



DRIVING ACCIDENTS: CONSCIOUS GUILT OR INTENTIONAL MISCONDUCT? TRAFFIC ACCIDENTS RESULTING FROM DRUNK DRIVING: CONSCIOUS FAULT OR EVENTUAL INTENTION?

Alexandre Jacob¹; Carolayne Santos Monte²

¹Graduated in Law and Specialist in Civil Law from the University Center of Espírito Santo. Specialist in Supervision, Guidance and School Management at Castelo Branco College. Specialist in Afro-Brazilian and Indigenous History and Culture at the Centro Universitário Internacional and Master in Religious Sciences at the Faculdade Unida de Vitória. Professor of Law at the Linhares Higher Education College. Reviewer for UNESC em Revista (ISSN 2527-0168) since 2018. Has experience in the areas of Law, Education, Management, Sociology and Religion, with emphasis on Criminal Sciences, Professional and Technological Education, Distance Education, Public Management. Human Rights, Religions of African Origin and Education for Ethnic-Racial Relations. ² Bachelor of Laws from the Linhares Higher Education College (Faceli).

ABSTRACT

In view of the fine line between intentional misconduct and conscious guilt, the general objective of this paper is to identify how the Brazilian judiciary has positioned itself in judgments of traffic accidents resulting from a driver's intoxication while driving a motor vehicle, pointing out whether the majority position is that the perpetrator's conduct will always be carried out with intentional misconduct, or whether, differently, it is possible for the perpetrator to carry out the conduct with conscious guilt. This is a study in the field of Criminal Law, carried out by means of a bibliographical, legislative and jurisprudential survey. It conceptualizes the criminal institutes and demonstrates the differences between indirect intent and conscious guilt in the practical field. It presents the criteria that have been adopted by the Judiciary for the effective punishment of criminal offenses. It concludes that, even in the face of the criteria, there is still a demand for explanatory legislation that provides greater legal certainty for the legal operator and avoids injustice.

Keywords: Criminal law; theory of crime; subjective element; criminal policy.

1 INTRODUCTION

This research deals with the institute of intentional misconduct and conscious guilt and their application in traffic accident trials resulting from the driver's drunkenness while driving the vehicle. The subject is not new, however it is not settled among legal practitioners, especially academics, who are divided between those who accept its existence and those who ally themselves with the defense theses, in which there is no room for this interpretation.



The fact is that, since law is a social science, albeit largely dogmatic, it is difficult to establish an obligatory interpretation of conduct that harms life as a legal asset in the context of traffic, given that the general rule is that every crime in this context is predominantly culpable, because every qualified driver has understood the rules of defensive driving, and therefore any action that differs from the rules would be due to recklessness, one of the elements of culpability.

It should be noted that Brazil is one of the countries in the world with the highest rates of traffic deaths. According to the *Global Status Report on Road Safety* by the World Health Organization (WHO), Brazil is the country with the third highest number of traffic fatalities in the world. Traffic accidents mainly affect young men between the ages of 15 and 39 (Ministry of Health, 2019). In addition, among the factors that cause accidents, the combination of alcohol and driving is predominant. In Brazilian capitals, one in ten drivers (11.4%) report driving under the influence of alcohol (Monteiro, 2020).

In view of this alarming data, it is important to discuss this issue, since it is interesting for the legal practitioner to find out how this subject will be held criminally responsible, because it calls into question their learning of crime theory, thus justifying the choice of topic.

In many situations, case law has taken the position that there is a possibility of intent in serious crimes committed by drunk drivers. However, classifying the crime as intentional is not an easy task, since the agent's intention is not explicitly visualized. For Bitencourt (2020), possible intent must be configured through two important elements: the representation of the possibility of the result and the consent to its occurrence, assuming the risk of producing it. Thus, the position is based on the various educational and awareness-raising campaigns warning that drinking and driving do not go together. Therefore, for those who defend this thesis, the numerous warnings would already be enough to alert and make the driver aware of the unlawful act that can lead to harmful results. And if, even so, the driver insists on the practice, his/her total indifference to the lives of others and the possible consequences of his attitude is revealed.

On the other hand, in Habeas Corpus No. 107.801-SP (2011), the Federal Supreme Court (STF) downgraded the conduct charged to the accused from intentional homicide to manslaughter while driving a motor vehicle, recognizing that liability for possible intent presupposes that the driver was drunk with the intention of committing the crime. In other

words, according to the STF's position in the relevant judgment, this is the action in which the person gets drunk with the aim of encouraging the commission of the illicit act, called preordained drunkenness, and which leads to liability for possible intent. In the case in point, it has not been shown that the accused drank alcohol with the aim of causing death.

Thus, in the face of contradictory decisions by judging bodies, it is important that there is a standardization of understandings, seeking legal certainty for all those involved in the process. In addition, it is important to point out that, to a certain extent, there is external interference that ends up influencing judgments, trivializing the applicability of the institute of indirect intent and conscious guilt in traffic crimes. The media coverage of fatal accidents caused by drunk drivers is an example of this. In this context, the study aims to answer the following question: what are the criteria for verifying possible intent or conscious guilt in traffic crimes involving driver intoxication?

The aim of this research is to analyze the majority position adopted by the Brazilian judiciary with regard to the criteria for verifying the existence of possible intent or conscious guilt in the conduct of drunk drivers who commit crimes against life. To this end, it is necessary to study the legislation on the subject, conceptualizing the related institutes; differentiate the institutes of indirect intent and conscious guilt based on doctrinal criteria; identify doctrinal and judicial positions on the subject in Brazilian courts; relate criteria for attributing indirect intent and conscious guilt in the cases studied.

2 THE CONCEPT OF INTENT AND ITS MAIN CHARACTERISTICS

According to Professor Cleber Masson (2019), there are three theories of intent. However, Brazil's legal system only adopts the will and assent theories.

Article 18(I) of the Penal Code states that the crime is: "intentional, when the agent wanted the result or assumed the risk of producing it" (Brazil, 1940). Analyzing the relevant legal provision, it can be seen that Brazilian legislation favors the understanding that the configuration of intent is formed by the agent's will to produce the result added to the realization of the conduct that assumes the risk of producing it. The intent and assumption theories are accepted in this case.

For Mirabete and Fabbrini (2018), in the theory of will: "The person who knowingly and voluntarily carries out the action acts intentionally. Its existence therefore requires awareness of the conduct and the result, and that the perpetrator does so voluntarily."

The Superior Court of Justice (STJ (Superior Court of Justice)) has already ruled on the matter, understanding that intent is composed of the cognitive element (awareness) plus the volitional element (will):

Brazilian criminal doctrine instructs that intent, although it is a subjective element of the type, must be understood from two aspects: cognitive, which translates knowledge of the objective elements of the type, and volitional, configured by the will to carry out the typical conduct. The cognitive element consists of actual knowledge that the result may occur, i.e. actual knowledge of the elements of the objective criminal type. The mere possibility of knowledge, so-called "potential knowledge", is not enough to characterize the cognitive element of intent. In the volitional element, on the other hand, the agent wants to produce the result directly - direct intent - or admits the possibility of the result occurring - indirect intent (STJ (Superior Court of Justice), 2008).

Furthermore, reinforcing this idea, Guilherme de Souza Nucci (2018) explains in his doctrine that the act practiced is configured with intent when the elements of the agent's conscious will directed towards the purpose of producing the typical result are present, and when this agent has the sufficient means to achieve that objective. In this way, intent must cover all the elements of the criminal type intended. For example, in the case of homicide, the perpetrator wants to take someone's life. So there is intent in eliminating a life, and this intent is practiced against a specific person.

Furthermore, it should be noted that in order for a crime to be classified as intentional, this intent must be immediate, not allowing for the possibility of intent before or after the moment of the action. Similarly, it is essential that the agent's actions are sufficiently capable of producing the intended result. In this case, it can be said that the will needs to be active, i.e. with the possibility of influencing the outcome. Therefore, in order to identify intent, it is enough for the result to be produced in line with the will of the agent at the time of the action.

3 THE CONCEPT OF GUILTY AND ITS MAIN CHARACTERISTICS

The crime is committed in the culpable mode when the agent fails to comply with an imposed rule, whose duty to comply was demanded, and as a result of this non-compliance an illicit but undesirable result is caused. The definition of guilt, for Bruno (2005):

Guilt consists of voluntarily performing, without due care or attention, an act which results in an outcome defined by law as a crime, which was neither intended nor foreseen by the agent, but which was foreseeable. The process of culpable crime develops in these two moments: a) voluntary conduct contrary to duty; b) an involuntary result, defined by law as a crime, which was not, but should and could have been foreseen by the agent” (Bruno, 2005).

Article 18, II of the Brazilian Penal Code states that there is guilt when: “the agent caused the result through recklessness, negligence or malpractice” (Brazil, 1940). Therefore, the main element of fault is the agent’s failure to comply with an objective duty of care, through recklessness, negligence or malpractice. Here, the agent fails to comply with a certain precautionary rule required of all members of society.

Recklessness is the practice of a dangerous act, it is acting without due caution. It can be seen that negligence is the fault of the person who omits, it is the lack of caution, failing to do what caution recommends. Malpractice, on the other hand, is the incapacity, lack of knowledge or skill in the exercise of a profession or activity. Nucci (2020) defines guilt as inattentive voluntary behavior, aimed at achieving a certain goal, which, although not desired, is foreseeable and results in an outcome that could have been avoided.

It is important to emphasize that, in order for the perpetrator to be held responsible for the crime in the culpable mode, it is necessary to include this provision in the criminal type itself. There are some important elements that structure and characterize guilt, one of which is the analysis of the agent’s behaviour, which must be assessed more precisely.

It should be noted that the result is in the background, because it was caused involuntarily, the agent did not want it, so it should not be analyzed with the same rigor. On the subject, Capez (2021) concludes:

Guilt, therefore, is neither described nor specified, but only provided for generically in the legal frame. This is due to the fact that it is absolutely impossible for the legislator to foresee all the ways in which this can be done, since it would be impossible, for example, to try to list all the ways in which someone could be killed culpably. It is unimaginable how many different ways guilt can play a role in causing death (speeding, inadvertently firing a loaded gun, overtaking in a prohibited place, letting a child play with an electric wire, etc). For this reason, aware of this impossibility, the legislator limited himself to generically predicting the occurrence of guilt, without defining it. This means that typical adequacy requires more than a simple correspondence between conduct and the typical description. It is essential to make a value judgment about the agent’s conduct in the specific case, comparing it with what a man of average prudence would have done in the same situation. Guilt therefore stems from the comparison made between the behavior carried out by the subject on a concrete level and what a person of

normal, average prudence would have done in the same circumstances (Capez, 2021).

It should be made clear that there are different types of guilt. The first type deals with unconscious guilt, which is characterized as guilt without any foresight of the result.

In unconscious guilt, there is no actual knowledge of the danger, even if the subject could and should have foreseen it. In these cases, there is only “potential” knowledge of the danger to other people’s legal assets (Zaffaroni; Pierangeli, 2021).

As an example, according to Nucci (2018), a driver driving his vehicle on a public road, at a speed compatible with the road, but with his “mind far away”, does not pay attention to the traffic light indicating the red light and is involved in a collision with another vehicle, injuring other people. The agent, despite driving the vehicle without due attention (acting recklessly), never intended or planned the result, even though he should have acted with the attention that was required for his action. Therefore, the result was foreseeable, but not foreseen by the driver. In this case, the agent only has a mere possibility of prevention, but does not foresee the actual result. Conscious guilt will be the subject of the next section.

4 CONSCIOUS GUILT AND INDIRECT INTENT

While in unconscious guilt the agent has no foresight of the result, conscious guilt is called guilt with foresight, according to Nucci (2020):

Conscious guilt, with foresight or *ex lascivia* is when the agent, after foreseeing the objectively foreseeable result, carries out the conduct sincerely believing that it will not occur. It represents the most advanced stage of guilt, as it is close to intentional misconduct. However, it differs from it (Nucci, 2020).

To give an example, a driver driving his vehicle, despite seeing that the traffic light is yellow, increases his speed because he believes he will be able to cross the intersection in time. However, even though he was accelerating his vehicle, the traffic light turned red before he reached the intersection, and the driver ended up crashing his vehicle into another on the adjacent road. This is a case where the driver (acting recklessly) clearly saw what could happen, in other words, foresaw the outcome. However, he sincerely believed that he could avoid it in view of his risky skill.

In a different way, in indirect intent, as Professor Masson (2019) teaches in his doctrine, the agent, despite not having the will directed towards a specific result, assumes the risk of its production:

Possible intent is the modality in which the agent does not want the result, which he foresees, but assumes the risk of producing it. Its existence is possible as a result of the Penal Code's acceptance of the theory of assent, in the expression "assumed the risk of producing it", contained in art. 18, I, of the Penal Code (Masson, 2019).

There is indirect intent, which the Penal Code equates with direct intent (art. 18, I, CP), when, for example, although the agent does not want to kill someone, they assume the risk of causing that death. Therefore, it is possible to admit indirect intent in Brazil, due to the adoption by the Brazilian legal system of the theory of assent, in accordance with the expression that says "assumed the risk of producing it".

Intent is a subjective element of the psychological and internal aspect of the person committing the conduct. Therefore, it is clear that it is impossible to assess the criterion of intent based on assumptions linked to the subject's innermost being. Thus, possible intent is drawn from the objective circumstances of the specific case, such as the means used, the assessment of the preceding situation, the agent's subsequent behavior after committing the crime, as well as his personality traits.

Knowing that the legislator accepts the theory of will and assent, Cleber Masson (2019) teaches that "in order to extract the occurrence of intent, it is enough that the result is produced according to the will intended by the agent at the time of the conduct". It is known that, in practice, distinguishing conscious guilt from indirect intent is not an easy task. In both situations, according to Nucci (2020), there is a prediction of the outcome. However, in conscious guilt the agent faithfully believes that he can avoid it, and in indirect intent, the agent admits the possibility of its production, but is indifferent to it.

The Brazilian Traffic Code (CTB) (Brazil, 1997), even after several changes, only provides for the crime of homicide committed in traffic, in the culpable mode, failing to provide for homicide in the intentional mode.

According to the position of the Federal Supreme Court:

The debate on the subject is not new in doctrine and in the courts, especially due to the difficulty of proving the homicidal volitional element of drivers of motor vehicles, even when speeding or the harmful effects of alcohol are involved. The crux of the matter is limited to legal discernment in the face of the criminal institutes

of possible intent and conscious guilt in traffic crimes. The distinction lies in the will of the agent, in the desire. Only if the answer to this question is yes: would the driver of the vehicle have acted in the same way if he had been aware of the harmful result? The foreseeability of the harmful result is not enough to recognize a crime as intentional, and the agent must assume the risk of producing it - article 18 of the Penal Code. It is necessary to demonstrate indifference to the probable consequences of the act (STF, 2021).

Therefore, it is undeniable that the institutes of intentional misconduct and conscious guilt are close to each other, but they cannot be confused, and an analysis of the specific case is necessary to make an effective distinction.

5 MATERIALS AND METHODS

The research is descriptive and exploratory, based on a bibliographical survey and judicial analysis of final cases published by Brazilian courts and the subject of doctrinal studies. The primary sources of research are the Constitution of the Federative Republic of Brazil (1988), the Penal Code (1940) and the Brazilian Traffic Code (1997) and secondary sources are the works of Guilherme de Souza Nucci (2018), Cleber Masson (2019) and Júlio Fabbrini Mirabete and Renato Nascimento Fabbrini (2018), among others, as well as consultations with official data from the websites of Brazilian courts.

6 RESULTS AND DISCUSSION

As we have seen, the CTB, when dealing with homicide committed in traffic, only makes provision for the culpable type, as provided for in article 302 of the law (Brasil, 1997):

Art. 302 Committing manslaughter while driving a motor vehicle:
Penalties. Imprisonment from two to four years and suspension or prohibition from obtaining a permit or license to drive a motor vehicle.
§ 1 - In manslaughter committed while driving a motor vehicle, the penalty is increased by 1/3 (one third) to half if the perpetrator:
I - Not having a driving permit or license;
II - Practicing it on a crosswalk or on the sidewalk;
III - Failing to provide help to the victim of an accident when possible without personal risk;
IV - In the exercise of their profession or activity, they are driving a passenger transport vehicle.
§3 If the agent drives a motor vehicle under the influence of alcohol or any other addictive substance:

Penalties. Imprisonment, from five to eight years, and suspension or prohibition of the right to obtain a permit or license to drive a motor vehicle (Brazil, 1997).

Despite the fact that the Traffic Code only expressly provides for culpable negligence, in many cases the agent's actions in causing traffic fatalities after combining alcohol consumption with driving a motor vehicle have been classified as culpable negligence, applying the provisions of art. 121 of the Penal Code (Brazil, 1940).

This position of Brazilian jurisprudence considers that possible intent can be applied in cases of homicide, where the driver has a high alcohol content, is speeding above the permitted limit associated with dangerous driving, as well as omission of aid, where the agent flees the scene without rendering any aid to the victims.

In Espírito Santo, there is a case that has become well known, the trial of the accused Wagner José Dondoni. The defendant was convicted of the crime provided for in art. 121, caput, c/c art. 14, item II, both of the Penal Code. On April 20, 2008, in the town of Viana (ES), there was an accident that killed three people from the same family. The defendant, businessman Wagner José Dondoni, was driving drunk on BR-101 when he hit the family car head-on. The police found a bottle of vodka in Dondoni's car. In addition, the driver was traveling dangerously on the road, driving in a "zig-zag" pattern. Immediately after the accident, the businessman refused to take a breathalyzer, but a blood test taken ten hours after the accident confirmed that he was drunk. Submitted to the jury, the conviction sentence stated:

In the present case, I note, as acknowledged by Messrs. The jury also found that the defendant assumed the risk of causing death by driving his vehicle S IO-2.4-S, license plate MSO-4848-ES on the BR 101, at a speed incompatible for the location and zigzagging along the road, even under the influence of alcohol, when he collided with the Fiat Uno Mille-EP vehicle, license plate CCS-4056-ES, where a family was and caused the death of a mother and her two children, still children, in addition to injuring the children's father and leaving him a widower and without his children. Now, the decision to decree the arrest of the accused as a result of this conviction in the Jury Plenary is in line with the established case law of the STJ (Superior Court of Justice) in the sense that, if there are elements in the case file that could configure indirect intent, as in "in casu" (presence of drunkenness at the wheel, zigzag driving and driving in the opposite direction, on a busy federal highway), the judgment on its occurrence or conscious guilt falls to the People's Court, the natural judge of the case, according to the narrative of the facts contained in the complaint and with the help of the factual-probatory set produced within the scope of due legal process (TJES, 2018).

Furthermore, it is considered that the various campaigns demonstrating the risks of drunk driving are enough to alert drivers and make it clear that this is prohibited conduct and if, despite this, the driver continues to act in a risky manner, attesting to his total lack

of commitment to the life and integrity of others, he can be held responsible for the crime in the intentional form.

The media constantly reports cases of drunk drivers who drive at high speed and cause disastrous results, causing deaths or leaving victims with serious sequelae, as in a recent case in ES, which generated great repercussions in the media due to the circumstances of the accident.

The accused, Adriana Felisberto Pereira, showed signs of drunkenness and total indifference to the accident that took the life of 24-year-old Luísa Lopes (G1, 2022). The case is currently underway, charging the defendant with the crimes provided for in art. 121, §2, items III and IV of the Penal Code (victim Luísa) and art. 306, of the Brazilian Traffic Code (victim Ana Paula and third parties).

Faced with these scenarios, society is yearning for stricter punishments. This movement has been reflected in the rulings of the higher courts:

The existence of reasonable doubt about the occurrence of an automobile dispute, known as a "racha" (illegal street race), at high speed and after apparently drinking alcoholic beverages, authorizes the pronouncement of a decision, and it is up to the Jury Court to analyze not only the factual context in which the fact occurred, but also the examination of the existence of intent or guilt, since the outcome of the controversy over the subjective element of the crime, whether the accused acted with intent or conscious guilt, is the competence of the Jury Court (STJ (Superior Court of Justice), 2017).

Furthermore, according to the judgment in Habeas Corpus no. 321.354-SC by the Superior Court of Justice, considering the complexity of the matter:

The debate about the subjective element of the type - whether there was indirect intent or guilt - is of great technical complexity, as the defense mentioned in its detailed reasons for appeal, but not for that reason should it be suppressed from the evaluation of the natural judge of the case. And you can't generalize the exclusion of indirect intent in voluntary human behavior practiced in traffic. "In this case, in the case of an indictment, the disqualification from intentional homicide to culpable homicide must be based on very solid evidence. In the iudicium accusationis, any doubt does not favor the accused, and the rule set out in the old *paremia in dubio pro societate* applies" (STJ (Superior Court of Justice), 2016).

Another point is that media repercussions end up influencing decisions. If, for example, a case of an accident caused by a drunk driver receives more media attention, due to the commotion in society and the desire for justice, the judge will most likely see it as a crime committed with intentional intent, and the case will be referred to the Jury Court

for trial, with the possibility of a stiffer sentence. In this way, the media doesn't just cover and disseminate news about traffic accidents, but also influences the public to think and act about these events. However, it is important to set limits to avoid sensationalism and keep the focus on information in the public interest.

Unfortunately, nowadays the perpetrator of a serious traffic crime who has drunk alcohol is a "hostage to fortune". It is not a question of reducing their culpability, but of reducing the legal uncertainty of using an institute with no clear rules.

8 CRITERIA FOR ASSIGNING EVENTUAL DUTY IN TRAFFIC CRIMES

Considering the absence of normative text on possible intent and its use or not in the cases under study, it will be possible to identify judgments on the same subject being decided differently, given the human difficulty of proving whether or not the agent acted with indifference to the result, since it is humanly impossible to extract such proof from the author's thoughts.

In an attempt to solve this problem, the method of investigating the event has currently been used, whereby the assessment of possible intent or conscious guilt is determined by examining the circumstances of the event, due to the lack of a legal provision.

As has been shown, in both conscious guilt and indirect intent, the agent foresees the result that their conduct may bring about. However, in conscious guilt, the agent states to himself that he will be able to avoid this result, given his abilities. In the case of possible intent, as we have seen, the agent is clearly indifferent to the result that may be caused, in other words, it matters little to him.

It should be noted that this differentiation is elaborated by the doctrine and reflected in the jurisprudence for the resolution of cases of crimes committed by drunk drivers, since in Brazilian criminal legislation there is no legal provision making the segregation of these institutes. This lack of legal provision dealing with this distinction ends up bringing legal uncertainty in judgments, as highlighted by Nucci (2018): "The disparities between culpable homicide and intentional homicide are very large and far-reaching. Criminal law cannot become a lottery."

Predominantly, in order to establish that the crime was committed with possible intent, it is necessary to analyze the specific case, as already decided by the STJ (Superior Court of Justice):

To understand that the conduct of getting drunk implies, in all cases, the assumption of risk and the (remote) acceptance of the possibility of subsequently committing criminal acts would be to take the theory of *actio libera in causato* an undue extreme. In the light of this assumption, it must be examined whether, even if the presence of evidence or signs of drunkenness is recognized, the other factual circumstances authorize the conclusion that the defendant, at the immediately preceding moment, assumed the risk of producing and assented to the criminal result (STJ (Superior Court of Justice), 2023).

In this understanding, according to the significant theory of action, the evaluation is carried out by a third party outside the case, the judge, who will be an observer, analyzing the circumstances of the fact to verify whether or not the agent acted with intent. It is clear that intent does not only refer to a desire on the part of the perpetrator, but that the act must be capable of influencing the intended result.

It should be noted that the significant theory of action has often been used in cases where resolution is almost impossible, given the dependence on uncovering what went on in the agent's mind. In any case, the adoption of the significant action theory has proved promising and effective, especially in situations where it is not possible to identify the agent's purpose solely from the evidence in the case file. Thus, the judge, as a third-party observer, considering the evaluative criteria, will be able to detect from the behavior, conduct and position of the accused whether there was intent or guilt in what happened.

More recently, with the advent of amending legislation no. 13.546/2017, which updated and added several articles to the Brazilian Traffic Code, a discussion arose in the Judiciary as to whether it would still be possible to apply possible intent when the driver is under the influence of alcohol or another psychoactive substance. The STJ (Superior Court of Justice), in judgment of AREsp no. 1.166.037, in which the defense pleaded for the disqualification of the crime of intentional homicide to manslaughter, held that, despite the introduction of §3 to article 302 of the CTB, promoted by Law no. 13.546/2017, it was only the express provision of a more serious penalty if the agent was under the influence of alcohol or a similar substance at the time of the accident.

However, for reporting judge Reynaldo Soares da Fonseca, the introduction of paragraph 3 to art. 302 of the CTB/1997 does not in itself mean that all drivers who drive

after drinking alcoholic beverages or other psychoactive substances and cause accidents with fatal victims will immediately benefit from the disqualification of the crime to the culpable mode. It is necessary to analyze other elements in the specific case. In the case herein, it was proven that the accused, in addition to having consumed alcohol, drove at a speed incompatible with the road, assuming the risk of producing the result of death, which characterizes the figure of indirect intent (STJ (Superior Court of Justice), 2019).

9 CONCLUSION

The guiding question of the research was, given the legal uncertainty about the use of intentional and conscious guilt in traffic homicides committed while the driver was drunk, what would be the criteria for their best use? Once the bibliographical survey and judicial analysis had been completed, it was possible to identify criteria that were more geared to the specific case, thus achieving the research objective, given that, based on the circumstantial analysis of these criteria, the magistrate will have more certainty and justification for their decisions.

In the study, we showed that, in addition to being drunk at the wheel, the application of intentional misconduct requires the presence of other indicators that the individual preferred to act rather than desist from the conduct, aware of the risk and willing to accept it, thus demonstrating his indifference to the possible consequences.

In the context of conscious guilt, we can see that the magistrates understand that the driver did not assume the risk of causing the damage, even though he acted with negligence, recklessness or malpractice. In these cases, volitional intent is absent, since even though the driver is aware of the possibility of a harmful outcome, he firmly believes in its non-occurrence or in his ability to avoid it.

Therefore, we conclude that, in cases of traffic homicide resulting from drunken driving, the individual analysis of each case is essential, since only the evidence and the consequences of the conduct can clarify whether the agent acted with intent or guilt.

It should be emphasized that this does not rule out the need for explanatory normatization by legislation, given that even with the adoption of this method, it is possible to find gaps that could cause injustices and legal uncertainty for the legal operator.

REFERENCES

BITENCOURT, Cezar Roberto. **Tratado de direito penal**: parte geral. 26. ed. São Paulo: Saraiva, 2020, v. 1.

BRASIL. **Constituição da República Federativa do Brasil de 1988**. (1988, 5 de dezembro). Brasília, DF, Available at: http://www.planalto.gov.br/ccivil_03/constituicao/constituicao.htm. Accessed on: 26 feb. 2023.

BRASIL. **Decreto-lei nº. 2.848 de 07 de dezembro de 1940**. Código penal. Rio de Janeiro: Catete, 1940. Available at: <https://bit.ly/3MvE6DR>. Accessed at: 26 feb. 2023.

BRASIL. **Lei nº. 9.503 de 23 de setembro de 1997**. Institui o código de trânsito brasileiro. Brasília-DF: Senado, 1997. Available at: <https://bit.ly/3Gy9dKZ>. Accessed on: 26 feb. 2023.

BRUNO, Aníbal. **Direito penal**: parte geral. 5. ed. Rio de Janeiro: Forense, 2005.
CAPEZ, Fernando. **Curso de direito penal**: parte geral. 25. ed. São Paulo: Saraiva, 2021, v. 1.

G1. 'Estourei a cabeça dela porque ela passou na minha frente', diz motorista que atropelou modelo. **G1 Espírito Santo**, 16 abr. 2022. Available at: <https://tinyurl.com/mrhr58nf>. Accessed on: May 20, 2023.

MASSON, Cleber. **Direito penal**: parte geral (arts. 1º a 120). 13. ed. São Paulo: Método, 2019, v. 1.

MINISTÉRIO DA SAÚDE - MS. **Vigitel Brasil 2018**: vigilância de fatores de risco e proteção para doenças crônicas por inquérito telefônico. Brasília-DF: Ministério da Saúde, 2019.

MIRABETE, Júlio Fabbrini; FABBRINI, Renato Nascimento. **Manual de direito penal**: parte geral. 34. ed. São Paulo: Atlas, 2018, v. 1.

MONTEIRO, Natália. **Um em cada 10 motoristas relata dirigir sob efeito de álcool**, 26 maio 2020. Available at: <https://tinyurl.com/49nfk7sf>. Accessed on: 06 May 2023.

NUCCI, Guilherme de Souza. **Curso de direito penal**: parte geral – arts. 1º a 120 do código penal. 2. ed. Rio de Janeiro: Forense, 2018, v. 1.

NUCCI, Guilherme de Souza. **Manual de direito penal**. 16. ed. Rio de Janeiro: Forense, 2020.

SUPREMO TRIBUNAL FEDERAL - STF. **Recurso Ordinário em Habeas Corpus nº 137.418-CE**. Primeira Turma. Relator: Ministro Marco Aurélio. Brasília-DF: DJe, 08 abr. 2021.

SUPERIOR TRIBUNAL DE JUSTIÇA - STJ. **Agravo Regimental no Recurso Especial nº. 1.043.279-PR**. Sexta Turma. Relatora: Ministra Jane Silva. Brasília-DF: DJe, 14 out. 2008.

SUPERIOR TRIBUNAL DE JUSTIÇA - STJ. **Habeas Corpus nº. 321.354-SC**. Quinta Turma. Relator: Ministro Félix Fischer. Brasília-DF: DJe, 23 ago. 2016.

SUPERIOR TRIBUNAL DE JUSTIÇA - STJ. **Agravo Regimental no Recurso Especial nº. 1.320.344-DF**. Quinta Turma. Relator: Ministro Reynaldo Soares da Fonseca. Brasília-DF: DJe, 01 ago. 2017.

Superior Tribunal de Justiça - STJ. **Agravo Regimental no Recurso Especial nº. 1.166.037-PB**. Quinta Turma. Relator: Ministro Reynaldo Soares da Fonseca. Brasília-DF: DJe, 20 nov. 2019.

SUPERIOR TRIBUNAL DE JUSTIÇA - STJ. **AgRg no Recurso Especial nº 1.991.574-SP**. Quinta Turma. Relator: Ministro João Batista Moreira. Brasília-DF: DJe, 24 abr. 2023.

TRIBUNAL DE JUSTIÇA DO ESPÍRITO SANTO - TJES. **Ação penal nº. 0001432-27.2008.8.08.0050**. Primeira Vara Criminal da Comarca de Viana. Juiz Carlos Henrique Rios do Amaral Filho. Viana: DJe, 06 nov. 2018.

ZAFFARONI, Eugénio Raúl; PIERANGELI, José Henrique. **Manual de direito penal brasileiro**: parte geral. 14. ed. São Paulo: Revista dos Tribunais, 2021, v. 1.