Volume 53
Issue 2 *Dickinson Law Review - Volume 53, 1948-1949*

1-1-1949

The Negligent Criminal Battery in Pennsylvania

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THE NEGLIGENT CRIMINAL BATTERY IN PENNSYLVANIA

Problem

The purposes of this note are: first, to determine whether a person may be convicted in the Pennsylvania Criminal Courts of an assault and battery resulting from an unintentional touching arising out of negligent conduct, and second, to examine the development of this concept in Pennsylvania, evaluating the influence exerted on it by the automobile.

It is important to bear in mind the distinction between the intent to commit the act which causes the injury and the intent to cause the injury. An intentional battery can mean only the latter, for in the former sense practically all touchings could be considered intentional.

Examination of Cases

Is there such a thing in Pennsylvania as a negligent criminal battery? The language used in the latest appellate court case would make one somewhat doubtful. The court says that a criminal intent is necessary to sustain a prosecution for assault and battery, "that it must have been intentional, not accidental or merely negligent", but then adds, "of course the criminal intent—the intent to injure—may . . . be inferred from the circumstances". The court deems such circumstances to be the grossly negligent use of an automobile in wanton disregard of another's safety.[1] The difficulty in determining Pennsylvania's position may be partially relieved by examining the previous cases.

The first instance this writer has been able to find is an unreported lower court case of 1848 mentioned in the 8th edition of Binns' *Justice*.[2] The court charged that the defendant was guilty of assault and battery if he injured another by riding his horse at an immoderate gait. Intent was not mentioned, and the court spoke as though the law were settled, saying that it had invariably so instructed. The same court stated in 1850 that a carter who allowed his horse and cart to proceed along the street while he was walking on the footway would be guilty of assault and battery if they hit another.[3] Again there was no mention of intent. In 1871 in a reported lower court Case where the issue was an intentional assault and battery, the court said by way of dicta that if a person threw a stone, or other dangerous things, on the highway and hit another, the person doing such *negligent* act could be convicted of assault and battery though he had no *intention* whatsoever to injure anyone.[4] The early cases indicate that the negligent criminal battery did exist, but none of them reached the appellate court.

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1 Com. v. Ireland, 149 Pa. Super. 298, 27 A. 2d 746 (1942).
2 Com. v. Way Q. S. Phila. (1849) Binns' *JUSTICE*, 8th Ed. 456.
3 Com. v. Cox Q. S. Phila. (1850) Bright Dig. 3365.
4 Com. v. Fleet, 8 Phila. 614 (1871).

The case which is ordinarily cited as establishing that an intent to injure will be inferred from certain circumstances is a Pennsylvania Supreme Court Case of 1882.[5] The defendant fired a pistol in a crowded railroad car in a spirit of frolic intending merely to frighten and not to injure anyone. He was indicted for assault and battery and aggravated assault and battery, and the Supreme Court in upholding the conviction said that the law would imply malice from the fact that the act was recklessly and willfully done. However, the main argument centered about the count of aggravated assault and battery and the Court's decision seems limited to that offense. This is particularly evident from a reading of the report of the trial court.[6] Since aggravated assault and battery is purely a statutory crime[7] and as the part of the statute under which the defendant was indicted required malice, the language of inference was necessary to hurdle this obstacle. Two later cases, one involving a pistol[8] and the other a truck[9] found the court implying the necessary statutory malice in a similar manner.

On the issue of simple assault and battery, we must return to the lower courts. In 1897, it was said that the law of Pennsylvania was well settled, that it was not necessary for the Commonwealth to show that the defendant intended to hit the prosecutor to convict him of assault and battery, but that it was sufficient if the defendant was driving his horse and carriage so carelessly, wantonly, and recklessly as to endanger the lives of others.[10] It is to be noted that in none of the cases where the Court spoke of a simple assault and battery was there any mention of intent.

The next cases take us into the automobile era. In 1913[11] and 1918[12] the Superior Court without mentioning intent, negligence, or the inferring of the one from the other, held that a conviction for assault and battery would be sustained where the defendant drove his car at a high rate of speed, zig-zagged across the road, swerved into a ditch on the wrong side of the road, and struck an obstruction which threw his car into the path of an approaching car. In 1926 two lower court Cases held that reckless operation of an automobile in disregard of other's rights and safety would sustain a conviction of assault and battery.[13]

The requisite of intent first appeared in *Commonwealth* v. *Muska,* 92 Pa. Super. 121 (1927), where the court in upholding a conviction of assault and battery arising out of an automobile hitting a pedestrian said, "the intent necessary for a conviction on this criminal charge may be supplied or inferred from such reckless and wanton operation of a car". This is often referred to as transitional language, language used to perform the function of making the change from intent to negli-

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5 Smith v. Com., 100 Pa. 324 (1882).
6 Com. v. Lister, 15 Phila. 405 (1882).
7 Act of June 24, 1939, PL 872, 18 PS 4709 (Pa.).
8 Com. v. Scutick, 105 Pa. Super. 524, 161 A. 610 (1932).
9 Com. v. Raspa, 138 Pa. Super 26, 9 A. 2d 925 (1939).
10 Com. v. Dooley, 19 Pa. C.C. 367 (1897).
11 Com. v. Bergdoll, 55 Pa. Super. 186 (1913).
12 Com. v. Gayton, 69 Pa. Super. 513 (1918).
13 Com. v. Renninger, 19 Berks 291 (1921); Com. v. Kline, 9 D & C 448 (Pa. 1926).

gence. But it is submitted that previous holdings had made this smoke screen unnecessary. Earlier cases using such language were referring to aggravated assault and battery wherein it was necessary to prove malice. When the issue was ordinary assault and battery, the court had simply said that circumstances showing a certain degree of negligence would be sufficient. They had avoided the seemingly useless task of requiring intent and then inferring it from circumstances which showed only negligence. Furthermore, the court said the intent could be supplied *or* inferred. Were the words used synonymously? Will the same facts which support an inference of intent also supply intent? Apparently the words mean the same thing, as later cases using similar language speak only of inferring intent.

The next appellate court case added to the confusion. The court, although citing the *Muska* case as authority, did not follow the language used in it, with respect to intent, but instead reverted to the earlier cases in holding that the proof required was that the car was being driven in a manner involving a reckless disregard for the safety of others.[14] They also said that gross negligence was necessary to support a criminal conviction. In the case next following, this holding was quoted but the court added, "from such conduct the *necessary* intent to injure may be inferred".[15] Then in *Commonwealth* v. *Bergen,* 134 Pa. Super. 62, 4 A. 2d 164 "The conduct of the defendant must be so gross or wanton that an intent to injure may be inferred". In the lower courts there was the same vacillation between merely requiring reckless conduct, and requiring intent but inferring it from such conduct.[16] This brings us down to *Commonwealth* v. *Ireland,* which, as noted above reiterated what appears to be an inconsistent statement, that intent was essential but would be inferred from certain unintentional touchings.

Conclusion

How has this study of the cases aided our purposes? It appears that the negligent criminal battery is in existence in Pennsylvania. Although the latest appellate court cases say that intent is necessary but will be inferred from certain circumstances, a comparison of the facts of these cases with those of other cases which merely require grossly negligent conduct discloses that the conduct of the defendant was the same in both. That is to say, that the grossly negligent conduct from which the court infers intent is the same conduct from which they previously sustained convictions of assault and battery without going into the element of intent. In view of this it is difficult to find adequate reasons for upholding the language of inferring intent. Could it not simply be said that gross negligence evidencing a wanton disregard for the safety of others will supply the mental element for a conviction of assault and battery?

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14 Com. v. Donnelly, 113 Pa. Super. 173, 172 A 190 (1934).

15 Com. v. Kalb, 129 Pa. Super. 241, 195 A 428 (1937).

16 Com. v. Nottoge, 13 D & C 448 (1929); Com. v. Bowsord, 23 Berks 239 (1930); Com. v. Bedard, 23 Berks 58 (1930); Com. v. Moshinskie, 30 Sch. 393 (1931); Com. v. Levan, 26 Berks 151 (1934); Com. v. Hines, 44 Lanc. 690 (1935).

The difficulty remains of precisely defining what degree of negligence is necessary, but it is of questionable assistance to say that it must be such as will allow a jury to infer intent and then sustain convictions where the defendant did not act intentionally but merely negligently. It is interesting to note that it is well settled in Pennsylvania that the degree of negligence required for a conviction of involuntary manslaughter is less than that required for assault and battery.[17] It appears that if the negligence is of the degree required for assault and battery and the victim dies the defendant would be guilty of murder.[18]

Our research has also disclosed that the negligent criminal battery existed long before the advent of the automobile. Our Superior Court recognized this when, in referring to decisions holding that one could be guilty of assault and battery by driving at a speed which menaced the safety of others it said:

> "These decisions involve no new departure in the criminal law, they merely apply well recognized and established principles to the conditions arising out of the introduction of high powered vehicles capable of high speed".[19]

However, since the coming of the automobile the number of situations calling for the application of these rules has greatly increased; thus emphasizing the necessity for a clear definition of that crime.

As to the propriety of holding one criminally responsible for his unintentional batteries, it is submitted that one of the principal objects of criminal law being deterrence, the high degree of danger involved in operating such potentially dangerous instruments as automobiles requires that society take such drastic measures to promote the safety of its members.

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[17] Com. v. Gill, 120 Pa. Super. 22, 182 A 103 (1935); Com. v. Ireland, 149 Pa. Super. 298, 27 A 2d 746 (1942).

[18] Com. v. Ochs, 91 Pa. Super. 528 (1927); Com. v. Beattie, 93 Pa. Super. 404 (1928); Com. v. Gill, 120 Pa. Super. 22, 182 A 103 (1935).

[19] Com. v. Coccodrelli, 74 Pa. Super. 324 (1920).