burden on the prosecution. *Van Fleet* v. *Heyler*,[34] a suit for damages under the guest statute, firmly established a rule in this field that had long been accepted in general tort law. Proof of knowledge need not be established by the testimony of the accused, a rather unlikely prospect at best, but knowledge can be inferred by the jury if they feel that a reasonable, ordinary man would, under the same circumstances, know that his acts are probably going to cause injury.[35] Heyler was driving at night on a narrow, curving

[30] *Ibid.* If a result is *probable*, there is more evidence for than against that it will happen. A *possible* result is within the powers of one's attainment, that is, it could happen because it is within the limits of one's capacity. WEBSTER, NEW INTERNATIONAL DICTIONARY OF THE ENGLISH LANGUAGE (3d ed. 1961).

[31] 41 Cal. App. 2d Supp. 965, 108 P.2d 105 (App. Dep't, Super. Ct., San Diego 1940).

[32] 45 Cal. App. 2d Supp. 811, 114 P.2d 81 (App. Dep't, Super. Ct., Los Angeles 1941).

[33] *Ibid.*

[34] 51 Cal. App. 2d 719, 125 P.2d 586 (1942).

[35] *Ibid.*

road at a speed of 85 miles per hour. The lights of a packmule station ahead did not influence him to reduce his speed. He went into a ditch when he had to swerve to avoid mules crossing the road near the station. The defendant pleaded lack of knowledge that injury would probably occur from his acts. The court stated that express knowledge by defendant's testimony need not be proved. Knowledge could be implied from the facts that defendant was familiar with the location, that he had knowledge of the presence of other persons on the highway, and from his persistent speed.[36] The defendant also argued that he lacked an intent to injure because his wife was in the car with him and that he certainly had no intent to injure her. The court declared that wilful misconduct does not require an intent to injure.[37]

Heyler embodies the California law regarding wilful misconduct on the basis of knowledge, express or implied, that probable injury would result from the defendant's acts. *Hastings* v. *Serleto*[38] analyzed wilful misconduct based on intentional acts done in wanton and reckless disregard of the possible consequences. There the defendant, anxious to take a young girl into the foothills, raced up a narrow, winding road. The girl and another passenger were locked in an embrace in the back seat. The defendant testified that he kept glancing at the couple in the back while maintaining his speed. His failure to heed the hazards along the roadway resulted in a collision with a tree. The defendant claimed that his conduct amounted to gross negligence at most, and that he therefore was not liable under the guest statute. The court rejected the claim. Gross negligence "is merely such lack of care as may be presumed to indicate a passive and indifferent attitude toward results, while wilful misconduct involves a more positive intent actually to harm another *or to do an act with a positive, active, and absolute disregard of its consequences.*"[39] While there need be no ill feeling on the part of the defendant, there must be an intent to misconduct himself, or a wilful indifference to his acts.[40]

Specific Acts

Any attempt to establish a standard, the application of which will, with infallible results, give an indication as to whether a particular act or failure to act constitutes reckless driving is beset by the difficulty

[36] *Ibid.*
[37] *Ibid.*
[38] 61 Cal. App. 2d 672, 143 P.2d 956 (1943).
[39] *Id.* at 680, 143 P.2d at 959.
[40] *Ibid.*

that the determining factor in recklessness is the state of mind accompanying the act.

In jurisdictions which have adopted reckless driving statutes similar to that of California, a general rule has evolved by judicial construction. It is that a specific act or omission to act while operating an automobile is not punishable as reckless driving if a statute exists to punish that particular act or omission as a separate offense.[41] This is, however, amplified by the exception that the circumstances surrounding such act or omission may bring the offense into the reckless driving category. California recognizes both the general rule and the exception.[42]

Speeding

Violation of the legal speed limit, an offense punishable under separate code sections, is not *per se* wilful misconduct.[43] The offense of reckless driving may involve the speed of an automobile,[44] however, and the surrounding circumstances of a speed limit violation may support the contention that it occurred in wilful or wanton disregard for the safety of persons or property.[45] In affirming a conviction for reckless driving based on excessive speed, one California court stated:[46]

> Of necessity, when referring to the speed of an automobile, there is involved the highway on which it travels, with its width, surface, and the presence or lack of traffic upon it. There is involved, too, the factor of visibility; was the car driven before or after dark? When considered in relation to these matters mere speed, without other acts, may demonstrate wilful misconduct or that the driving is reckless.

From this statement it would seem that the general rule against punishment of an act or omission to act under the reckless driving statute, where such an act or omission is made an offense by a separate statute, is really meaningless. No act in connection with the operation of an automobile occurs in a vacuum. There are always surrounding

[41] Annot., 86 A.L.R. 1273 (1933); 52 A.L.R.2d 1337 (1957).

[42] People v. Nowell, 45 Cal. App. 2d Supp. 811, 114 P.2d 81 (App. Dep't, Super. Ct., Los Angeles 1941); People v. Thompson, 41 Cal. App. 2d Supp. 965, 108 P.2d 105 (App. Dep't, Super. Ct., San Diego 1940); People v. McNutt, 40 Cal. App. 2d Supp. 835, 105 P.2d 657 (App. Dep't, Super. Ct., Los Angeles 1940); People v. Smith, 36 Cal. App. 2d Supp. 748, 92 P.2d 1039 (App. Dep't, Super. Ct., Los Angeles 1939); People v. Steel, 35 Cal. App. 2d Supp. 748, 92 P.2d 815 (App. Dep't, Super. Ct., San Diego 1939).

[43] Petersen v. Petersen, 20 Cal. App. 2d 680, 67 P.2d 759 (1937).

[44] People v. Peet, 108 Cal. App. 775, 288 Pac. 44 (1930).

[45] People v. Nowell, 45 Cal. App. 2d Supp. 811, 114 P.2d 81 (App. Dep't, Super. Ct., Los Angeles 1941).

[46] *Id.* at 813, 114 P.2d at 82. *Accord,* Hastings v. Serleto, 61 Cal. App. 2d 672, 143 P.2d 956 (1943).

circumstances. It would perhaps be helpful to recognize that *any* act or omission can constitute reckless driving if the necessary mental elements of the offense can be established.[47]

Driving Under the Influence of Intoxicating Liquor

A special problem is presented by cases in which the defendant is found to be driving while under the influence of intoxicating liquor. This is made unlawful by two separate sections of the California Vehicle Code.[48]

Driving while under the influence of intoxicating liquor does not in itself establish that such driving was also reckless.[49] Because of the serious nature of such conduct courts will consider such driving as raising a rebuttable presumption of lack of ordinary care;[50] but this recognition is limited in its practical effect to civil suits for damages for injuries proximately caused by the defendant, since more than negligence is needed to establish wilful or wanton disregard of consequences.[51]

In several instances trial courts have attempted to find a defendant guilty of reckless driving when the information charged him with driving under the influence of intoxicating liquor. In one of the earliest cases, *People* v. *McGrath*,[52] the court informed the jury that reckless driving is a lesser included offense in the charge of driving while under the influence of intoxicating liquor, and that where a charge includes two or more degrees of crime it is the duty of the jury to return a verdict of guilty of the lesser offense if it entertains doubt as to the degree of the crime committed by the defendant.[53] The con-

[47] Wilful misconduct: Bechtold v. Bishop & Co., Inc., 16 Cal. 2d 285, 105 P.2d 984 (1940) (failure to stop at stop sign). Gibson v. Easley, 138 Cal. App. 303, 32 P.2d 983 (1934) and Browne v. Fernandez, 140 Cal. App. 689, 36 P.2d 122 (1934) (disregard of stop sign and excessive speed). Reckless driving: People v. Thompson, 41 Cal. App. 2d Supp. 965, 108 P.2d 105 (App. Dep't, Super. Ct., San Diego 1940) (weaving from traffic lanes). People v. Nowell, 45 Cal. App. 2d Supp. 811, 114 P.2d 81 (App. Dep't, Super. Ct., Los Angeles 1941) (speeding). *But see* Hall v. Mazzei, 14 Cal. App. 2d 48, 57 P.2d 948 (1936) and McLeod v. Dutton, 13 Cal. App. 2d 545, 57 P.2d 189 (1936) (excessive speed attained temporarily to pass another car not held wilful misconduct). In other jurisdictions under similar statutes: Maughs v. City of Charlottesville, 181 Va. 123, 23 S.E.2d 787 (1943) (driving without lights at night). Commonwealth v. Diehl, 35 Pa. D. & C. 503 (1939) (failure to give left turn signal).

[48] CAL. VEH. CODE §§ 23101, 23102.

[49] People v. Clenney, 165 Cal. Ap. 2d 241, 331 P.2d 696 (1958).

[50] Christensen v. Harmonson, 113 Cal. App. 2d 175, 247 P.2d 956 (1952).

[51] See note 21 *supra*.

[52] 94 Cal. App. 520, 271 Pac. 549 (1928).

[53] CAL. PEN. CODE § 1097: "When it appears that the defendant has committed a public offense, and there is reasonable ground of doubt in which of two or more degrees he is guilty, he can be convicted of the lowest of such degrees only." This section applies to lesser included

viction was reversed, the court holding that reckless driving is not a lesser included offense.

The California courts have employed two tests for determining whether reckless driving is a lesser included offense of driving while under the influence of intoxicating liquor. The *McGrath* case relied principally on the rule that all the elements of the lesser offense must be included in the statutory definition of the greater offense.[54] The statutory definition of misdemeanor drunk driving punishes any person who is under the influence of intoxicating liquor while driving a vehicle upon any highway.[55] The offense is complete when a person under the influence of intoxicating liquor drives his car. The determining factor in such a prosecution relates to the mental and physical condition of the driver, that is, his ability to operate his car.[56] The offense of reckless driving, however, refers to the manner in which the car is being driven. Not only do the two offenses embrace different factual components, but the determining mental element of reckless driving is irrelevant in the former offense.[57]

The second test is that a conviction or acquittal of one offense will bar a prosecution for the other if the two are in fact a part of each other.[58] Since the two offenses in question are based on different factual circumstances and differ in their necessary elements (one punishing driving while under the influence of intoxicating liquor, the other punishing driving in wilful or wanton disregard of the consequences), a defendant could be charged and convicted of both offenses if he had indulged in liquor and then driven his car in such a manner as to allow the necessary inference of wantonness or wilfulness.[59] Such wantonness or wilfulness must be inferred by the trier of fact from the manner of driving, however, and not from the fact that the defendant has indulged in intoxicating liquor.[60]

Until the present time the courts have upheld the principle of the *McGrath* case. Two recent cases, however, while affirming the principle,

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offenses as well as to specifically defined degrees of a single offense. People v. Dewberry, 51 Cal. 2d 548, 334 P.2d 852 (1959).

[54] People v. Kerrick, 144 Cal. 46, 77 Pac. 711 (1904); People v. Lewis, 186 Cal. App. 2d 585, 9 Cal. Rptr. 263 (1960).

[55] CAL. VEH. CODE § 23102.

[56] People v. McGrath, 94 Cal. App. 520, 271 Pac. 549 (1928).

[57] People v. Clenney, 165 Cal. App. 2d 241, 331 P.2d 696 (1958).

[58] Gomez v. Superior Court, 50 Cal. 2d 640, 328 P.2d 976 (1958); People v. McDaniels, 137 Cal. 192, 69 Pac. 1006 (1902); People v. Helbing, 61 Cal. 620 (1882).

[59] People v. McGrath, 94 Cal. App. 520, 271 Pac. 549 (1928).

[60] People v. Schumacher, 194 Cal. App. 2d 335, 14 Cal. Rptr. 924 (1961); People v. Clenney, 165 Cal. App. 2d 241, 331 P.2d 696 (1958).

seem to have indicated a possible way to reach the result of making reckless driving a lesser included offense of driving while under the influence of intoxicating liquor.

In *People* v. *Marshall*[61] the defendant was charged with statutory robbery[62] for "wilfully, unlawfully, feloniously and forcibly" taking an automobile. His conviction of auto theft,[63] as a necessarily included offense, was affirmed by the appellate court. Even though the offense of auto theft, as defined in the Vehicle Code, is not a lesser included offense of the crime of robbery, as defined in the Penal Code, is not a lesser included offense of the crime of robbery, as defined in the Penal Code, the wording of the information was held sufficient to establish the necessary elements of auto theft. While supporting previous rules used in determining whether an offense is included, the *Marshall* case established a new measuring device: a lesser offense is necessarily included if it is within the offense specifically charged in the accusatory pleading, even though its elements are not necessarily in the statutory definition of the greater crime.[64]

Dictum in *People* v. *Clenney*[65] intimated that if an accusatory pleading charged driving while under the influence of intoxicating liquor in such words as also to include the elements of reckless driving, a conviction of reckless driving would undoubtedly be sustained by applying the rule of the *Marshall* case; *i.e.*, determining whether the elements of reckless driving were charged in the complaint—not whether they were included in the statutory definition of driving while intoxicated.

In *People* v. *Schumacher*,[66] the prosecution attempted to turn this dictum into law. Schumacher was charged with wilfully, unlawfully and feloniously driving an automobile while under the influence of intoxicating liquor. His conviction for reckless driving, as a lesser included offense, was reversed by the appellate court on the ground that the use of the word "wilfully" in the information was not sufficient

[61] 48 Cal. 2d 394, 309 P.2d 456 (1957).

[62] CAL. PEN. CODE § 211.

[63] CAL. VEH. CODE § 503, now § 10851.

[64] 48 Cal. 2d at 405, 309 P.2d at 462-3: "Since the decisions as to included offenses, so far as they relate to choice of a standard to measure what offenses are 'necessarily included' within the meaning of section 1159 of the Penal Code, have not expressly considered or decided the question of selection as between the language of the accusatory pleading and the statutory definition, we base our choice of the specific language of the accusatory pleading upon considerations of fairness to both parties." *Accord*, People v. Williams, 189 Cal. App. 2d 254, 11 Cal. Rptr. 142 (1961); People v. Marquis, 153 Cal. App. 2d 553, 315 P.2d 57 (1957). The effect of the Marshall case on the California law of included offenses is the subject of a note in 45 CALIF. L. REV. 534 (1957).

[65] 165 Cal. App. 2d 241, 331 P.2d 696 (1958).

[66] 194 Cal. App. 2d 335, 14 Cal. Rptr. 924 (1961).

to establish the element of "wilful disregard" needed for reckless driving. The decision is limited to the point that the word as used in the pleading was insufficient because it referred to the intentional doing of the acts by the defendant, whereas "wilful" in the definition of reckless driving relates to the intentional disregard for safety.

This result leaves open the question whether an information charging driving while under the influence of intoxicating liquor can be sufficient to sustain a conviction for reckless driving, *if additional words in the pleading sufficiently allege wanton or wilful disregard* for the safety of persons or property. The determining factor will be how broadly courts wish to apply the rule of the *Marshall* case. Even if this application is to be limited by regarding as surplusage those elements in the accusatory pleading which are not considered a proper part of the offense charged,[67] the language of the *Clenney* and *Schumacher* cases strongly supports the assumption that a conviction for reckless driving as an included offense would be sustained.

Conclusion

Legislative amendment and judicial interpretation have sharply limited the applicability of the reckless driving statute. By successive legislative changes the words suggesting negligence as an element of the offense were deleted. The application of judicial interpretations of "wilful misconduct" to the reckless driving statute may also have affected the statute's usefulness. The guest statute sought to limit civil liability. It incorporates a negative philosophy and its judicial application has coincided with its legislative purpose. The reckless driving statute is penal in nature. Its purpose is to punish wrongdoers. The application of interpretations of "wilful misconduct" may have done more harm than good; for even though the words employed in defining each concept may be outwardly the same, the connotative meanings may not be synonymous. Whether, in the absence of this interchange of words from two different areas, gross negligence might have been found sufficient to constitute reckless driving is a question not completely irrelevant. That prosecutions for violation of the statute seem to be rare is signficant, especially in view of the ever-increasing number of automobiles on the highways, the operation of which annually increases the destruction of property and human life.

The majority of American jurisdictions have enacted reckless driving statutes to punish conduct exceeding the bounds of negligence or

[67] FRICKE, CALIFORNIA CRIMINAL LAW 41-42 (8th ed. 1961).

gross negligence.[68] But it is open to question whether these statutes fulfill the function of deterring reckless conduct on the highway. Perhaps a stronger deterrent effect would result from the enactment of statutes punishing negligent, or grossly negligent, conduct as reckless driving. Such statutes would certainly ease the burden of proof and result in more prosecutions. The Wisconsin statute[69] punishes as reckless driving the operation of a vehicle with a high degree of negligence, such negligence exceeding ordinary, but falling short of gross, negligence.[70] Violations of this statute resulted in seventy-four convictions out of eighty-one warrants issued in one year. And under a Milwaukee city ordinance similarly defining the same offense, six hundred sixty-seven prosecutions were brought in one year.[71]

Judicial interpretation of the present statute is not likely to be modified. But until a change occurs a useful weapon in the campaign against careless driving is not being utilized to its full potential. Reluctance to punish negligent conduct as reckless driving is based on the traditional aversion to imposing criminal sanctions for conduct not involving criminal intent. An analogy may be helpful in demonstrating the weakness of this argument. The Department of Motor Vehicles has authority to suspend or revoke *by administrative procedures* the licenses of drivers who have violated certain sections of the Vehicle Code.[72] Such suspension or revocation occurs after the imposition of criminal punishment. Yet the application of both criminal and administrative sanctions for the same conduct is justified as furthering the maintenance of safe highways for public use and does not inflict "double penalties."[73]

Should that public interest in safety on the highways not also be sufficient to support the punishment of negligent or, at least, grossly negligent conduct? Legislative action to make the reckless driving statute an effective deterrent to conduct which presently incurs small pecuniary sanctions, or which goes unpunished, is the only alternative.

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[68] See note 41 *supra.*

[69] WISC. VEH. CODE § 346.62. Other statutes punishing negligent conduct as reckless driving: CODE OF ALA., Tit. 36, § 3; White v. State, 37 Ala. App. 424, 69 So. 2d 874 (1953); Kirk v. State, 35 Ala. App. 405, 47 So. 2d 283 (1950); N. D. VEH. CODE § 39-08-03; State v. Sullivan, 58 N.D. 732, 227 N.W. 230 (1929).

[70] O'Connell, *Reckless Driving—Prosecution and Defense*, 1958 WIS. L. REV. 210.

[71] *Id.* at 217.

[72] CAL. VEH. CODE §§ 13200-13202, 13350, 13352, 13354-13356, 13358-13361, 13363.

[73] Beamon v. Department of Motor Vehicles, 180 Cal. App. 2d 200, 4 Cal. Rptr. 396 (1960); Johnson v. Department of Motor Vehicles, 177 Cal. App. 2d 440, 2 Cal. Rptr. 235 (1960).