worth Trucks Philadelphia, Inc. to sever the Plaintiffs' cause of action against it from the causes of action alleged against the other named Defendants is granted, and the Rule made absolute.

Exceptions are granted the Plaintiffs.

COMMONWEALTH v. WITMER, C.P. Franklin County Branch, No. 148-1980.

Criminal Law - Homicide - Degree of Guilt Hearing

1. A motor vehicle may be the instrument used in the commission of the crime of murder.

2. At a degree of guilt hearing the Commonwealth has the burden of presenting evidence to establish first degree murder and the defendant has the burden of reducing it to involuntary manslaughter, if that is what defendant contends the case is.

3. If a defendant wantonly, recklessly and in disregard of the consequences drives his car into another and death results, consciousness of peril or probable peril to human life will be imputed to establish the element of malice.

District Attorney, Attorney for the Commonwealth

Public Defender, Attorney for Defendant

OPINION AND ORDER

EPPINGER, P.J., March 18, 1981:

Jeffrey L. Witmer, the defendant, entered a plea of guilty to murder. After a degree of guilt hearing the defendant was found to have committed murder of the third degree. He filed a postverdict motion saying that the decision was against the the law and a motion in arrest of judgment reiterating the same grounds.

As the legal issue, Witmer contended that the court erred in supporting the presumption that on a guilty plea to murder generally, with nothing more, the defendant is guilty of murder of the third degree, and that the Commonwealth has the burden of proving murder of the first degree and the defendant has the

burden of reducing it to voluntary or involuntary manslaughter.

The defendant's position on the facts is that they are more consistent with involuntary manslaughter than with third degree murder.

We will discuss the facts first. Witmer had been having some problems with her girlfriend. He went to her house, and after some discussion the two of them left her home in his truck. They traveled on some back roads, eventually entering U.S. 30 west of St. Thomas, Pa., heading in the direction of Ft. Loudon. While enroute Witmer said to the girl: "Let's go out and get killed tonight." She replied, "Are you crazy?" He answered, "No I am serious."

When they reached Route 30 and were headed west Witmer was driving the truck riding the yellow line. Even before the fatal event occurred, he came close to hitting another car. This caused the girl to complain to him, saying "Get on your own side of the road." But he didn't do that. Instead, he kept on going onto the other side of the road. Then, according to the girl, Witmer saw a car coming and went for it. When the two cars were about 500 feet apart he really hit the gas pedal and swerved to the left just before the collision. Fruitlessly, the other driver tried to avoid the collision but there wasn't room. Witmer had been drinking, but the girl could not say that he was intoxicated.

The vehicles came together on a slight curve with good sight distance in each direction. One half of the Witmer vehicle was on the wrong side of the road where the accident happened. At the time they came together the other vehicle was on its own side of the road and there were no skid marks to indicate that Witmer attempted to avoid impact. After the accident, which sheared and collapsed the other automobile, the Witmer truck turned on its side and skidded across the road, gathering up some yellow paint from the center line as it did so. The driver of the other vehicle, Mr. Shew, was killed and his wife, injured also, sustained a memory loss.

A motor vehicle may be the instrument used in the commission of the crime of murder. *Commonwealth v. Aurick*, 342 Pa. 282, 19 A.2d 920 (1941).

> "In determining the sufficiency of the evidence to support a finding of [third] degree murder where death results from a motor vehicle accident, it is crucial to determine whether the facts and circumstances surrounding the incident reflect malice which distinguishes murder from other types of homi-

cide." *Commonwealth v. Taylor*, 461 Pa. 557, 562, 337 A.2d 545, 547 (1975).

In *Taylor* it was pointed out that malice lies somewhere between the recklessness or culpable negligence of involuntary manslaughter and the specific intent to kill of murder. It is wanton and reckless conduct manifesting an extreme indifference to the value of human life going beyond just negligent killing. From *Commonwealth v. Beattie*, 93 Pa. Super. 404, 408 (1928), it seems clear that if a defendant wantonly, recklessly and in disregard of the consequences drives his car into another and death results, consciousness of peril or probable peril to human life will be imputed to establish the element of malice required in murder.

The facts in this case establish that defendant, having threatened to kill himself and his girlfriend, intentionally drove into the car driven by Mr. Shew. It may be, as was argued, that this is either a case of first degree murder or involuntary manslaughter. If it is not involuntary manslaughter, as we have found, the court would not be prevented from deciding that the degree of guilt was third degree murder.

We think the evidence supports the court's decision that it is at least third degree murder. So the second argument, that the court unconstitutionally gave the Commonwealth the benefit of a presumption that upon the entering of the guilty plea, the defendant was guilty of murder of the third degree, putting the burden upon him to reduce it to voluntary or involuntary manslaughter, becomes academic.

However, it is the law of Pennsylvania that at a degree of guilt hearing the Commonwealth has the burden of presenting evidence to establish first degree murder and the defendant has the burden of reducing it to involuntary manslaughter, if that is what defendant contends his case is. *See, e.g., Commonwealth v. Geiger*, 475 Pa. 249, 254-55, 380 A.2d 338, 340 (1977); *Commonwealth v. Moore*, 473 Pa. 169, 173, 373 A.2d 1101, 1103 (1977); *Commonwealth v. Ewing*, 439 Pa. 88, 91, 264 A.2d 661, 662 (1970).

But, says the defendant, relying on *Mullaney v. Wilbur*, 421 US 684, 44 L.Ed 2d 508, 95 S.Ct. 1881 (1975), that can't be. In *Mullaney* the court was dealing with a Maine statute which required a defendant charged with murder to prove that he acted in the heat of passion or sudden provocation in order to reduce the homicide to manslaughter. The court found that the rule violated the Due Process Clause of the Fourteenth Amendment that the prosecution prove beyond a reasonable

doubt every fact necessary to constitute the crime charged and concluded that it was the state's burden to prove beyond a reasonable doubt the absence of the heat of passion or sudden provocation when the issue was properly presented. In that case, of course, the defendant had entered a plea of not guilty and was entitled to the presumption of innocence and the state was required to prove every element of the offense of which he was convicted beyond a reasonable doubt.

In this case, the defendant has already said he is guilty of some degree of homicide. If we accepted the argument of the defendant it would change the law of Pennsylvania. For instead of the plea constituting a plea to third degree murder, it would be a plea to involuntary manslaughter, which is the lowest grade of homicide.

For these reasons we deny the defendant's motions for a new degree of guilty hearing and in arrest of judgment.

ORDER OF COURT

March 18, 1981, it is ordered that defendant's motions for a new degree of guilt hearing and arrest of judgment are denied. The defendant shall appear before the court on April 1, 1981 to be sentenced.

COMMONWEALTH v. DESMOND, C.P. Franklin County Branch, No. 291 of 1980

Criminal Law - Vehicle Code - Driving Under Influence - Definition of "Drive"

1. The Vehicle Code in using the word "drive" instead of the word "operate" imposes a burden upon the Commonwealth to prove beyond a reasonable doubt the actual movement of a motor vehicle.

2. The fact that a private citizen, without any evidence of authority, urged the defendant to move his vehicle from a position of danger is no excuse for the defendant driving his vehicle.

David W. Rahauser, Assistant District Attorney, Counsel for the Commonwealth

E. Franklin Martin, Esq., Counsel for Defendant