St. John's Law Review

Volume 9
Issue 2 *Volume 9, May 1935, Number 2*

Article 7

June 2014

Automobiles--Manslaughter in First Degree--Intoxicated Driver

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Recommended Citation

Reagan, John A. Jr. (2014) "Automobiles--Manslaughter in First Degree--Intoxicated Driver," *St. John's Law Review*: Vol. 9: Iss. 2, Article 7.
Available at: http://scholarship.law.stjohns.edu/lawreview/vol9/iss2/7

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Although the courts have not said the burden is on the insured to prove the performance of conditions precedent or the truth of his material representations, they have placed upon him the duty of going forward with the proof after the insurer has given evidence of a breach of a representation. The recent decisions have achieved that result.[38]

Not being able to waive the physician's immunity, the beneficiary in life policies often finds it hard to overcome the *prima facie* case which the insurer is allowed to prove without overstepping the bounds of privilege. The result of this is, in many cases, the obstruction of justice and a concealment of the facts.[39] The legislature by allowing such beneficiaries the right to waive the privilege would overcome this defect.

LEO F. BOLAND.

AUTOMOBILES—MANSLAUGHTER IN FIRST DEGREE—INTOXICATED DRIVER.

Manslaughter is defined as homicide not amounting to murder in the first or second degree, or justified or excusable homicide.[1] It is specifically defined in its most common form by Section 1050, Subdivision 1, of the New York Penal Law as homicide committed without a design to effect death while engaged in committing or attempting to commit a misdemeanor affecting the person or property either of the person killed or of another.[2]

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[38] Supra note 34.

[39] (1933) 12 ORE. L. REV. 216, quotes from a letter from Professor Wigmore on the subject of privilege:

> "For two centuries it has been settled in the law of evidence that confidential communications as such are not entitled to any privilege. The administration of justice must get at the facts of the controversy, or else it is blocked. Any privilege is a distinct exception. The privilege that was established some years ago in many states for communications between medical men and patients has proved to be nothing but an obstruction of justice; it obstructs the ascertainment of facts in insurance cases and in personal injury cases and in most instances its application makes a laughing stock of the law of evidence; nor was it justified by any necessity."

[1] N. Y. PENAL LAW (1909) §1049.

[2] People v. Koerber, 244 N. Y. 147, 155 N. E. 79 (1926); People v. Darragh, 141 App. Div. 408, 126 N. Y. Supp. 522 (1st Dept. 1910), *aff'd*, 203 N. Y. 527, 96 N. E. 1124 (1911); People v. Stacy, 119 App. Div. 743, 104 N. Y. Supp. 615 (3d Dept. 1907), *aff'd*, 192 N. Y. 577, 85 N. E. 1112 (1908); People v. Harris, 74 Misc. 353, 134 N. Y. Supp. 409 (1911); People v. McKeon, 31 Hun 449 (N. Y. 1884).

This statute is intended to protect society from killings which arise out of misdemeanors of such a nature that, when they are commenced, they are directed against person or property.[3] The crime of manslaughter is repugnant to human nature and properly merits a drastic punishment.[4] But it is not fitting that a person should be convicted of manslaughter in the first degree for a death which is not readily foreseeable as a natural consequence of the commission of the misdemeanor. For example: *A,* while driving an automobile at a rate of speed in excess of the speed limit in the locality, struck and killed *B* who stepped into the path of *A's* car in such close proximity that *A* was unable to stop in time to avoid striking *B.* If *A* was not driving at a speed which would constitute gross or culpable negligence, he cannot be convicted of manslaughter in the second degree.

The majority of jurisdictions have held that to kill a person in the course of driving an automobile in an intoxicated condition is gross or culpable negligence.[5] What constitutes gross or culpable negligence is a subject of a variety of interpretations.[6] In New York, it is accepted as meaning a great deal more than negligence sufficient to support a civil action[7] but less than a wanton disregard for human life or safety.[8] In other words, it is a question of degree.

The New York Vehicle and Traffic Law is designed to protect the people of this state from injury to person or property due to any unlawful use of motor vehicles or other means of transportation on its highways. At first glance it would appear that a violation of

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[3] N. Y. PENAL LAW (1909) §1050, subd. 1; People v. Grieco, 266 N. Y. 48, 193 N. E. 635 (1934).

[4] N. Y. PENAL LAW (1909) §1051. Manslaughter in the first degree is punishable by imprisonment for a term not exceeding twenty years.

Id. §1053. Manslaughter in the second degree is punishable by imprisonment for a term not exceeding fifteen years, or by a fine of not more than one thousand dollars.

[5] King v. Commonwealth, 253 Ky. 775, 70 S. W. (2d) 667 (1934); Morris v. Commonwealth, 255 Ky. 276, 73 S. W. (2d) 1 (1934); People v. Townsend, 214 Mich. 267, 183 N. W. 177 (1921); State v. Horner, 266 Mo. 109, 180 S. W. 873 (1915); State v. Rountree, 181 N. C. 535, 106 S. E. 669 (1921); State v. Palmer, 197 N. C. 135, 147 S. E. 817 (1929); State v. Stansell, 203 N. C. 69, 164 S. E. 580 (1932).

[6] Culpable negligence is something more than the slight negligence necessary to support a civil action for damages and means a disregard of the consequences which may ensue from the act and an indifference to the right of others. People v. Angelo, 246 N. Y. 451, 159 N. E. 394 (1927).

Gross negligence is the want of even slight care and diligence. White v. Western Union Telegraph Co., 14 Fed. 710 (C. C. D. Kan. 1897); McGrath v. Hudson River R. R. Co., 19 How. Prac. 211 (N. Y. 1860); Seybel v. National Currency Bank, 54 N. Y. 288 (1873).

[7] A reasonable degree of care is required of a person to successfully defend a civil action.

[8] A charge of murder in the first degree may be predicated on an act which is imminently dangerous to others and evincing a depraved mind regardless of human life, although without a design to effect death. N. Y. PENAL LAW (1909) §1044, subd. 2.

any of its prohibitions would constitute a misdemeanor affecting person or property, but it must be kept in mind that this statute is fundamentally intended for the protection of the people as a whole and secondarily for that of the individual.[9] Violations of its prohibitions, except in so far as they are designated by it as felonies, are misdemeanors.[10] An analysis of Section 1050 of the Penal Law reveals that the misdemeanors referred to therein are such that affect either the individual killed or his property, or affect another or his property.[11]

A strict construction of this statute would require an affirmance in *People* v. *Grieco*,[12] but since it must be liberally construed,[13] the court held that the statute did not include a misdemeanor affecting society as a whole,[14] and reversed the conviction. In that case the defendant was driving an automobile while intoxicated when he struck two persons who were standing in a safety zone, killing one and injuring the other, and then struck another automobile. Grieco was indicted for manslaughter in the first degree and for violations of the Vehicle and Traffic Law, Sections 58[15] and 70, Subdivision 5.[16] On the trial, the court charged the jury that to drive an automobile while intoxicated is, as a matter of law, a misdemeanor affecting the person or property either of the person killed or of another within the meaning of Section 1050, Subdivision 1, of the Penal Law. The Court of Appeals reversed the conviction, saying that the misdemeanor charged was not sufficient to support manslaughter in the first degree.[17] The court, however, did not deny that the indictment found against Grieco would support the crime charged, but expressly finds that the driving of an automobile while intoxicated, is a misdemeanor not specifically directed against an individual.[18]

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[9] People v. Grieco, *supra* note 3.

[10] N. Y. VEHICLE AND TRAFFIC LAW (1929) §§16, 17, subds. 2, 5; §§57, 58, 65, subd. 1; §§66, 70, subds. 1-9; §§74, 93, 94b; N. Y. PENAL LAW (1909) §29.

[11] N. Y. PENAL LAW (1909) §1050.

"* * * Homicide is manslaughter in the first degree, when committed without a design to effect death;

"1:—By a person engaged in committing or attempting to commit a misdemeanor affecting the person or property either of the person killed or of another; or

"2:—* * *"

[12] *Supra* note 3.

[13] N. Y. PENAL LAW (1909) §21.

[14] People v. Grieco, *supra* note 3.

[15] Defines reckless driving as a misdemeanor.

[16] Defines driving while intoxicated as a misdemeanor, unless the person charged therewith has been previously convicted of the same offense, in which case it becomes a felony.

[17] People v. Grieco, *supra* note 3.

[18] *Ibid.*

Assault in the third degree [19] is the outstanding example of a misdemeanor affecting a person; unlawful entry [20] of a misdemeanor affecting property. But, it will be noticed, here there is either a specific intent,[21] or an implied intent [22] necessary to commit the misdemeanor. This intent runs directly from the person acting, to and against the property or the individual. In *People* v. *Stacy*,[23] the defendant was convicted of manslaughter in the first degree. He had assaulted and beaten his wife and as a result thereof she died. The court held that this was assault in the third degree,[24] and was sufficient to sustain a conviction of manslaughter in the first degree.[25]

When the decision in the *Grieco* case is considered from the view of an injury to property, the fact that there was an injury to property of another person allows the reasoning of the court to be applied equally to misdemeanors affecting property.[26]

The question, therefore, now is whether our statute,[27] as it now stands, is sufficient to include the inebriated driver of an automobile who runs down and kills a pedestrian, or otherwise kills a person using the public highways. The court pointed out in the *Grieco* case that the defendant could have been indicted for assault in the third degree [28] or manslaughter in the second degree.[29] The sole charge was manslaughter in the first degree under two counts.[30]

In the prevailing opinion by Hubbs, J., the court said,

> "A moment before the collision, the defendant's conduct constituted a crime, a misdemeanor against society, against law and order, and against the people of this state. The

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[19] N. Y. PENAL LAW (1909) §244.

[20] *Id.* §405.

[21] Unlawful entry requires that the person committing the misdemeanor have the specific intent to enter the premises and commit a felony. *Supra* note 20.

Assault in the third degree requires a specific intent to inflict a bodily injury. *Supra* note 19, subd. 1.

[22] Assault in the third degree under the second subdivision of §244 implies an intent to inflict the bodily injury when there is culpable negligence shown.

[23] *Supra* note 2; see also, People v. McKeon, *supra* note 2, where the defendant was convicted of manslaughter in the first degree for a death which resulted from an assault and battery.

[24] "Nor is it apparent how any substantial rights of the defendant have been prejudiced by the failure to allege the conclusion that the defendant was engaged in the commission of a felony or a misdemeanor." People v. Stacy, 119 App. Div. 743, 748, 104 N. Y. Supp. 615 (3d Dept. 1907). The indictment was sustained. *Ibid.*

[25] People v. Stacy, *supra* note 2.

[26] Grieco also ran into an automobile belonging to a third party.

[27] *Supra* note 11.

[28] *Supra* note 25.

[29] N. Y. PENAL LAW (1909) §1052.

[30] Manslaughter in the first degree committed while driving in an intoxicated condition; and manslaughter in the first degree committed while driving recklessly.

> conclusion of the misdemeanor was not one affecting the person or property of the person killed or of another." [31]

This is a holding which construes the statute [32] to include only those misdemeanors which directly and primarily affect the person or property of an individual, for the court continues,

> "He had not seen the deceased and did not know that she was present. The fact that his automobile struck her could not instantly change his conduct so as to make it an act affecting the person of the deceased and thereby make him liable for manslaughter in the first degree." [33]

Therefore, if the misdemeanor charged is not such a misdemeanor that it is primarily directed against an individual's person or property and a person is killed thereby, that misdemeanor cannot be the basis for a charge of manslaughter in the first degree.[34] O'Brien, J., dissented from the reversal in this case, however, and said,

> "The fact that the defendant did not intentionally run down the deceased does not appear to have any relevancy to the case. The gravamen of the misdemeanor is the failure to exercise the care of the reasonably prudent man. If he failed to see his victim when he should have seen her, he committed this misdemeanor. The question is, therefore, whether the commission of this misdemeanor was such a one as 'affected' the person or property either of Mrs. Burgess or of another. * * * Not only did defendant's commission of the misdemeanor as defined in Section 58 of the Vehicle and Traffic Law offend against society in general, but it affected the person of Mrs. Burgess and simultaneously affected the person of Mrs. Briant and almost instantaneously affected the property of the owner of the car with which defendant collided." [35]

But the conduct which directly affected the person of the deceased and Mrs. Briant was the fact that the defendant drove his car through the safety zone, which is not a misdemeanor, but is an unlawful act.[36]

As applied to this case, Section 21 of the Penal Law is to be construed to intend a liberal interpretation of the Penal Law against the state and in favor of the person indicted. The decision in the *Grieco* case, at first glance, seems to be a strained construction of

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[31] People v. Grieco, *supra* note 3, at 51, N. E. at 635.
[32] *Supra* note 11.
[33] People v. Grieco, *supra* note 3, at 52, N. E. at 635.
[34] People v. Grieco, *supra* note 3.
[35] People v. Grieco, *supra* note 3, at 55, N. E. at 637.
[36] N. Y. VEHICLE AND TRAFFIC LAW (1929) §87, subd. 2.

the statute[37] but, when carefully considered, is merely a liberal interpretation of its terms. If, however, it is the legislative intent that to kill a person, while driving an automobile in an intoxicated condition, shall constitute manslaughter in the first degree, the statute should be amended.

JOHN A. REAGAN, JR.

THE APPLICABILITY OF THE PAROL EVIDENCE RULE TO PLEDGEES AND PURCHASERS UNDER THE NEW YORK FACTORS' ACT.[1]

In a recent New York case,[2] the plaintiff, a dealer engaged in the business of buying and selling jewelry, delivered to another dealer in the same business, a diamond ring. The dealer signed the following memorandum: "These goods are sent for your inspection and remain our property and are to be returned to us on demand. Sale takes effect only from date of our approval of your selection." The dealer pledged the ring with the defendant as security for a loan of $125.00. The defendant advanced the money to the dealer in good faith and without knowledge of the plaintiff's ownership. In an action of replevin, against the pledgee, the validity of the pledge under the New York Factors' Act,[3] was set up as a defense. The defendant attempted to show by parol that the ring was delivered to the dealer for the purpose of sale to such customer as he could find; and that he was merely obligated to return either the goods or the proceeds. The plaintiff contended that these facts were inadmissible under the parol evidence rule. Upon an agreed statement of facts, the question was submitted to the Appellate Division,[4] which held that the evidence should have been excluded. The Court of Appeals

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[37] N. Y. PENAL LAW (1909) §1050.

[1] N. Y. PERS. PROP. LAW (1909) §43.

[2] Nelkin v. Provident Loan Society of N. Y., 265 N. Y. 393, 193 N. E. 245 (1934).

[3] N. Y. PERS. PROP. LAW (1909) §43, subd. 1: Every factor or other agent, entrusted with the possession of any bill of lading, custom-house permit, or warehouseman's receipt for the delivery of any merchandise, and every such factor or agent not having the documentary evidence of title, who shall be intrusted with the possession of any merchandise for the purpose of sale, or as a security for any advances to be made or obtained thereon, shall be deemed to be true owner thereof, so far as to give validity to any contract made by such agent with any other person, for the sale or disposition of the whole or any part of such merchandise and any account receivable or other chose in action created by sale or other disposition of such merchandise, for any money advanced, or negotiable instrument or other obligation in writing given by such other person upon the faith thereof.

[4] Nelkin v. Provident Loan Society, 241 App. Div. 875, 271 N. Y. Supp. 314 (2d Dept. 1934).