

**CRIMINAL LAW, FALL, 2009 - HANDOUT # 1**

**§ 702-200 Requirement of a Voluntary Act or voluntary omission.**

(1) In any prosecution, it is a defense that the conduct alleged does not include a voluntary act or the voluntary omission to perform an act of which the defendant is physically capable ...

**§ 702-201 “Voluntary Act” defined.**

“Voluntary act” means a bodily movement performed consciously or habitually as the result of the effort or determination of the defendant.

**§ 702-202 Voluntary act includes possession.**

Possession is a voluntary act if the defendant knowingly procured or received the thing possessed or if the defendant was aware of his control of it for a sufficient period to have been able to terminate his possession.

**§ 702-203 Penal Liability Based on an Omission**

Penal liability may not be based on an omission unaccompanied by action unless:

- (1) The omission is expressly made a sufficient basis for penal liability by the law defining the offense; or
- (2) A duty to perform the omitted act is otherwise imposed by law.

**Hawai`i Case Law:** The common law consists of fundamental principles and reason, and is a system of legal logic rather than a fixed and inflexible set of rules. *Welsh v. Campbell*, 41 Haw. 106 (1955).

Orderly growth. – The genius of the common law is its capacity for orderly growth. *Lum v. Fullaway*, 42 Haw. 500 (1958).

The common law does not consist of absolute, fixed and inflexible rules, but rather of broad and comprehensive principles based on justice, reason, and common sense. It is of judicial origin and promulgation. Its principles have been determined by the social needs of the community and have changed with changes in such needs. *Fung Dai Kim Ah Leong v. Lau Ah Leong*, 27 F.2d 582 (9th Cir.) *Cert. Denied* 278 U.S. 636 (1928).

Exception to English common law. – While the common law of England is established and generally recognized in the State of Hawai`i, an exception is made in favor of Hawaiian judicial precedent or usage fixed or established before the enactment of this section. *De Freitas v. Coke*, 46 Haw. 425, 380 P.2d 762 (1963).

This section codifies Hawaiian usage as an exception to the English common law of the State of Hawai`i. *Pai ‘Ohana v. United States*, 875 F. Supp. 680 (D. Haw. 1995).

Continued without harm. – Where practices associated with the ancient Hawaiian way of life have, without harm to anyone, been continued, reference to Hawaiian usage in this section insures their continuance for so long as no actual harm is done thereby. *Kalipi v. Hawaiian Trust Co.*, 66 Haw. 1, 656 P.2d 745 (1982).

Date Hawaiian usage established. – HRS § 1-1's predecessor fixed November 25, 1892 as the date Hawaiian usage was established in practice. *Public Access Shoreline Hawaii ex rel. Rothstein v. Hawaii County Planning Comm'n ex rel. Fujimoto*, 79 Haw. 425, 903 P.2d 1246 (1995), cert. denied, \_\_\_ U.S. \_\_\_, 116 S. Ct. 1559 (1996).

**HAWAII REVISED STATUTES**

**§ 1-1 Common law of the State; exceptions.** The common law of England, as ascertained by English and American decisions, is declared to be the common law of the State of Hawai`i in all cases, except as otherwise expressly provided . . . ; provided, that no person shall be subject to criminal proceedings except as provided by the written laws of the United States or of the State.

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63 A.L.R.2d 970

The **PEOPLE** of the State of New York, Appellant-Respondent,

v.

Emil **DECINA**, Respondent-Appellant.

Court of Appeals of New York.

Nov. 29, 1956.

Prosecution for criminal negligence in operating an automobile with knowledge that defendant was subject to epileptic attacks. The Supreme Court, Trial Term, Erie County, Lee L. Ottaway, J., overruled demurrer to indictment and entered judgment of conviction and defendant appealed. The Supreme Court, Appellate Division, Fourth Department, McCurn, P. J., 1 A.D.2d 592, held that the demurrer was properly overruled but reversed the judgment and granted new trial on ground that certain evidence should not have been admitted. The People appealed and the defendant cross-appealed. The Court of Appeals, Froessel, J., held that indictment was sufficient and that testimony by county hospital house physician as to statements made to him by defendant after he was arrested and taken to hospital by police was inadmissible because privileged as a transaction between physician and patient.

Order of Appellate Division affirmed.

Desmond, Fuld and Van Voorhis, JJ., dissented in part.

John F. Dwyer, Dist. Atty., Buffalo (Leonard Finkelstein, Asst. Dist. Atty. of Buffalo, of counsel), for appellant- respondent.

Charles J. McDonough, Buffalo, for respondent-appellant.

FROESSEL, Judge.

At about 3:30 p. m. on March 14, 1955, a bright, sunny day, defendant was driving, alone in his car, in a northerly direction on Delaware Avenue in the city of Buffalo. The portion of Delaware Avenue here involved is 60 feet wide. At a point south of an overhead viaduct of the Erie Railroad, defendant's car swerved to the left, across the center line in the street, so that it was completely in the south lane, traveling 35 to 40 miles per hour. It then veered sharply to the right, crossing Delaware Avenue and mounting the easterly curb at a point beneath the viaduct and continued thereafter at a speed estimated to have been about 50 or 60 miles per hour or more. During this latter swerve, a pedestrian testified that he saw defendant's hand above his head; another witness said he saw defendant's left arm bent over the wheel, and his right hand extended towards the right door.

A group of six schoolgirls were walking north on the easterly sidewalk of Delaware Avenue, two in front and four slightly in the rear, when defendant's car struck them from behind. One of the girls escaped injury by jumping against the wall of the viaduct. The bodies of the children struck

were propelled northward onto the street and the lawn in front of a coal company, located to the north of the Erie viaduct on Delaware Avenue. Three of the children, 6 to 12 years old, were found dead on arrival by the medical examiner, and a fourth child, 7 years old, died in a hospital two days later as a result of injuries sustained in the accident.

After striking the children, defendant's car continued on the easterly sidewalk, and then swerved back onto Delaware Avenue once more. It continued in a northerly direction, passing under a second viaduct before it again veered to the right and remounted the easterly curb, striking and breaking a metal lamppost. With its horn blowing steadily apparently because defendant was 'stopped over' the steering wheel the car proceeded on the sidewalk until it finally crashed through a 7 ¼ inch brick wall of a grocery store, injuring at least one customer and causing considerable property damage.

When the car came to a halt in the store, with its horn still blowing, several fires had been ignited. Defendant was stooped over in the car and was 'bobbing a little'. To one witness he appeared dazed, to another unconscious, lying back with his hands off the wheel. Various people present shouted to defendant to turn off the ignition of his car, and 'within a matter of seconds the horn stopped blowing and the car did shut off'.

Defendant was pulled out of the car by a number of bystanders and laid down on the sidewalk. To a policeman who came on the scene shortly he appeared 'injured, dazed'; another witness said that 'he looked as though he was knocked out, and his arm seemed to be bleeding'. An injured customer in the store, after receiving first aid, pressed defendant for an explanation of the accident and he told her: 'I blacked out from the bridge'.

When the police arrived, defendant attempted to rise, staggered and appeared dazed and unsteady. When informed that he was under arrest, and would have to accompany the police to the station house, he resisted and, when he tried to get away, was handcuffed. The foregoing evidence was adduced by the People, and is virtually undisputed defendant did not take the stand nor did he produce any witnesses.

From the police station defendant was taken to the E. J. Meyer Memorial Hospital, a county institution, arriving at 5:30 P.M. The two policemen who brought defendant to the hospital instructed a police guard stationed there to guard defendant, and to allow no one to enter his room. A pink slip was brought to the hospital along with defendant, which read: 'Buffalo Police Department, Inter-Departmental Correspondence.

To: Superintendent of Meyer Memorial Hospital,

From: Raymond, J. Smith, Captain, Precinct 17.

Subject, Re: One Emil A. Decina, 87 Sidney, CD 553284, date 3-14- 55.

Sir: We are forwarding one Emil A. Decina, age 33, of 87 Sidney Street, to your hospital for examination on the recommendation of District Attorney John Dwyer and Commissioner Joseph A. De Cillis. Mr. Decina was involved in a fatal accident at 2635 Delaware Avenue at 3:40 P.M. this date. There were three fatalities, and possibly four. A charge will be placed against Mr. Decina after the investigation has been completed.'

On the evening of that day, after an intern had visited and treated defendant and given orders for therapy, Dr. Wechter, a resident physician in the hospital and a member of its staff, came to his room. The guard remained, according to his own testimony, in the doorway of the room according to Dr. Wechter, outside, 6 or 7 feet away. He observed both Dr. Wechter and defendant 'on the 'bed',

and he stated that he heard the entire conversation between them, although he did not testify as to its content.

Before Dr. Wechter saw defendant, shortly after the latter's admission on the floor, he had read the hospital admission record, and had either seen or had committed to him the contents of the 'pink slip'. . . . In the course of ... cross-examination, the doctor testified as follows:

That he saw defendant in his professional capacity as a doctor but that he did not see him for purposes of treatment. However, . . . he stated that the information he obtained was pursuant to his duties as a physician; that the purpose of his examination was to diagnose defendant's condition; that he questioned the defendant for the purpose of treatment, among other things; that in the hospital they treat any patient that comes in.

He further testified at this trial that ordinarily the resident on the floor is in charge of the floor, and defendant was treated by more than one doctor; that he took the medical history. . . . He . . . saw defendant as part of his routine duties at the hospital; that he would say that defendant 'was a patient'; that he was not retained as an expert by the district attorney or the Police Department, and was paid nothing to examine defendant; that his examination was solely in the course of his duties as a resident physician on the staff of the hospital, and that, whether or not he had a slip from the police, so long as that man was on his floor as a patient, he would have examined him. . . .

The . . . [doctor was] permitted to state the conversation with defendant over objection and exception. He asked defendant how he felt and what had happened. Defendant, who still felt a little dizzy or blurry, said that as he was driving he noticed a jerking of his right hand, which warned him that he might develop a convulsion, and that as he tried to steer the car over to the curb he felt himself becoming unconscious, and he thought he had a convulsion. He was aware that children were in front of his car, but did not know whether he had struck them.

Defendant then proceeded to relate to Dr. Wechter his past medical history, namely, that at the age of 7 he was struck by an auto and suffered a marked loss of hearing. In 1946 he was treated in this same hospital for an illness during which he had some convulsions. Several burr holes were made in his skull and a brain abscess was drained. Following this operation defendant had no convulsions from 1946 through 1950. In 1950 he had four convulsions, caused by scar tissue on the brain. From 1950 to 1954 he experienced about 10 or 20 seizures a year, in which his right hand would jump although he remained fully conscious. In 1954, he had 4 or 5 generalized seizures with loss of consciousness, the last being in September, 1954, a few months before the accident. Thereafter he had more hospitalization, a spinal tap, consultation with a neurologist, and took medication daily to help prevent seizures.

On the basis of this medical history, Dr. Wechter made a diagnosis of Jacksonian epilepsy, and was of the opinion that defendant had a seizure at the time of the accident. Other members of the hospital staff performed blood tests and took an electroencephalogram during defendant's three-day stay there. The testimony of Dr. Wechter is the only testimony before the trial court showing that defendant had epilepsy, suffered an attack at the time of the accident, and had knowledge of his susceptibility to such attacks.

Defendant was indicted and charged with violating § 1053-a of the Penal Law, Consol. Laws, c. 40. Following his conviction, after a demurrer to the indictment was overruled, the Appellate Division, while holding that the demurrer was properly overruled, reversed on the law, the facts having been 'examined' and found 'sufficient'. It granted a new trial upon the ground that the 'transactions between the defendant and Dr. Wechter were between physician and patient for the

purpose of treatment and that treatment was accomplished', and that evidence thereof should not have been admitted. From its determination both parties have appealed.

We turn first to the subject of defendant's cross appeal, namely, that his demurrer should have been sustained, since the indictment here does not charge a crime. The indictment states essentially that defendant, knowing 'that he was subject to epileptic attacks or other disorder rendering him likely to lose consciousness for a considerable period of time', was culpably negligent 'in that he consciously undertook to and did operate his Buick sedan on a public highway' (emphasis supplied) and 'while so doing' suffered such an attack which caused said automobile 'to travel at a fast and reckless rate of speed, jumping the curb and driving over the sidewalk' causing the death of 4 persons.

In our opinion, this clearly states a violation of § 1053-a of the Penal Law. The statute does not require that a defendant must deliberately intend to kill a human being, for that would be murder. Nor does the statute require that he knowingly and consciously follow the precise path that leads to death and destruction. It is sufficient, we have said, when his conduct manifests a 'disregard of the consequences which may ensue from the act, and indifference to the rights of others. No clearer definition, applicable to the hundreds of varying circumstances that may arise, can be given. Under a given state of facts, whether negligence is culpable is a question of judgment.' *People v. Angelo*, 246 N.Y. 451, 457, 159 N.E. 394, 396.

Assuming the truth of the indictment, as we must on a demurrer, this defendant knew he was subject to epileptic attacks and seizures that might strike at any time. He also knew that a moving motor vehicle uncontrolled on public highway is a highly dangerous instrumentality capable of unrestrained destruction. With this knowledge, and without anyone accompanying him, he deliberately took a chance by making a conscious choice of a course of action, in disregard of the consequences which he knew might follow from his conscious act, and which in this case did ensue. How can we say as a matter of law that this did not amount to culpable negligence within the meaning of § 1053a?

To hold otherwise would be to say that a man may freely indulge himself in liquor in the same hope that it will not affect his driving, and if it later develops that ensuing intoxication causes dangerous and reckless driving resulting in death, his unconsciousness or involuntariness at that time would relieve him from prosecution under the statute. His awareness of a condition which he knows may produce such consequences as here, and his disregard of the consequences, renders him liable for culpable negligence, as the courts below have properly held. *People v. Eckert*, 2 N.Y.2d 126, 157 N.Y.S.2d 551; ... To have a sudden sleeping spell, an unexpected heart or other disabling attack, without any prior knowledge or warning thereof, is an altogether different situation, see *Jenson v. Fletcher*, 101 N.Y.S.2d 75, aff'd 303 N.Y. 639, 101 N.E.2d 759, and there is simply no basis for comparing such cases with the flagrant disregard manifested here.

It is suggested in the dissenting opinion that a new approach to licensing would prevent such disastrous consequences upon our public highways. But would it and how and when? The mere possession of a driver's license is no defense to a prosecution under §1053-a; nor does it assure continued ability to drive during the period of the license. It may be noted in passing, and not without some significance, that defendant strenuously and successfully objected to the district attorney's offer of his applications for such license in evidence, upon the ground that whether or not he was licensed has nothing to do with the case. Under the view taken by the dissenters, this defendant would be immune from prosecution under this statute even if he were unlicensed. Section 1053-a places a

personal responsibility on each driver of a vehicle whether licensed or not and not upon a licensing agency.

Accordingly, the Appellate Division properly sustained the lower court's order overruling the demurrer, as well as its denial of the motion in arrest of judgment on the same ground. The appeal by the People (hereinafter called appellant) challenges the determination of the Appellate Division that the testimony of Dr. Wechter was improperly admitted in contravention of §352 of the Civil Practice Act, which states that a physician 'shall not be allowed to disclose any information which he acquired in attending a patient in a professional capacity, and which was necessary to enable him to act in that capacity'. . . . [evidentiary issue discussion omitted: The court held that the doctor's testimony was improperly admitted because it came under doctor-patient privilege; However, it rejected the argument that the hospital records had been improperly used as the basis for the indictment.]

Accordingly, the order of the Appellate Division should be affirmed.

**DESMOND, Judge (concurring in part and dissenting in part).**

I agree that the judgment of conviction cannot stand but I think the indictment should be dismissed because it alleges no crime. Defendant's demurrer should have been sustained. The indictment charges that defendant knowing that 'he was subject to epileptic attacks or other disorder rendering him likely to lose consciousness' suffered 'an attack and loss of consciousness which caused the said automobile operated by the said defendant to travel at a fast and reckless rate of speed' and to jump a curb and run onto the sidewalk 'thereby striking and causing the death' of 4 children. Horrible as this occurrence was and whatever necessity it may show for new licensing and driving laws, nevertheless this indictment charges no crime known to the New York statutes. Our duty is to dismiss it. Section 1053-a of the Penal Law describes the crime of 'criminal negligence in the operation of a vehicle resulting in death'. Declared to be guilty of that crime is 'A person who operates or drives any vehicle of any kind in a reckless or culpably negligent manner, whereby a human being is killed'. The essentials of the crime are, therefore, first, vehicle operation in a culpably negligent manner, and, second, the resulting death of a person. This indictment asserts that defendant violated §1053-a, but it then proceeds in the language quoted in the next-above paragraph of this opinion to describe the way in which defendant is supposed to have offended against that statute. That descriptive matter (an inseparable and controlling ingredient of the indictment, Code Crim. Proc. ss 275, 276; *People v. Dumar*, 106 N.Y. 502, 13 N.E. 325) shows that defendant did not violate § 1053-a. No operation of an automobile in a reckless manner is charged against defendant. The excessive speed of the car and its jumping the curb were 'caused', says the indictment itself, by defendant's prior 'attack and loss of consciousness'. Therefore, what defendant is accused of is not reckless or culpably negligent driving, which necessarily connotes and involves consciousness and volition. The fatal assault by this car was after and because of defendant's failure of consciousness. To say that one drove a car in a reckless manner in that his unconscious condition caused the car to travel recklessly is to make two mutually contradictory assertions.

One cannot be 'reckless' while unconscious. One cannot while unconscious 'operate' a car in a culpably negligent manner or in any other 'manner'. The statute makes criminal a particular kind of knowing, voluntary, immediate operation. It does not touch at all the involuntary presence of an unconscious person at the wheel of an uncontrolled vehicle. To negative the possibility of applying §1053-a to these alleged facts we do not even have to resort to the rule that all criminal statutes are closely and strictly construed in favor of the citizen and that no act or omission is criminal unless specifically and in terms so labeled by a clearly worded statute, *People v. Benc*, 288 N.Y. 318, 323,

43 N.E.2d 61, 63, and cases cited. Tested by its history §1053-a has the same meaning: penalization of conscious operation of a vehicle in a culpably negligent manner. It is significant that until this case (and the *Eckert* case, 2 N.Y.S.2d 126, 157 N.Y.S.2d 551, handed down herewith) no attempt was ever made to penalize, either under §1053-a or as manslaughter, the wrong done by one whose foreseeable blackout while driving had consequences fatal to another person.

The purpose of and occasion for the enactment of § 1053-a is well known. . . . It was passed to give a new label to, and to fix a lesser punishment for, the culpably negligent automobile driving which had formerly been prosecuted under § 1052 of the Penal Law defining manslaughter in the second degree. It had been found difficult to get manslaughter convictions against death-dealing motorists. But neither of the two statutes has ever been thought until now to make it a crime to drive a car when one is subject to attacks or seizures such as are incident to certain forms and levels of epilepsy and other diseases and conditions. Now let us test by its consequences this new construction of §1053- a. Numerous are the diseases and other conditions of a human being which make it possible or even likely that the afflicted person will lose control of his automobile. Epilepsy, coronary involvements, circulatory diseases, nephritis, uremic poisoning, diabetes, Meniere's syndrome, a tendency to fits of sneezing, locking of the knee, muscular contractions any of these common conditions may cause loss of control of a vehicle for a period long enough to cause a fatal accident. An automobile traveling at only 30 miles an hour goes 44 feet in a second. Just what is the court holding here? No less than this: that a driver whose brief blackout lets his car run amuck and kill another has killed that other by reckless driving. But any such 'recklessness' consists necessarily not of the erratic behavior of the automobile while its driver is unconscious, but of his driving at all when he knew he was subject to such attacks. Thus, it must be that such a blackout-prone driver is guilty of reckless driving, Vehicle and Traffic Law, Consol. Laws, c. 71, s 58, whenever and as soon as he steps into the driver's seat of a vehicle. Every time he drives, accident or no accident, he is subject to criminal prosecution for reckless driving or to revocation of his operator's license, Vehicle and Traffic Law, s 71, subd. 3. And how many of this State's 5,000,000 licensed operators are subject to such penalties for merely driving the cars they are licensed to drive? No one knows how many citizens or how many or what kind of physical conditions will be gathered in under this practically limitless coverage of §1053-a of the Penal Law and §58 and subdivision 3 of §71 of the Vehicle and Traffic Law. It is no answer that prosecutors and juries will be reasonable or compassionate. A criminal statute whose reach is so unpredictable violates constitutional rights, as we shall now show.

When §1053-a was new it was assailed as unconstitutional on the ground that the language 'operates or drives any vehicle of any kind in a reckless or culpably negligent manner' was too indefinite since a driver could only guess as to what acts or omissions were meant. Constitutionality was upheld in *People v. Gardner*, 255 App. Div. 683, 8 N.Y.S.2d 917. The then Justice Lewis, later of this court, wrote in *People v. Gardner* that the statutory language was sufficiently explicit since 'reckless driving' and 'culpable negligence' had been judicially defined in manslaughter cases as meaning the operation of an automobile in such a way as to show a disregard of the consequences, see *People v. Angelo*, 246 N.Y. 451, 159 N.E. 394. The manner in which a car is driven may be investigated by a jury, grand or trial, to see whether the manner was such as to show a reckless disregard of consequences. But giving §1053-a the new meaning assigned to it permits punishment of one who did not drive in any forbidden manner but should not have driven at all, according to the present theory. No motorist suffering from any serious malady or infirmity can with impunity drive any automobile at any time or place, since no one can know what physical conditions make it 'reckless' or 'culpably negligent' to drive an automobile. Such a construction of a criminal statute

offends against due process and against justice and fairness. The courts are bound to reject such conclusions when, as here, it is clearly possible to ascribe a different but reasonable meaning, *People v. Ryan*, 8 N.E.2d 313, 315; *Schwarz v. General Aniline & Film Corp.*, 113 N.E.2d 533, 538, and cases cited.

A whole new approach may be necessary to the problem of issuing or refusing drivers' licenses to epileptics and persons similarly afflicted (SEE BARROW AND FABING ON EPILEPSY AND THE LAW, ch. IV; and RESTRICTED DRIVERS' LICENSES TO CONTROLLED EPILEPTICS, and see 2 U.C.L.A. L.REV., p. 500 et seq.). But the absence of adequate licensing controls cannot in law or in justice be supplied by criminal prosecutions of drivers who have violated neither the language nor the intentment of any criminal law.

Entirely without pertinence here is any consideration of driving while intoxicated or while sleepy, since those are conditions presently known to the driver, not mere future possibilities or probabilities.

The demurrer should be sustained and the indictment dismissed.

**CONWAY, Ch. J., DYE and BURKE, JJ.**, concur with **FROESSEL, J., DESMOND J.**, concurs in part and dissents in part in an opinion in which **FULD and VAN VOORHIS, JJ.**, concur.

**Order affirmed.**