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Recommended Citation

Criminal Assaults In Nonfatal Automobile Accidents, 22 Wash. & Lee L. Rev. 271 (1965),
https://scholarlycommons.law.wlu.edu/wlulr/vol22/iss2/12

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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-
gravated assaults are involved, as is illustrated by the recent case of *State v. Balderrama.* 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,* in which the court held that a conviction of aggravated assault could be sustained upon proof of driving with criminal negligence.

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 or decided in states holding automobiles generally to be "dangerous instrumentalities." 

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631 Ariz. 522, 255 Pac. 165 (1927).
7Ibid. 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: (g) 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.

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).

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. Holzomback,* 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.\textsuperscript{10} Sometimes this is phrased in terms of criminal negligence being the equivalent of intent,\textsuperscript{11} and at other times the defendant is said to have intended the natural consequences of his reckless conduct.\textsuperscript{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,\textsuperscript{13} any punishable application of force to the person of another may constitute an assault and battery.\textsuperscript{14} The rule is now established that a conviction of this crime may be supported by harm to the person resulting from criminal negligence.\textsuperscript{15} In prosecutions for negligent assault and battery with an automobile, therefore, a showing of criminal negligence with reference to the person injured\textsuperscript{16} should be suf-

\textsuperscript{10}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).

\textsuperscript{11}State v. Hamburg, 34 Del. 62, 143 Atl. 47 (1928).

\textsuperscript{12}State v. Hamburg, supra note 10; Lyons v. Commonwealth, 176 Ky. 657, 197 S.W. 387 (1917); Woodward v. State, 164 Miss 498, 144 So. 895 (1932); Davis v. Commonwealth, 150 Va. 611, 143 S.E. 641 (1928).

\textsuperscript{13}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).


\textsuperscript{15}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).

\textsuperscript{16}A driver may be guilty of criminal assault when he injures 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-
sufficient to uphold a conviction. There is no necessity for supplying the
driver with a criminal intent.

Aggravated assaults are generally statutory crimes. Some statutes
define the offense as assault with an intent to inflict great bodily in-
jury. Under these statutes, it is clear that criminal negligence alone
will not support a conviction. The specific intent to inflict harm must
be proved. 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.

Most statutes defining aggravated assault are open to interpreta-
tion as to whether an element of specific intent is required. The
statute in the Balderrama case is typical: "A person who commits an
assault upon the person of another with a deadly weapon or instru-
ment, or by any means of force likely to produce great bodily in-
jury...." 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 neg-
ligence will support a conviction. Some courts have assumed a sta-
tutory element of intent, and supported their convictions by imput-
ing the required intent from the driver's criminal negligence. 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 pas-
senger to jump from another vehicle. McDuffy v. State, 151 Tex. Crim. 203, 206
S.W.2d 601 (1947).

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.

E.g., Iowa Code Ann. § 694.6 (1950).

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 Piatkow-
ski 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.


State v. Eason, 242 N.C. 59, 86 S.E.2d 774 (1955); State v. Agnew, 202 N.C.
courts have based their decisions on an analogy to involuntary manslaughter convictions. Brimhall v. State 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." 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. The Texas legislature has solved this problem by enacting a statute specifically concerned with aggravated assault with a motor vehicle. To convict under this statute requires only a showing of ordinary negligence.

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 in a manner likely to produce death or great bodily injury.

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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.
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 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).
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. 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. 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, and certain wanton and reckless states of mind can be treated by the jury as sufficient proof of a specific intent to kill.

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. 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-
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.

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\(^{37}\) 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).


\(^{38}\) 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.