Fordham Law Review

Volume 26 | Issue 3 Article 5

1957

The Problem of Double Jeopardy in Vehicular Manslaughter

THE PROBLEM OF DOUBLE JEOPARDY IN VEHICULAR MANSLAUGHTER

Protection against twice being put in jeopardy for the same offense is found not only in the United States Constitution[1] but also in most state constitutions.[2] A plea of former jeopardy although a bar to a subsequent trial[3] must be based upon a former prosecution for the "same identical offense,"[4] a term which is subject to divergent interpretation.[5] The effect of these divergent views as to the meaning of the concept "same offense" is clearly focused when several persons are killed or injured by the culpably negligent operation of a motor vehicle.

A conflict exists among the various jurisdictions as to whether a person who kills or injures two or more persons at the same time while operating an automobile in a reckless or culpably negligent manner has committed one or more offenses against the state. It naturally follows that if there is more than one offense, more than one prosecution and punishment will be allowed; and if there is only one offense, one prosecution will be a bar to future prosecutions. A majority[6] of the states that have passed on the issue have decided that the defendant has committed as many offenses as there are victims; the minority[7] hold that one reckless act is but one offense regardless of the number of victims.

Vehicular manslaughter, as is true of involuntary manslaughter generally, is the unlawful killing of a human being unintentionally and without malice while in the commission of a lawful act performed in a negligent manner.[8] Negligence satisfies the requisite of criminal intent necessary for a criminal prosecution[9] but the negligence must be greater than that required for civil liability.[10] While there is no satisfactory definition of the degree of negligence

1. U.S. Const. amend. V; Willis, Constitutional Law 259 (1936).

2. All but five states' constitutions have safeguards against double jeopardy; Connecticut, Maryland, Massachusetts, North Carolina, and Vermont. Palko v. Connecticut, 302 U.S. 319 (1937), held that neither the due process clause nor the privileges and immunities clause impose upon the states the prohibition against twice putting a person in jeopardy for the same offense. See also Developments in the Law—Res Judicata, 65 Harv. L. Rev. 818, 874 (1952).

3. Ex parte Lange, 85 U.S. (18 Wall.) 163 (1874).

4. Burton v. United States, 202 U.S. 344 (1906).

5. Notes, 7 Brooklyn L. Rev. 79 (1938), 45 Harv. L. Rev. 535 (1932), 40 Yale L.J. 462 (1931).

6. Arkansas, Florida, Georgia, Illinois, Kentucky, Minnesota, Mississippi, Nebraska, Ohio, Oklahoma, Virginia, and Washington.

7. Iowa, New Jersey, Pennsylvania, and Tennessee.

8. Harding v. State, 26 Ariz. 334, 225 Pac. 482 (1924); People v. Kelley, 24 Cal. App. 54, 140 Pac. 302 (1914); State v. Wheelock, 216 Iowa 1428, 250 N.W. 617 (1933); State v. Pond, 125 Me. 453, 134 Atl. 572 (1926).

9. Holmes, The Common Law 75 (1881); 6 Cornell L.Q. 105, 106 (1920).

10. Maryland v. Chapman, 101 F. Supp. 335 (D. Md. 1951); People v. Schwartz, 298 Ill. 218, 131 N.E. 806 (1921); State v. Rountree, 181 N.C. 535, 106 S.E. 669 (1921). There are two standards for determining whether the essential degree of negligence is present, i.e., the subjective and the objective standard. Bussard v. State, 233 Wis. 11, 288 N.W. 187 (1939); Commonwealth v. Pierce, 138 Mass. 165 (1884).

necessary the courts have, as a guide, classified the conduct as "wanton," "gross," "wilful," and "reckless." In the final analysis, however, it is for the jury to determine whether the conduct imputes a criminal intent.[11]

The crime, then, consists of some injury caused by the reckless act plus the criminal intent which is in turn imputed from the very recklessness of the act. The question that arises is whether this one act is single and indivisible or whether it can support a separate offense in regard to each individual injured as a consequence thereof.

Minority Rule

The earliest case to deal with this problem was *State v. Cosgrove*.[12] There, the defendant was responsible for the death of one person and the serious injury of another. The court held that since the death and injury were the direct result of the same identical act, which constituted only *one* criminal offense, the defendant could successfully plead *autrefois acquit*[13] in a prosecution for atrocious assault and battery when he had previously been acquitted of manslaughter.[14]

Two years later, a Tennessee court[15] in an almost identical situation said, "The criminal intent present [in the crimes charged] is an imputed disregard of the safety of all persons who might be in the way of the recklessly and unlawfully driven automobile, and no act or intent can be charged against the [defendant] . . . as affecting either of the two injured [persons] . . . to the exclusion of the other. The [defendant] . . . was guilty of a single unlawful act with a single unlawful intent, and therefore can only be punished for a single offense or crime."[16] Therefore, a conviction for manslaughter was a bar to a prosecution for assault and battery arising out of the same reckless act. This case notes that in negligent manslaughter there is no actual intent to harm

11. 6 Cornell L.Q. 105 (1920).

12. 103 N.J.L. 412, 135 Atl. 871 (1927); see State v. Cooper, 13 N.J.L. 361 (Sup. Ct. 1833). The doctrine elicited in the Cosgrove case was affirmed and extended in State v. Pennsylvania R.R., 9 N.J. 194, 87 A.2d 709 (1952). The railroad company was indicted eight-four separate times for manslaughter for the deaths of eighty-four people who were killed in an accident. The trial court allowed a consolidation of the indictments. The appellate division reversed. The supreme court affirmed the reversal on the ground that if the indictments were consolidated, the defendant would be deprived of its right to enter a plea of autrefois acquit or autrefois convict to any one of the other indictments after a judgment of guilty or not guilty had been rendered in the first prosecution. The court said, ". . . the number of crimes or offenses in this jurisdiction is not decided by the number of deaths." Id. at 198, 87 A.2d at 711.

13. "The name of a plea in bar to a criminal action, stating that the defendant has been once already indicted and tried for the same alleged offense and has been acquitted." Black, Law Dictionary 170 (4th ed. 1951).

14. Since it was held that there was only one offense, the same result could have been reached by an application of the doctrine of res judicata, which applies to criminal cases. United States v. Oppenheimer, 242 U.S. 85 (1916); Comment, Res Judicata in Criminal Cases, 27 Tex. L. Rev. 231 (1948).

15. Smith v. State, 159 Tenn. 674, 21 S.W.2d 400 (1929).

16. Id. at 683-84, 21 S.W.2d at 402.

and so distinguishes this situation from intentional homicides.[17] Reckless conduct, the court indicated, will only support an inference that the defendant has a general criminal intent but not that he intends to injure each victim.

Iowa followed this reasoning in *State v. Wheelock*,[18] where the defendant was involved in an automobile accident wherein a mother and two daughters were killed. Having been indicted three times for involuntary manslaughter, he was tried and acquitted for death of the mother. The lower court sustained pleas of *autrefois acquit* to the other two indictments. The supreme court, in affirming said ". . . every material allegation charged in each indictment was completely negatived by the acquittal upon the first prosecution. . . . [I]f the defendant was not guilty of the conduct that resulted in the death of [the mother] . . . he could not be guilty of causing the death of either daughter. The acquittal in the first prosecution would be completely contradicted by a conviction in the second."[19] The court held that ". . . an act of negligence . . . which results in the involuntary killing of two or more human beings, is ordinarily a single offense and is subject to one prosecution."[20]

In *Commonwealth v. McCord*[21] the defendant's negligence was responsible for the death of one person and injuries to two others. He was convicted of assault and battery, aggravated assault and battery and involuntary manslaughter, and given successive sentences for the last two convictions. The superior court reversed the sentence for aggravated assault and battery on the ground that there was only one unlawful act. The Pennsylvania court, cognizant of the fact that they were dealing with a unique situation, evolved the anomalous rule that although multiple offenses had been committed, the defendant could be punished only once.

Although the *McCord* case appears to be a third view, closer examination indicates that the court relied on *Commonwealth v. Veley*,[22] as binding authority. There, the defendant was acquitted of involuntary manslaughter resulting from the alleged negligent management of a dam. Thereafter, the defendant was charged with the death of another victim of the same accident. The court said the former acquittal was a bar stating that criminal prosecution

17. In People v. Warren, 1 Park. Crim. Rep. 338 (N.Y. Sup. Ct. 1852), it was held that a former acquittal in the charge of administering poison with the intent to kill one person would not bar a subsequent action charging the same crime based upon the same facts where it was alleged that defendant intended to kill the second person also. It was held that "the intent in these cases is the material constituent of the crime. Though the acts may have been the same, the crimes as characterized by the intent are different." Id. at 339. Cf. People ex rel. Flinn v. Barr, 259 N.Y. 104, 181 N.E. 64 (1932) which cites the Cosgrove case with approval.

18. 216 Iowa 1428, 250 N.W. 617 (1933).

19. Id. at 1433, 250 N.W. at 619.

20. Id. at 1448, 250 N.W. at 625.

21. 116 Pa. Super. 480, 176 Atl. 834 (1935). See Commonwealth v. Carroll, 131 Pa. Super. 357, 200 Atl. 139 (1938).

22. 63 Pa. Super. 489 (1916); Commonwealth v. Ernesto, 93 Pa. Super. 339 (1928). These two decisions were the authorities which the McCord case cited as supporting its decision.

is for injury to the state and when there is one cause of the injury, there is but one injury to the state.[23] This reasoning is consistent with the minority view.

Under the minority view, then, when there is one reckless act and no specific intent to harm each victim, there is only one offense. The reckless conduct will impute a general intent to harm but not an intention to injure each victim. There being only one act with one criminal intent, there can be only one offense. The minority clearly distinguishes this situation from intentional homicides resulting from a single act which are more than one offense.

Majority Rule

Since 1936, however, every state court which has ruled on the point has held that the number of victims determines the number of offenses.[24] The first case to adopt this view was *State v. Taylor*.[25] The court, in upholding multiple convictions reasoned: "Even though two persons are killed by the same act, as by one bullet from a rifle, each killing constitutes a separate crime."[26] To support this reasoning the court relied upon a case involving murder in the first degree.[27] The Washington court declined to draw any distinction between the actual intent to kill present in cases of voluntary homicide and the constructive intent predicated on recklessness deemed sufficient to support a conviction for involuntary homicide. This failure to distinguish between voluntary and involuntary homicide is found in every case that follows the majority view.

The holding of the *Taylor* case made it possible to subject a defendant to three consecutive sentences for manslaughter and raised the question of whether a defendant should be committed to what may amount to a life sentence because of one reckless or culpably negligent act. *Webb v. State*[28] gave an affirmative answer. There convictions under five separate counts and consecutive sentences were affirmed on the ground that there is ". . . no reason why the presumption of knowledge of the exact consequences [of his act] cannot be imputed to the defendant as well as the presumption of malice and intent. By his unlawful act he [the defendant] placed himself in the position of impliedly intending to commit the crime, and, as he 'knew the natural and necessary consequences that would result,' it follows that he intended (by implication) to drive the automobile into the other car, and that he had knowledge (by implication) that the other carried five persons, three of whom would be killed and two injured by his unlawful act."[29]

The possible results of the majority view, when carried to its logical conclusion, are demonstrated in the recent case of *Burton v. State*.[30] Defendant killed

23. 63 Pa. Super. at 496.

24. 8 Ala. L. Rev. 372 (1956), 23 Iowa L. Rev. 425 (1938).

25. 185 Wash. 198, 52 P.2d 1252 (1936).

26. Id. at 204, 52 P.2d at 1255.

27. State v. Robinson, 12 Wash. 491, 41 Pac. 884 (1895).

28. 68 Ga. App. 466, 23 S.E.2d 578 (1942).

29. Id. at 470, 23 S.E.2d at 581.

30. 79 So. 2d 242 (Miss. Sup. Ct. 1955), 27 Miss. L.J. 64, 8 Ala. L. Rev. 372 (1956). Similiar decisions are Holder v. Fraser, 215 Ark. 67, 219 S.W.2d 625 (1949) (on the ground that recklessness is so akin to intention that the defendant will be treated

three people in an automobile accident, was indicted separately for each death in 1945 but was tried and convicted for only one. In 1955, after serving ten years of a twenty year sentence, he was again tried, convicted and sentenced for another twenty years for the death of the second person. A majority of the Mississippi Supreme Court held that since there were two offenses, the defendant was liable to a prosecution for each. The dissenting justices argued that, "To now impose an additional twenty year sentence upon the accused, and with the right on the part of the State at the end of such period or prior thereto to try him on the third indictment, could amount to a life sentence for less than a capital felony, that is to say, a life sentence for one culpably negligent act."[31]

The leading case propounding the majority rule is *State v. Fredlund*.[32] The defendant, whose reckless driving of his automobile caused an accident in which a mother and son were killed, was acquitted of murder in the third degree for the death of the mother. Subsequently, to an indictment charging the same crime in regard to the son, he entered a plea of *autrefois acquit*. The court denied the plea on the ground that two offenses were involved, drawing an analogy to the availability of separate civil actions for the injured parties. The cases the court cited as directly in point[33] and the analogies they drew were situations where the wrongdoer actually intended to commit more than one crime, as for example, ". . . one might poison a well from which many persons might die because the water therefrom was used by many persons residing in that locality. One might throw a bomb into a large crowd of people and thereby injure many and possibly kill several."[34] Certainly these analogies are distinguishable. In the poison and the bomb cases, there would be not only a specific and actual intent to injure, but a multiple intent, that is, an actual intent to kill or injure more than one person. In these situations even though involving one act, more than one offense results. However, in the *Fredlund* case, there was no actual intent to kill.

The majority implicitly recognize that a merely single act cannot constitute several offenses of involuntary manslaughter. The majority, however, discern in the reckless conduct the intention to injure each victim, a result arrived at by extending to its logical conclusion the principle that a person intends the

---

as though he intended to kill the three people); Fay v. State, 62 Okla. Crim. 350, 358, 71 P.2d 768, 771 (1937); Flemming v. Commonwealth, 284 Ky. 209, 144 S.W.2d 220 (1940).

31. 79 So. 2d at 251 (dissenting opinion).

32. 200 Minn. 44, 273 N.W. 353 (1937), 23 Iowa L. Rev. 425 (1938), 5 Chi. L. Rev. 140 (1937). To the same effect, Jeppesen v. State, 154 Neb. 765, 49 N.W.2d 611 (1951) (the conviction was reversed, however, for lack of evidence); State v. Martin, 154 Ohio St. 539, 96 N.E.2d 776 (1951). The concurring opinion in the Martin case, however, stated that the question of whether the doctrine of collateral estoppel should be applied to a criminal case was left open because it had not been raised by the defendant.

33. State v. O'Brien, 106 Vt. 97, 170 Atl. 98 (1934); State v. Corbett, 117 S.C. 356, 109 S.E. 133 (1921); People v. Majors, 65 Cal. 138, 3 Pac. 597 (1884).

34. 200 Minn. at 54, 273 N.W. at 358.

natural and necessary consequences of his act.[35] Having a specific intent to injure each victim, the courts hold there are as many offenses as victims, applying the principles applicable to intentional homicides.[36]

CONCLUSION

In voluntary manslaughter resulting from a single act, there are as many offenses as victims. The specific intent to kill each victim is the material constituent of separate offenses.[37] The reckless driver, however, does not actually intend to kill anyone but rather the law imputes the intention to kill from his reckless conduct.[38] The position of the majority would seem to be weakened by its failure to recognize the distinction between actual and imputed intent. This weakness is emphasized by the reasoning of the *Webb* case, where the court concedes that only by heaping implication upon implication is it able to arrive at a multiple intent.[39] In negligent manslaughter, the defendant may realize that he is increasing the danger to other human beings but to assume that a negligent driver actually intends to cause an accident is rather arbitrary. The legal fiction that a person intends the natural consequences of his act, serves a beneficial purpose to the extent that it makes the reckless driver amenable to punishment by society. However, when the court by adding implication upon implication arrives at a multiple intent, which is the basis for multiple offenses, the decision is at best questionable.

The majority position may also be criticized for its failure to give effect to a prior acquittal. The basis of a defendant's guilt or innocence is exactly the same as in the former prosecution, that is, the reckless conduct. The doctrine of collateral estoppel[40] should be applied by the court to bar the second prosecution.[41] The *Fredlund* case stated that "the only thing determined by the prior adjudication is that as to her [the mother's] death the proof of the defendant's

35. Webb v. State, 68 Ga. App. 466, 23 S.E.2d 578 (1942); see Holder v. Fraser, 215 Ark. 67, 219 S.W.2d 625 (1949).

36. People v. Warren, 1 Park. Crim. Rep. 338 (N.Y. Sup. Ct. 1852).

37. "Though, the acts may have been the same, the crimes as characterized by the intent are different." Id. at 339.

38. Webb v. State, 68 Ga. App. 466, 23 S.E.2d 578 (1942).

39. Id. at 470, 23 S.E.2d at 581.

40. "Collateral estoppel is that aspect of res judicata concerned with the effect of a final judgment on subsequent litigation of a different cause of action involving some of the same issues determined in the initial action. The usual succinct statement of the rule is that where an issue of fact . . . 'essential to the judgment is actually litigated and determined by a valid and final judgment, the determination is conclusive between the parties. . . .'" Developments in the Law—Res Judicata, 65 Harv. L. Rev. 818, 840 (1952). See Scott, Collateral Estoppel by Judgment, 56 Harv. L. Rev. 1 (1942).

41. United States v. De Angelo, 138 F.2d 466 (3d Cir. 1943); United States v. Carlisi, 32 F. Supp. 479 (E.D.N.Y. 1940); Scott, Collateral Estoppel by Judgment, 56 Harv. L. Rev. 1 (1942). These cases, however, indicate that a former conviction cannot be used against the defendant as a collateral estoppel of any issue in a later prosecution because the defendant has a constitutional right to a trial of every issue raised in a prosecution for a separate crime.