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CRIMINAL LAW—PREMEDITATION
INFERRED FROM USE OF DEADLY WEAPON

The deadly weapon doctrine staunchly buttresses a supposed defect in the common-law murder structure. This doctrine—that intent, the essential element in intentional murder, is to be inferred where a homicide has been achieved through the use of a deadly weapon—is generally accepted. However, the question to be discussed herein is: Should the doctrine be extended to support first-degree murder where deliberation and premeditation make the difference in degree? This would mean that deliberation and premeditation would be inferred in the same way as intent where a killing has been effected through the use of a deadly weapon.

Intent is a subjective fact, rather than a fact of tangible, substantive matter. For this reason, intent is difficult to prove. Yet it remains the essential element in common law intentional murder. Faced with the dilemma of this elusive subjective element, the common law sought and found a solution to the problem in the deadly weapon doctrine. The rationalization was that a person intends the natural consequences of his own acts, and if he acts with a deadly weapon, causing another’s death, the law can raise an inference of intent. In this way the law made out his intent by working backwards from the killing: the homicide was the result of the act (use of a deadly weapon), and the act was the result of intent. And so, where the deadly weapon doctrine was interjected by the prosecution, the state’s case was prima facie. It meant that the accused had to show to the jury that his use of a deadly weapon was not evidence of intent—he had to destroy the state’s inference of intent.

A recent Arkansas case points up the use of the deadly weapon doctrine. The deceased was cut on the leg in an altercation in which the defendant was the aggressor. The defendant was armed with a knife and severed an artery, from which wound the deceased bled to death in 20 minutes. The court wrote:

Malice and intent to kill may be implied from the use of weapons, such as knives, as here, capable of producing death.

\[1\] 26 AM. JUR. 360.

\[2\] Liggins v. United States, 297 F. 881 (D.C. Cir. 1924); MORELAND, LAW OF HOMICIDE 26 (1952).

\[3\] Wooten v. State, 249 S.W. 2d 964 (Ark. 1952).

\[4\] Id. at 966.

In another knifing case, the rule was stated:

The law is well established . . . that the intentional killing of a human being with a deadly weapon implies malice, and, if nothing else appears, constitutes murder in the second degree.  

Murder was first divided into degrees in 1794 when Pennsylvania made "...all murder which shall be perpetrated by means of poison, lying in wait, or by any other kind of wilful, deliberate and premeditated killing" murder in the first degree. Other states followed the Pennsylvania lead, and so premeditation became necessary in those states to raise homicide to the level of first degree murder where the theory of the prosecution was based upon a planned, cold-blooded killing.

With the division of murder into degrees came the problem with which this note is concerned. Intent had been necessary for common law intentional murder. The deadly weapon doctrine provided that element where a deadly weapon was used. But under statutory first degree murder, premeditation became the key to conviction. The murder structure had been added to—a new element was necessary for the new level, and this new component was even more difficult to prove than the primary, necessary element in common law murder. It was buried much deeper in the mind and necessarily had a higher degree of subjectivity. How to prove premeditation became the new problem for prosecutors, just as intent had harasied their predecessors. And once again, some turned to the deadly weapon doctrine.

The courts in Virginia were the first to make this application, using the deadly weapon doctrine to raise an inference of premeditation. This appears to be the law of that state today. Hill v. Commonwealth in 1845 started Virginia on the road to this solution for the requisite of premeditation. Evidence at the trial showed that the decedent, a major of the militia, had not appointed the accused, Hill, as captain of a patrol some months before the killing, and that Hill "had taken umbrage at the decedent." He had been heard to remark, "Major Smith must mind how he cuts his cards with me." The evidence also showed that Hill had requested the decedent to "leave the company and walk with him under the shade of night," and that the deceased had died from the wound of a dirk near his

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* Id. at 601.
* Moreland, op. cit. supra, note 2 at 200.
* 2 Grattan 594 (Va. 1845).
* Id. at 598.
* Id. at 601.
* Id. at 604.
heart. The jury found the accused guilty of first degree murder, and the General Court of Virginia sustained the conviction, writing:

In order to elevate the offense from murder in the second to murder in the first degree, there must be proof that the accused deliberated; and that the killing was the result of such deliberation. This being proved, it is not material how recently the deliberation preceded the killing. The practical difficulty in cases of this kind, is, in determining what is sufficient evidence of deliberation. A homicide rarely declares his intention; nay, he often, under the guise of friendship and kind offices, sedulously conceals his fatal purpose. Often the resolution to kill may be fixed, but the time and the means not determined upon. The most wilful, deliberate and premeditated murders would often go unpunished unless means existed of proving the intention, independent of the admissions or declarations of the homicide. We are of the opinion that such means are furnished by the rule: “That a man shall be taken to intend that which he does, or which is the immediate or necessary consequence of his act.”

Then the court illustrated the point with reference to a pistol, saying:

The taking aim, and firing such a weapon, one from which death would most likely ensue, would itself be prima facie evidence that he intended it; and was, therefore, a wilful, deliberate and premeditated killing.

The Hill case set forth the rule followed by Virginia today, but it appears from the facts of the case that the reasoning of the court with reference to the use of the deadly weapon to show premeditation was unnecessary. The Commonwealth’s case was very strong even without the use of the doctrine. It appears that the court could have sustained the verdict without having to resort to the application now in discussion. In fact, in reviewing the case, the court asked, “Are not these circumstances sufficient?” The query was put forth with reference to all the circumstances tending to show premeditation. But the court did adopt the disputed doctrine, and apparently the reason for doing so was the same rationalization which originally created the deadly weapon doctrine. “A person intends the natural consequences of his own acts” thus echoed again to buttress the new rule with reason.

Thomas v. Commonwealth, a 1947 Virginia case, illustrates the rule today in that state and possibly in some other jurisdictions:

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186 Va. 131, 41 S.E. 2d 476 (1947).
A mortal wound, given with a deadly weapon in the previous possession of the slayer without any or on very slight provocation . . . [is a prima facie case of first degree murder.]\textsuperscript{18}

The Virginia application—that the use of a deadly weapon in effecting a homicide raises an inference of a "premeditated" design or plan to kill has a certain persuasiveness. It may be argued that the very fact that the killer selected a death weapon indicates that he "premeditated" death to his victim. However, the extension of the deadly weapon doctrine as a means of making out the premeditation requisite for murder in the first degree has not been followed to any appreciable degree in other jurisdictions. Indeed, it has been said: "The better rule, perhaps, refuses to imply premeditation from the mere use of the weapon, requiring, further, that deliberation in its manner of employment also be made to appear."\textsuperscript{19}

\textit{State v. Phillips,}\textsuperscript{20} a 1902 Iowa case, reasons that the application seems to go to the extent of holding that intent to kill necessarily implies deliberation and premeditation. The court said that this would make one inference the basis of another, which of course, cannot be done. "Literally construed, it makes murder in the first degree of every intentional homicide."\textsuperscript{21} Other cases have refused the application because of the nature of the intent necessary for first degree murder.\textsuperscript{22}

Some writers\textsuperscript{23} would attack the application through an attack upon the original deadly weapon doctrine by contending that even there the difficulty in obtaining proof to rebut or counteract the inference in certain cases is a most serious objection. This objection would be even stronger to the extended doctrine. The high degree of subjectivity of the element of premeditation also comes to the defense of the majority. If premeditation and deliberation are so difficult to

\textsuperscript{18} Thomas v. Commonwealth 186 Va. 131 at .........., 41 S.E. 2d 476 at 479 (1947).
\textsuperscript{19} Id. at 361.
\textsuperscript{20} 118 Iowa 660, 92 N.W. 876 (1902), which says, at 882: "The inference, so far as inference in such cases may be allowed, is of murder in the second degree, leaving it to the state to establish, if it can, the elements of deliberation and premeditation necessary to raise the crime to the first degree, and to the defendant to reduce it to manslaughter if he can by rebutting the presumption of malice."
\textsuperscript{21} Id. at .........., 92 N.W. at 882.
\textsuperscript{22} Cases contra to extension: State of North Carolina v. Gosnell, 74 F. 734 (W.D.N.C. 1899); Coats v. State, 253 Ala. 290, 45 So. 2d 35 (1950); State v. Johnson, 221 Iowa 8, 264 N.W. 596 (1936), citing State v. Woodmansee, 212 Iowa 596, 233 N.W. 725 (1930); People v. Vinunzo, 212 Mich. 472, 180 N.W. 502 (1920); Ex Parte Johnson, 280 S.W. 702 (Mo. 1926); State v. Lamm, 232 N.C. 402, 21 S.E. 2d 188 (1950), citing State v. Miller, 197 N.C. 445, 149 S.E. 590 (1929); State v. Cunningham, 173 Ore. 25, 144 P. 2d 303 (1942); Bass v. State, 231 S.W. 2d 707 (Tenn. 1950); State v. Masato Karumai, 101 Utah 592, 126 P. 2d 1047 (1942).
prove, then they are equally difficult to disprove, if they are inferred. It is further argued that if the primary purpose in instituting degrees of murder is looked at—to relieve the harshness of the punishment of all murder by death (as in England) by limiting the use of the death penalty to the most heinous crimes—then the application of the doctrine to include premeditation and deliberation seems destructive of the practical purpose of the two degrees of murder. The very purpose of creating and using the two degrees is defeated in a great majority of the cases.

It would seem that the best solution to the problem is to allow the jury to determine premeditation and deliberation from all the facts of the case. *People v. Vinunzo*²⁴ expressed this opinion (in citing from the brief of counsel for the people the summarized rule as announced in *People v. Potter*²⁵):

"The use of the lethal weapon is not in itself sufficient evidence to warrant a verdict of murder in the first degree, but in addition to this there must be evidence in the case, as to circumstances surrounding the killing or the manner in which the weapon is used, from which a logical inference may be drawn that there is willfulness, deliberation, and premeditation."²⁶

And Alabama states the same rule in a different way:

The essential constituents of murder in the first degree . . . are that the taking of life must have been willful, deliberate, malicious, and premeditated. These must concur and coexist or, whatever other offense may be committed, this offense of statutory creation is not committed. There is no possible state of facts from which the law presumes their concurrence and coexistence; and their concurrence and coexistence is not a fact to which a witness, or any number of witnesses, can testify. It is a matter of inference from all the facts and circumstances of the particular case.²⁷

It is believed that the deadly weapon doctrine should not be extended to infer premeditation and deliberation. The reasons behind the majority rule as outlined above seem to support this conclusion. The application necessarily includes not only "premeditation", but also "simple intent." The two concepts were separated by the murder degree statutes, and if the deadly weapon doctrine can be used to make out both, then the purpose of the statutes is defeated. The first degree of murder was meant to be a distinctly different degree of murder; it was meant to be delicately balanced by the legislators. The death penalty was meant to be distinctly limited. To extend the deadly

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²⁵ 5 Mich. 1 (1858).
²⁶ Supra note 24 at ......., 180 N.W. at 508.
²⁷ Coats v. State, 253 Ala. 290 at ......., 45 So. 2d 35 at 38 (1950).
weapon doctrine to the highest degree of murder would result in destroying the distinction between the two degrees, and thus, in effect, invalidate murder in the first degree.

DICK DOYLE

BREACH OF WARRANTY OF FITNESS AS FAILURE OF CONSIDERATION—MEYER V. LAND

In determining whether a breach of warranty of fitness for purpose intended can also constitute failure of consideration, we must look first at the nature of the warranty and the instances in which it has been deemed part of the primary consideration.¹ Both at common law² and under the Uniform Sales Act³ an implied warranty of fitness arises when goods are sold for a specific purpose. That is, when a buyer makes known to the seller the particular purpose for which he needs certain goods, and relies on the seller's judgment in procuring the goods, there is an implied warranty that the goods are suitable for that purpose.⁴ It is found, however, that in certain instances this concept does not provide relief to a vendee who discovers that he has purchased an article which he cannot use.

In England no rescission is permitted for breach of warranty if the property in the goods has passed to the buyer.⁵ Thus, if the vendee finds his purchases unsuitable for the purpose intended, he must seek rescission under a different theory. This theory is failure of consideration. Having had its inception in the law of contracts rather than the law of sales, this familiar doctrine was placed in an unusual setting by the court in the leading case of Young v. Cole.⁶ In that case certain bonds which the vendor held out to be marketable negotiable instruments were, in truth, worthless pieces of paper. Rescission could not

¹ By "primary consideration" the writer is referring to that consideration which must be present before a valid agreement can be effected under basic principles of contract law, as distinguished from secondary obligations such as warranties.
² MADDEN, UNIFORM SALES ACT 25 (1923); HILLARD, SALES 254 (1860); 4 MECHEM, SALES 1160 (1901); see also Griffin v. Williams, 305 Ky. 18, 202 S.W. 2d 744 (1947).
³ Uniform Sales Act, sec. 15(1).
⁴ Thus, if the requisite reliance is present and the article fails to meet the particular use for which it was purchased, the buyer can recover damages on this type of warranty. For example, see Brandenburg v. Samuel Stores, 211 Iowa 1821, 235 N.W. 741 (1931) (wherein a fur coat, purchased from a retailer, was found to be unfit as an article of wearing apparel); also see 46 AM. Jur. 529 et seq. (1943); 2 BENJAMIN, Sales 887 (rev. ed. 1889).
⁵ The leading English case is Street v. Blay, 109 Eng. Rep. 1212 (1831); VOLD, SALES 497 (1931); 3 WILLISTON, SALES 321 (rev. ed. 1948).