Washington and Lee Law Review

Volume 22 | Issue 2 Article 12

Fall 9-1-1965

Criminal Assaults In Nonfatal Automobile Accidents

dinary income into capital gain, as well as the taxpayer's problem of obtaining a depreciation deduction against ordinary income.[60]

JEROME TURNER

CRIMINAL ASSAULTS IN NONFATAL AUTOMOBILE ACCIDENTS

The common law recognizes that the automobile driver who causes death by his criminal negligence is guilty of the crime of involuntary manslaughter.[1] The common law, however, did not develop a separate and distinct crime to cover the situation where only injury, and not death, is the result of the driver's criminal negligence. To fill this gap, it has been necessary to expand the coverage of the crime of assault and battery, in effect creating a crime of negligent assault and battery.[2] Assault and battery is both a crime and a tort. In torts it is strictly limited to intentional wrongs.[3] This has led to efforts to limit the crime, also, to intentional wrongs. To do so, though, is to overlook the fact that torts has a separate action to cover negligent injuries.[4] In criminal law, either a crime with a new name must be created or the coverage of an old one expanded, unless an area of social harm is to go unpunished.

The confusion that has resulted is particularly evident where ag-

---

[60]Cases on point decided after Macabe Co. are listed below. Bell Lines, Inc., 43 T.C. 358 (1964); Nichols, 42 T.C. 135 (1964); Smith Leasing Co., Inc., 43 T.C. 37 (1964); Frotz, 43 T.C. 127 (1964); Juniper Investment Co., CCH 1964—2 U.S. Tax Cas. ¶ 9848 (1964); Adams, P-H Tax Ct. Rep. & Mem. Dec. 1964—305 (1964); Moses Lake Homes, Inc., P-H Tax Ct. Rep. & Mem. Dec. 1964—289 (1964).

[1]E.g., State v. Barnett, 218 S.C. 415, 63 S.E.2d 57 (1951); Keller v. State, 155 Tenn. 633, 299 S.W. 803 (1927); Zirkle v. Commonwealth, 189 Va. 862, 55 S.E.2d 24 (1949).

An automobile owner who was at home when the accident occurred, was guilty of a misdemeanor for giving his car keys to a drunken driver, but he was not a principal to the accident and therefore was not guilty of involuntary manslaughter. People v. Marshall, 362 Mich. 170, 106 N.W.2d 842 (1961).

[2]"[T]here seems to be no good reason to doubt that a person may be quilty of criminal assault and battery if he intentionally does an act which, by reason of its wanton and grossly negligent character, exposes another to personal injury, and does in fact cause such injury." Clark & Marshall, Law of Crimes § 198 (4th ed. 1940). Convictions of assault and battery by reckless driving were reported as early as 1916. Tift v. State, 17 Ga. App. 663, 88 S.E. 41 (1916); State v. Schutte, 88 N.J.L. 396, 96 Atl. 659 (Ct. Err. & App. 1916).

[3]See Restatement, Torts § 13 (1934).

[4]Negligence, which emerged out of the action on the case, has been recognized since about 1825 as a separate basis of tort liability. Prosser, Torts § 28 (3d ed. 1964).

gravated assaults are involved, as is illustrated by the recent case of *State v. Balderrama.*[5] The Supreme Court of Arizona reversed a conviction for assault with a deadly weapon where the instrumentality was an automobile, operated with criminal negligence. The defendant was drunk and driving at an improper speed when his automobile struck and injured a ten-year old boy. Balderrama was convicted and sentenced to from two to five years in the state prison. On appeal, the state relied for affirmance on the court's 1927 decision of *Brimhall v. State,*[6] in which the court held that a conviction of aggravated assault could be sustained upon proof of driving with criminal negligence.[7]

The Supreme Court of Arizona in *Balderrama* overruled *Brimhall v State,* holding that to convict of aggravated assault requires proof of an actual intent to commit an injury. The court rejected the authorities based on manslaughter convictions[8] or decided in states holding automobiles generally to be "dangerous instrumentalities."[9]

---

[5]97 Ariz. 134, 397 P.2d 632 (1964).

[6]31 Ariz. 522, 255 Pac. 165 (1927).

[7]Ibid. The defendant drove an automobile at a reckless speed at night, without headlights, on the wrong side of the road in violation of the law, and while so doing struck and severely injured another person. The defendant was convicted under § 215 of the 1913 penal code, which is now Ariz. Rev. Stat. Ann. § 13-245(A)(5) (1956): "An assault or battery is aggravated when committed under any of the following circumstances: (5) When a serious bodily injury is inflicted upon the person assaulted." In deciding this case of first impression, the court in Brimhall relied primarily on cases where convictions for manslaughter were sustained when death was caused by a driver's recklessness, rather than intentional conduct. E.g., People v. Falkovitch, 280 Ill. 321, 117 N.E. 398 (1917).

The court concluded that one is not criminally liable for ordinary negligence, but where an injury is the result of reckless and wanton conduct, the law imputes to the wrongdoer a willful and malicious intention.

[8]In State v. Sudderth, 184 N.C. 753, 114 S.E. 828 (1922), it was assumed that the same facts in a homicide case that constituted a conviction of manslaughter would make out a crime of assault if death had not resulted. The Arizona court rejected this rule on the ground that historically manslaughter has always covered "unintentional" homicide. State v. Balderrama, supra note 5, at 635.

In a prosecution for involuntary manslaughter as a result of negligent driving, it has been held that the refusal of an instruction that the defendant might be found guilty of assault was not error since neither assault nor assault and battery is necessarily included in the offense of manslaughter. Blackburn v. State, 203 Ind. 332, 180 N.E. 180 (1932). Contra, State v. Dean, 32 Del. 290, 122 Atl. 448 (1923).

[9]Williamson v. State, 92 Fla. 980, 111 So. 124, 126 (1926); Beck v. State, 73 Okla. Crim. 229, 119 P.2d 865, 870 (1941). In Florida, an automobile is not dangerous per se. Any automobile operated upon a public highway, however, is a dangerous instrumentality. Southern Cotton Oil Co. v. Anderson, 80 Fla. 441, 86 So. 629, 632 (1920).

In a majority of states, an automobile only becomes a dangerous instrumentality, so as to impose civil liability, when it is in the control of a careless or reckless operator. E.g., Rounds v. Phillips, 166 Md. 151, 170 Atl. 532, 536 (1934); Slaughter v. Holsomback, 166 Miss. 643, 147 So. 318, 322 (1933); Moore v. Roddie, 106 Wash.

The crime of negligent assault and battery with an automobile is based upon conduct that is criminally negligent with reference to the person injured. In sustaining convictions for this offense, courts frequently use an unnecessary fiction of imputing a criminal intent from the driver's criminal negligence.[10] Sometimes this is phrased in terms of criminal negligence being the equivalent of intent,[11] and at other times the defendant is said to have intended the natural consequences of his reckless conduct.[12] These rationales indicate that many courts have failed to distinguish the crime of assault and battery from the strictly intentional wrong in torts. In criminal law, absent statute,[13] any punishable application of force to the person of another may constitute an assault and battery.[14] The rule is now established that a conviction of this crime may be supported by harm to the person resulting from criminal negligence.[15] In prosecutions for negligent assault and battery with an automobile, therefore, a showing of criminal negligence with reference to the person injured[16] should be suf-

548, 180 Pac. 879 (1919). See cases collected at Annot., 16 A.L.R. 270 (1922). In some states, the "modern automobile is a dangerous instrumentality even in the hands of a most careful and prudent operator." Tyndall v. Rippon, 44 Del. 458, 61 A.2d 422, 424 (1948). Accord, People v. Chatham, 43 Cal. App. 2d 298, 110 P.2d 704 (1941); Marsh v. O'Flaherty, 319 Ill. App. 250, 48 N.E.2d 806 (1943). At early law, a trolley car was held to be "a machine of a highly dangerous character." New Jersey Traction Co. v. Danbech, 57 N.J.L. 463, 31 Atl. 1038, 1039 (1895).

[10]E.g., State v. Hamburg, 34 Del. 62, 143 Atl. 47 (1928).

[11]State v. Hamburg, supra note 10; Lyons v. Commonwealth, 176 Ky. 657, 197 S.W. 387 (1917); Woodward v. State, 164 Miss 468, 144 So. 895 (1932); Davis v. Commonwealth, 150 Va. 611, 143 S.E. 641 (1928).

[12]Bleiweiss v. State, 188 Ind. 184, 122 N.E. 577 (1919).

[13]An occasional statute requires intent to cause bodily harm to constitute a battery. Wis. Stat. § 940.20 (1963).

[14]Perkins, Criminal Law 85 (1957).

[15]Ibid. For criminal guilt, negligence must supply the mens rea. State v. Strobel, 130 Mont. 442, 304 P.2d. 606 (1956). The terms "gross," "criminal," and "culpable" negligence are used by different courts to show that a higher degree of negligence is required to impose criminal guilt than that required to establish ordinary negligence which is sufficient to impose civil liability. Perkins, Criminal Law 667 (1957). E.g., People v. Penny, 44 Cal. 2d 861, 285 P.2d 926 (1955); People v. Dawson, 206 Misc. 297, 133 N.Y.S.2d 423, 427 (1954).

Texas is an exception to this rule. Criminal negligence for the statutory offenses of negligent homicide and aggravated assault with a motor vehicle is a lack of the degree of care and caution that a man of ordinary prudence would use under like circumstances. Tex. Pen. Code arts. 1149, 1230-1233 (1948).

[16]A driver may be guilty of criminal assault when he injuries a person who is a pedestrian or an occupant of another vehicle. Cases cited supra note 2. In Texas, the statutory offense of aggravated assault with a motor vehicle includes any driver who wilfully or negligently collides with or causes injury less than death to any other person. Tex. Pen. Code art. 1149 (1948). This statute has been construed as meaning that a collision has to be made with the person injured. A negligent driver, therefore, who runs into a utility pole does not commit an aggravated as-

ficient to uphold a conviction. There is no necessity for supplying the driver with a criminal intent.

Aggravated assaults are generally statutory crimes.[17] Some statutes define the offense as assault with an intent to inflict great bodily injury.[18] Under these statutes, it is clear that criminal negligence alone will not support a conviction. The specific intent to inflict harm must be proved.[19] It has been held that a last moment abandonment of this intent will not absolve the driver's guilt for consequences of force that he has set in motion.[20]

Most statutes defining aggravated assault are open to interpretation as to whether an element of specific intent is required.[21] The statute in the *Balderrama* case is typical: "A person who commits an assault upon the person of another with a deadly weapon or instrument, or by any means of force likely to produce great bodily injury. . . ."[22] The Supreme Court of Arizona read a specific intent into this statute, apparently defining "assault" as strictly an intentional crime.

Courts that have construed aggravated assault statutes similar to that of Arizona have generally held that driving with criminal negligence will support a conviction. Some courts have assumed a statutory element of intent, and supported their convictions by imputing the required intent from the driver's criminal negligence.[23] Other

---

sault upon his own passenger, Jones v. State, 162 Tex. Crim. 451, 286 S.W.2d 427 (1956); nor does he commit an assault when his negligence causes a frightened passenger to jump from another vehicle. McDuffy v. State, 151 Tex. Crim. 203, 206 S.W.2d 601 (1947).

[17]The term "aggravated assault" is used to include the crimes of aggravated assault, assault with a deadly weapon, and assault with intent to murder. The offense of aggravated assault was not known at common law. An assault that would have resulted in murder, mayhem, rape, or robbery if successful, was prosecuted as an attempt to commit the felony. See Saunders v. State, 148 Miss. 425, 114 So. 747 (1927). Some jurisdictions provide for aggravated assault by degrees of assault. E.g., N.Y. Pen. Law §§ 240-245.

[18]E.g., Iowa Code Ann. § 694.6 (1950).

[19]E.g., State v. Richardson, 179 Iowa 770, 162 N.W. 28 (1917). A conviction was upheld where the defendant made two attempts with his automobile to knock a policeman down. State v. Garner, 360 Mo. 50, 226 S.W.2d 604 (1950). In Piatkowski v. State, 43 Misc. 2d 424, 251 N.Y.S.2d 354 (Ct. Cl. 1964), reckless driving was not sufficient to show a willful intent under the statutory felony of assault in the second degree. The driver had been chased at speeds from seventy to ninety miles per hour, and was driving on the wrong side of the road, before colliding with a pursuing police car.

[20]See People v. Claborn, 36 Cal. Rptr. 132 (Dist. Ct. App. 1964).

[21]E.g., Ariz. Rev. Stat. Ann. § 13-249 (1956); Cal. Pen. Code § 245.

[22]Ariz. Rev. Stat. Ann. § 13-249 (1956).

[23]State v. Eason, 242 N.C. 59, 86 S.E.2d 774 (1955); State v. Agnew, 202 N.C. 755, 164 S.E. 578, 580 (1932); Matin v. State, 333 P.2d 585 (Okla. Crim. App. 1958).

courts have based their decisions on an analogy to involuntary manslaughter convictions.[24] *Brimhall v. State*[25] was in accord with these decisions. In that case, the Arizona court concluded that courts unhesitatingly convict for involuntary manslaughter when a driver's reckless rather than intentional conduct causes death. When only injury results, "we see no good reason why he [the criminally negligent driver] may not be held for the lessor offense of aggravated assault."[26]

Courts that have convicted drivers under aggravated assault statutes by inferring criminal intent, and the court in *Balderrama* which rejected this practice, are alike in failing to recognize a crime of negligent assault and battery. The majority of cases have interpreted aggravated assault statutes so as to impose punishment on the driver who causes injury by his criminal negligence.[27] The Texas legislature has solved this problem by enacting a statute specifically concerned with aggravated assault with a motor vehicle.[28] To convict under this statute requires only a showing of ordinary negligence.[29]

In the jurisdictions that have prosecuted criminally negligent drivers for assault with a deadly weapon, the question frequently arises whether an automobile is a "deadly weapon" within the meaning of the statute. A majority of jurisdictions that have ruled on the question hold that an automobile may become a deadly weapon when it is operated[30] in a manner likely to produce death or great bodily

---

[24]State v. Carlson, 325 Mo. 689, 29 S.W.2d 135 (1930).

[25]31 Ariz. 522, 255 Pac. 165 (1927).

[26]Ibid. at 167.

[27]State v. Carlson, 325 Mo. 698, 29 S.W.2d 135 (1930); State v. Eason, 242 N.C. 59, 86 S.E.2d 774 (1955); State v. Agnew, 202 N.C. 755, 164 S.E. 578 (1932); Matin v. State, 333 P.2d 585 (Okla. Crim. App. 1958); Winkler v. State, 45 Okla. Crim. 322, 283 Pac. 591 (1929).

[28]Tex. Pen. Code art. 1149 (1948).

[29]McCollum v. State, 171 Tex. Crim. 158, 346 S.W.2d 126 (1961); Merryman v. State, 153 Tex. Crim. 593, 223 S.W.2d 630 (1949). A conviction under this statute was reversed where the defendant's failure to stop at a stop sign resulted in another vehicle striking him. The court held that the defendant could not be guilty of an assault if the other vehicle hit him, notwithstanding that the defendant's negligence was the proximate cause of the accident. Fannin v. State, 168 Tex. Crim. 593, 331 S.W.2d 47 (1960).

[30]The word "operate" is a broad term, including most acts incidental to movement as well as the actual movement of the vehicle. The meaning of "operate" is significant in prosecuting under drunken driving statutes. Starting the engine is usually sufficient to constitute the offense. State v. Ray, 4 N.J. Misc. 493, 133 Atl. 486 (1926). Steering a car which is being towed was held to be operating the vehicle. State v. Tacey, 102 Vt. 439, 150 Atl. 68 (1935). Similarly, shifting a gear and allowing the vehicle to roll a short distance is operating. Commonwealth v. Clarke, 254 Mass. 566, 150 N.E. 829 (1926).

harm.[31] The question is then determined from the evidence whether the defendant was operating the vehicle in such a manner at the time of the accident.

Negligent drivers who cause nonfatal injuries have occasionally been indicted for the crime of assault with an intent to murder. This offense generally requires proof of a specific intent to kill.[32] Georgia, which is the only state with a significant number of prosecutions against motorists for this offense, requires malice and a specific intent to kill to constitute the crime.[33] In sustaining convictions of motorists, however, the Georgia courts have held that malice may be presumed from the use of a deadly weapon in a manner likely to produce death,[34] and certain wanton and reckless states of mind can be treated by the jury as sufficient proof of a specific intent to kill.[35]

In most cases, the facts that have convicted a driver of an assault offense would have also been sufficient to support a conviction for at least one motor vehicle violation. A comparison of statutory punishments reveals in some states a considerably more lenient penalty for motor vehicle violations than for assault offenses.[36] It is apparent that the courts in these states must frequently extend the coverage of criminal assault statutes rather than exclude a criminally negligent driver from the punishment that public policy demands.

There is no doubt that a person who inflicts bodily injury by oper-

---

[31]The law recognizes as a deadly weapon anything with which death can be easily and readily produced. Acres v. United States, 164 U.S. 388 (1896). This includes an automobile when it is operated in a manner likely to produce death or great bodily harm. People v. Clink, 216 Ill. App. 357 (1920).

[32]Bowen v. State, 32 Ala. App. 357, 26 So. 2d 205 (1946); Bennett v. State, 180 Ga. App. 881, 134 S.E.2d 847 (1964); Davis v. State, 76 Ga. App. 860, 47 S.E.2d 670 (1948); State v. Buchanan, 73 Idaho 365, 252 P.2d 524 (1935); People v. Coolidge, 26 Ill. 2d 533, 187 N.E.2d 694 (1963).

[33]Easley v. State, 49 Ga. App. 275, 175 S.E. 23 (1934).

[34]Ibid.

[35]Ibid. Webb v. State, 68 Ga. App. 466, 23 S.E.2d 578 (1942); Chambliss v. State, 37 Ga. App. 124, 139 S.E. 80 (1927).

[36]In California, reckless driving that proximately causes bodily injury carries a maximum penalty of six months in jail and a fine of five hundred dollars. Cal. Vehicle Code § 23104. The maximum penalty for assault with a deadly weapon is ten years in the state penitentiary and a fine of five thousand dollars. Cal. Pen. Code § 245.

In the Balderrama case, the defendant drove an automobile while intoxicated and at an improper speed for the existing conditions. The maximum penalty that could have been imposed for the combined effenses of reckless driving and driving while intoxicated would have been nine months imprisonment in the county jail and a fine of six hundred dollars. See Ariz. Rev. Stat. Ann. §§ 28-692, 28-692.01, 28-693 (Supp. 1964). A conviction of assault with a deadly weapon in Arizona carries a maximum penalty of ten years imprisonment in the state prison and a fine of five thousand dollars. Ariz. Rev. Stat. Ann. § 13-249 (1956).

ating an automobile with an utter disregard of human safety deserves a most severe penalty. In view of the numerous nonfatal automobile accidents, the legislatures might declare that if any injury short of death is inflicted by a driver's criminal negligence, it shall, without reference to intent, constitute criminal assault with an automobile.

It is submitted that until such legislation is enacted, the policy of extending the coverage of criminal assault offenses must be continued. The *Balderrama* decision rejected the practice of convicting drivers under assault statutes that were enacted before the invention of the automobile.[37] The Supreme Court of Arizona correctly suggested an existing gap in motor vehicle legislation; but it failed to consider that criminal statutes must be interpreted so as to help suppress crime and protect society.[38] The court's reasoning is hardly sufficient for reading criminal intent into Arizona's assault with a deadly weapon statute, apparently ignoring a crime of negligent assault and battery, and thereby failing to provide an appropriate punishment for a serious offense.

RAYMOND H. VIZETHANN, JR.

---

[37]Many courts have been compelled to turn to penal statutes that were enacted before the invention of the automobile. The Oklahoma statute for assault with a dangerous weapon was enacted in 1890. See Okla. Stat. tit. 21 § 645 (1961). A defense on the ground that the legislature could not possibly have intended to include automobiles within this statute was rejected in Beck v. State, 73 Okla. Crim. 229, 119 P.2d 865, 867 (1941).

The Arizona assault with a deadly weapon statute was enacted in 1901. See Ariz. Rev. Stat. Ann. § 13-249. Arizona's statute is derived from the California assualt with a deadly weapon statute, which was enacted in 1872. Cal. Pen. Code § 245.

[38]In Oklahoma, the maximum penalty for assault with a deadly weapon is five years imprisonment in the state penitentiary. Okla. Stat. tit. 21, § 645 (1961). In two cases where a defendant's drunken and reckless driving resulted in serious bodily injury to others, the Oklahoma courts applied the assault statute rather than prosecute under the applicable misdemeanor motor vehicle statutes. In Lott v. State, 92 Okla. Crim. 324, 223 P.2d 147 (1950), the defendant was sentenced to eighteen months in the state penitentiary. In convicting under the assault with a deadly weapon statute, the court stated that penal laws are not enacted for the protection of criminals. The court concluded that the defendant could be properly prosecuted and punished under the assault statute since it is the duty of the courts to construe penal laws so as to suppress crime and protect society.

In Beck v. State, 73 Okla. Crim. 229, 119 P.2d 865 (1941), the defendant was sentenced to three years and six months in the state penitentiary. This sentence was held not to be excessive since the defendant had been a persistent law violator.