



---

Fall 9-1-1963

## Operating a Motor Vehicle While Under the Influence

Follow this and additional works at: <https://scholarlycommons.law.wlu.edu/wlulr>



Part of the [Criminal Law Commons](#)

---

### Recommended Citation

*Operating a Motor Vehicle While Under the Influence*, 20 Wash. & Lee L. Rev. 380 (1963).

Available at: <https://scholarlycommons.law.wlu.edu/wlulr/vol20/iss2/22>

This Comment is brought to you for free and open access by the Washington and Lee Law Review at Washington and Lee University School of Law Scholarly Commons. It has been accepted for inclusion in Washington and Lee Law Review by an authorized editor of Washington and Lee University School of Law Scholarly Commons. For more information, please contact [christensena@wlu.edu](mailto:christensena@wlu.edu).

if not, immunity from service would be granted. It is less harsh to subject a defendant to service in a civil action growing out of the same facts as the criminal action than it is to subject him to service in a civil action wholly unrelated to the one to which he is involuntarily responding. Refusing to allow service by the plaintiff alleging damages occasioned by the same wrong would produce the anomalous situation of having the state seeking to make the defendant answer for alleged injury to one of its citizens, but barring that citizen from seeking relief on his own behalf. On the other hand, disallowing service by a plaintiff seeking damages occasioned by defendants' acts which were unrelated to the alleged criminal act protects the defendant from service without producing this anomalous situation.

The above rule would apply to the facts of the *Greene* case as follows: The defendant would not be immune from service because his appearance was not voluntary, but compulsory, and the civil action and criminal action grew out of the same occurrence. Thus the result would be the same. But the rule proposed would have the virtue of giving some consideration to the position of the involuntarily responding defendant; it would not unnecessarily or unreasonably impair the plaintiff's right to sue the defendant wherever he can be found. Furthermore, continuing to provide immunity where the appearance is voluntary protects the courts and their jurisdiction and facilitates the disposition of cases.

RICHARD V. MATTINGLY, JR.

### OPERATING A MOTOR VEHICLE WHILE UNDER THE INFLUENCE

The question of what minimum acts constitute "operating" a motor vehicle arises in a number of situations. One of the most frequent situations involves the "operating" of a motor vehicle while under the influence of intoxicating beverages. The decisions of the courts in this situation are not uniform, nor are they consistent with definitions of the term as applied in connection with other problems

---

was apprehended within the District, and charges were placed against him before he was released on bond.

It may be added that the discussion in note 13 *supra* is equally pertinent with regard to the provisions of § 25 of the Uniform Criminal Extradition Act. If personal jurisdiction may be obtained over an absent defendant, the provision immunizing him from service of civil process in the state to which he is extradited becomes meaningless.

such as licensing acts or insurance claims. For this reason it is important to consider both the jurisdiction using the definition and the purpose for which it is used. Generally, it may be said that early decisions indicated that some motion of the vehicle was a necessary element of "operating" the vehicle. Later decisions are rejecting this idea.

The current trend towards reducing, rather than enlarging, the minimal requirements to constitute "operating" a vehicle was recently demonstrated in the Georgia decision of *Flournoy v. State*.<sup>1</sup> The police discovered the defendant sitting under the steering wheel of his car, which was parked on the wrong side of the road. The engine was running, but the car never moved from its parked position. The trial court held that the defendant was "operating" his motor vehicle while under the influence of intoxicating liquor, even in the absence of any motion of the vehicle. The Court of Appeals upheld the conviction. There being no Georgia decisions directly upon this point, the court found from a consideration of decisions from other states that motion of the vehicle is not an essential element of "operating" an automobile. Instead, acts which worked the machinery of the vehicle were sufficient.

State statutes generally prohibit both "operating" and "driving" while under the influence of intoxicating liquors, with each of these words defining an offense. No peculiar problem is involved where the driver has been apprehended after having actually "driven" his car for some substantial distance.

The question of whether a driver is "operating" as distinguished from "driving" a vehicle arises in three distinct situations: (1) there has been some movement of the vehicle; (2) there has been no movement but some working of the mechanism of the vehicle; and (3) the vehicle has been abandoned by the driver.

Where there has been some motion, but perhaps not a "driving" of the vehicle, the courts have had little difficulty in finding there has been an "operating" of the vehicle.<sup>2</sup> The motion occurs generally where the car has been started and moved only a few feet before the driver is stopped and arrested.<sup>3</sup> Motion may, however, have been very slight, as where the car rolled a short distance without the motor running.<sup>4</sup> It is relatively easy to find that the defendant was "op-

---

<sup>1</sup>106 Ga. App. 756, 128 S.E.2d 528 (1962).

<sup>2</sup>*Austin v. State*, 47 Ga. App. 191, 170 S.E. 86 (1933); *Echols v. State*, 104 Ga. App. 695, 122 S.E.2d 473 (1961); *State v. Roberts*, 139 Me. 273, 29 A.2d 457 (1942).

<sup>3</sup>*Austin v. State*, 47 Ga. App. 191, 170 S.E. 86 (1933).

<sup>4</sup>The act of shifting the automobile's gears caused it to roll forward and

erating" his vehicle in these cases because the operator has usually intentionally caused the car to be set in motion. It is not necessary that the car have moved under its own power, as drivers of vehicles being towed<sup>5</sup> and pushed<sup>6</sup> were held to be "operating" the vehicles.

Some differences of interpretation of what constitutes "operating" in this first situation arise as a result of the difference between the offences which the operator may commit. For example, courts are apparently less likely to find that one has been "operating" his motor vehicle where the offense charged is "operating" without a driver's license<sup>7</sup> or motor vehicle registration,<sup>8</sup> than where the offense charged is that of "operating" while under the influence of alcohol. This seeming double standard becomes more understandable when one considers the greater likelihood for injury resulting from "operating" when the driver cannot control his vehicle because of his intoxicated condition. For reasons such as the above it is important to make the distinction between the types of criminal "operating" with which a defendant is charged when any attempt is made to define the term.

The problem of defining this ambiguous term, "operating," increases in complexity in the second situation where there has been no motion at all by the vehicle, as in the *Flournoy* case. When the courts, in these cases, find that there has been an "operating" of the vehicle, it has usually been the result of the determination that one who is charged with being the operator has, by some personal act, worked the machinery of the vehicle.<sup>9</sup> Courts which find "operating" in the case of a motionless vehicle, often find that the issue of a possibility of slight motion of the vehicle may not be important.<sup>10</sup> The element of "operating" is satisfied when the operator does such acts as may alone or in a sequence of a mechanical or electrical nature, set the motor of the vehicle in motion.<sup>11</sup> The case is only strengthened

strike another vehicle. Although there was motion of the vehicle, the court found the act of shifting the gears to be the prime element of "operating" the vehicle. *Commonwealth v. Clarke*, 254 Mass. 566, 150 N.E. 829 (1926).

<sup>5</sup>*State v. Tacey*, 102 Vt. 439, 150 Atl. 68 (1930).

<sup>6</sup>*Richardson v. District of Columbia*, 134 A.2d 492 (D.C. Munic Ct. 1957).

<sup>7</sup>*Dewhirst v. Connecticut Co.*, 96 Conn. 389, 114 Atl. 100 (1921); *Ricciardi v. McMahon*, 163 Misc. 659, 299 N.Y.S. 440 (Albany City Ct. 1937); *Wolcott v. Renault Selling Branch*, 175 App. Div. 858, 162 N.Y.S. 496 (1916).

<sup>8</sup>*Norcross v. B. L. Roberts Co.*, 239 Mass. 596, 132 N.E. 399 (1921).

<sup>9</sup>*Flynn v. Kramer*, 271 Mich. 500, 261 N.W. 77 (1935); *Brown v. Cleveland Tractor Co.*, 265 Mich. 475, 251 N.W. 557 (1933).

<sup>10</sup>*Commonwealth v. Uski*, 263 Mass. 22, 160 N.E. 305 (1928).

<sup>11</sup>The act of turning the ignition key and pushing starter to turn on a heater caused the car to jump forward across the sidewalk and damage a theatre entrance. The passenger who did this act was held to be "operating" the motor vehicle.

by the slight motion of the vehicle.<sup>12</sup> Neither is it important that the attempted motion may have been prevented by some outside force, such as a curb<sup>13</sup> or a ditch.<sup>14</sup> The personal act which constitutes "operating" in this minimal sense may be just stepping on the starter<sup>15</sup> or turning the ignition key.<sup>16</sup> Not all courts are in agreement with this conception of the word "operating" and apparently feel that the intent to move forms an essential element to a finding that the driver was "operating" the vehicle.<sup>17</sup> Courts in these jurisdictions have felt that such acts as holding the car on a hill by applying the brake<sup>18</sup> or running the motor for a mechanic<sup>19</sup> did not constitute an "operating" of the vehicle. These cases cannot be distinguished from the rest solely upon the grounds of intent, however, because there are courts which have found that not only is motion unimportant, but intent to move is irrelevant as well.<sup>20</sup> The problem of defining the term "operating" in connection with offenses other than "operating" while under the influence is not so marked in this situation as it was in the first. Because the courts are not so uniform in their definitions in this second situation as they were in the first, the holdings in regard to charges of other types of "operating" do not form any really independent group. These cases may therefore be grouped along with the holdings of the courts which feel a reluctance to find an "operating" in violation of some statute unless that type of "operating" is one against which the statute was specifically designed to protect.

The third situation, where the vehicle is not only motionless, but has been parked or even abandoned by the former driver, requires the greatest extension of the definition of the word "operating." Those states which already have a liberal interpretation of the term have even further extended it to include situations where the inebriated driver leaves his vehicle in a manner dangerous to others.<sup>21</sup> In these

---

Bomes v. Crowley, 78 R.I. 453, 82 A.2d 867 (1951). The act of starting the motor of a car after it has just been involved in an accident was held to be "operating" that vehicle. State v. Ray, 4 N.J. Misc. 493, 133 Atl. 486 (Sup. Ct. 1926).

<sup>12</sup>State v. Jalbert, 142 Me. 407, 53 A.2d 336 (1947).

<sup>13</sup>People v. Domagala, 123 Misc. 757, 206 N.Y.S. 288 (Erie County Ct. 1924).

<sup>14</sup>State v. Overbay, 201 Iowa 758, 206 N.W. 634 (1925).

<sup>15</sup>State v. Webb, 202 Iowa 633, 210 N.W. 751 (1926).

<sup>16</sup>State v. Jones, 125 Me. 42, 130 Atl. 737 (1925); State v. Storrs, 105 Vt. 180, 163 Atl. 560 (1933).

<sup>17</sup>Underwood v. State, 24 Ala. App. 191, 132 So. 606 (1931).

<sup>18</sup>State v. Hatcher, 210 N.C. 55, 185 S.E. 435 (1936).

<sup>19</sup>State v. Sullivan, 146 Me. 381, 82 A.2d 629 (1951).

<sup>20</sup>State v. Fox, 248 Iowa 1394, 85 N.W.2d 608 (1957); State v. Lorey, 197 Iowa 552, 197 N.W. 446 (1924).

<sup>21</sup>Barrington v. State, 145 Fla. 61, 199 So. 320 (1940).

cases the problem is that of establishing the defendant as the intoxicated "operator" of the vehicle. The courts of these states have held that when this situation occurs, he was "operating" his vehicle so as to be a hazard to others.<sup>22</sup> In this third situation, again, as in the other two previous situations, the courts appear more reluctant to hold that there has been some "operating" of the vehicle where the offense does not have the possibility of such severe consequences as does "operating" while under the influence. A good example of this type of offense is that of "operating" without displaying the proper lights at night.<sup>23</sup> Some of the courts have felt that it is necessary to restrict this type of "operating" to stops made in the normal course of road travel,<sup>24</sup> such as delivering merchandise or shopping.<sup>25</sup> Most courts, however, have not been reluctant to find the former driver guilty of careless or drunken "operating" of his vehicle when he has endangered others by the way in which the car was left standing.

It is apparent, therefore, that although the courts of all states are by no means uniform in their definition of the word "operating" the definite trend appears to be a rejection of the concept that the stationary nature of a vehicle precludes one from "operating" it. The decision which was rendered in *Flournoy v. State* is indicative of this trend. Courts seem to require less and less in the way of acts to establish an "operating" of the vehicle. Rather than leaving this without any stopping point, some minimum requirements should perhaps be established. "Intent to move" is one consideration that could be employed to separate those who pose some real menace from those who may still occupy their vehicle but whose acts do not constitute any potential danger. If no limits are set either by statute or by judicial decision, then even the slightest relationship between the automobile and the potential driver could be held to be an "operating" of the vehicle. Several states have substituted or included as an alternative, the phrase, "actual physical control" for the word "operating." When this concept is applied, the court may not even require any con-

---

<sup>22</sup>*Brandam v. State*, 191 Tenn. 626, 235 S.W.2d 801 (1950).

<sup>23</sup>*City of Harlan v. Kraschel*, 164 Iowa 667, 146 N.W. 463 (1914); *State v. Bixby*, 91 Vt. 287, 100 Atl. 42 (1917).

<sup>24</sup>*Commonwealth v. Henry*, 229 Mass. 19, 118 N.E. 224 (1918); *Hand v. Frazier*, 139 Misc. 446, 248 N.Y.S. 557 (1931); *Horton v. Benson*, 266 S.W. 213 (Tex. Ct. App. 1924); *Lima Used Car Exch. Co. v. Hemperly*, 120 Ohio St. 400, 166 N.E. 364 (1929); *Maher v. Concannon*, 56 R.I. 395, 185 Atl. 907 (1936); *Scheppmann v. Sweennes*, 172 Minn. 493, 215 N.W. 861 (1927).

<sup>25</sup>*Cook v. Crowell*, 273 Mass. 356, 173 N.E. 587 (1930); *Stroud v. Board of Water Comm'rs*, 90 Conn. 412, 97 Atl. 336 (1916).

scious volition towards the vehicle, as in the case of the inebriated driver slumped over the wheel.<sup>26</sup>

It is in the interest of the public welfare that the state seeks to protect its citizens from the inebriate behind the wheel just as it seeks to protect against other wrongful operators of automobiles. Those states which have retained their strict definitions of the term "operating" will most likely be induced in the future to adopt the more liberal construction of the word as drunken driving continues to pose more and more of a threat to the public safety and well-being. Despite this increase in action against the intoxicated driver, however, the courts should be wary of becoming over-zealous in attempting to find "operating" of the motor vehicle. It certainly appears that there is a real need to establish some sort of uniformity in defining the term "operating" especially as it applies to the drunk driving statutes. Certainly this definition would not be the same as that applied under statutes passed for other purposes.<sup>27</sup> Cases in other fields indicate that the word can only be properly understood and therefore correctly applied when the purpose for which the statute was passed is considered as the prime consideration in arriving at a definition.

Unless the courts begin to set some minimum limit on the nature of acts which constitute "operating" then the statutes under which the convictions are made will have lost all their value. The statutes were not written to give the courts an unfettered license to convict, and the courts, realizing this, should not try to convict on tenuous grounds. Only if the acts have a reasonable relationship to the sort of "operating" which the statute seeks to punish should the court find that the defendant is guilty as charged. To permit convictions for lesser acts than those prohibited is to lose sight of the whole purpose of criminal statutes.

BEN P. MICHEL

---

<sup>26</sup>Houston v. District of Columbia, 149 A.2d 790 (D.C. Munic. Ct. 1959); State v. Rouna, 113 Mont. 243, 321 P.2d 615 (1958); State v. Webb, 78 Ariz. 8, 274 P.2d 338 (1954).

<sup>27</sup>A good example of this is the extreme case in which a car owner was held to be "operating" his motor vehicle when he was changing a flat tire. This holding was made in regard to the possibility of recovery under an insurance policy insuring against injuries received while "operating" the automobile. Union Indemn. Co. v. Storm, 86 Ind. App. 562, 158 N.E. 904 (1927).