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J. Jerald Johnston
University of Kentucky

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NOTE

A RE-EXAMINATION OF THE MISDEMEANOR MANSLAUGHTER DOCTRINE

Because the penalty is so much greater than that for other forms of homicide, much has been written and said about the crime of murder. It is continually being examined in all its facets. The crime of manslaughter, on the other hand, receives comparatively little attention, and the doctrines related thereto are likely to be accepted without question. When rules are permitted to remain in the law without serious scrutiny from time to time, they have a tendency to become tyrannical in their application. Great injustice may be done as a result of a blind following of precedent. Reasonableness, not age, should be the criterion by which rules of law are accepted. With these thoughts in mind, let us turn to an examination of the misdemeanor manslaughter doctrine.

Manslaughter, as generally conceived by the courts today, may be divided into two main categories, (1) voluntary, with which this note is not concerned, and (2) involuntary. Involuntary manslaughter, the unlawful killing of a human being without malice, express or implied, and without intent to kill or inflict the injury causing death,¹ may be subdivided as follows

(a) Negligent manslaughter, which is, to take a composite view of the cases, the unintentional killing of a human being arising from the commission of an act dangerous either in itself or by reason of the reckless manner of its commission, or by recklessly omitting to do some duty required by law;² and

(b) Misdemeanor manslaughter, an unintentional homicide committed accidentally during the commission of some unlawful act, not amounting to a felony.³

¹ *Davis v State*, 31 Ala. App. 508, 19 So. 2d 356 (1944), *People v Oberlin*, 355 Ill. 317, 189 N.E. 333 (1934), *Lloyd v. State*, 206 Ind. 359, 189 N.E. 406 (1934), *Dean v State*, 128 Neb. 466, 259 N.W. 175 (1935), *Commonwealth v McLaughlin*, 293 Pa. 218, 142 Atl. 213 (1928).

² *People v Crossan*, 87 Cal. App. 5, 261 Pac. 531 (1928), *People v Buzan*, 351 Ill. 610, 184 N.E. 890 (1933), *State v. Custer*, 129 Kan. 381, 282 Pac. 1071 (1930), *State v. Cape*, 204 N.C. 28, 167 S.E. 456 (1933), *Kirk v Commonwealth*, 186 Va. 839, 44 S.E. 2d 409 (1948).

³ *Wiley v State*, 19 Ariz. 346, 170 Pac. 869 (1918), *Nichols v. State*, 187 Ark. 999, 63 S.W. 2d 655 (1933), *People v Brown*, 392 Ill. 519, 64 N.E. 2d 739 (1946), *Brown v. Commonwealth*, 219 Ky. 406, 293 S.W. 975 (1927), *State v Lee*, 180 La. 494, 156 So. 801 (1934).

It is with subdivision (b) above that this note is primarily concerned.

An analysis of the historical development of the doctrine will aid in an understanding of the problem. It has been said⁴ that the first clear distinction between homicide committed during the course of an unlawful act and that committed during the course of a lawful act was made by Bracton near the middle of the thirteenth century⁵ At that time there was no division between murder and manslaughter. All felonious homicide was punishable by death and the need for a distinction did not exist. The primary result of Bracton's distinction was the felony murder doctrine,⁶ which was repudiated for all practical purposes in England by *Regina v Serné*⁷ When a distinction came to be made between murder and manslaughter, misdemeanors came to be applied to manslaughter as felomes had been applied to murder.

Writing about four hundred years after Bracton, Coke, without making any clear distinction between murder and manslaughter, gave impetus to the doctrine of unlawful act when he defined homicide by misadventure as "when a man doth an act, that is not *unlawful*, which without any evil intent tendeth to a man's death."⁸ (italics writer's) Quoting Bracton, he declared, "If the act be unlawful, it is murder."⁹ When the distinction between felony and misdemeanor came to be a part of the law, Coke's words came to be interpreted to mean "If the act be a felony, it is murder, if it be a misdemeanor, it is manslaughter." At the time Hale wrote his *History of the Pleas of the Crown*,¹⁰ the misdemeanor manslaughter doctrine was firmly entrenched in the law of England. *Sir John Chichester's Case*¹¹ is illustrative. Sir John and his servant were mock-duelling, Sir John using his sword, covered by its scabbard, and the servant using his bedstaff. By accident the scabbard slipped off

⁴ Wilner, *Unintentional Homicide in the Commission of an Unlawful Act*, 87 U. OF PA. L. REV. 811 (1939), MORELAND, *RATIONALE OF CRIMINAL NEGLIGENCE* (1944) 2.

⁵ 2 BRACTON, *DE LEGIBUS ANGLIAE* (Twiss ed. 1879) 277.

⁶ Where homicide results from the commission of, or attempt to commit a felony, the necessary malice will be inferred in law, and it will be held murder.

⁷ 16 Cox C. C. 311 (1887).

⁸ Co. INST. (6th ed. 1680) 56.

⁹ *Ibid.*

¹⁰ New edition, 1778 (1st ed. 1736).

¹¹ Aley 12, 82 Eng. Rep. 888 (1648)

the sword and the servant was run through and killed. Because thrusting at the servant was voluntary and an assault in law, and therefore *unlawful*, the death, though unintended, was held to be manslaughter.

It may readily be seen that the strict application of the rule as understood at that time must, of necessity, have been attended by harsh results. Such a rule could not long stand, its application was bound to be modified. Credit has been given to Hale¹² for providing the first relief in the rigid application of the rule. It was he who made the first distinction between unintentional homicide arising from the commission of acts *mala in se* and those *mala prohibita*. He said that if the act which caused the death was *malum in se*, it was manslaughter, but if the act was merely *malum prohibitum*, and death ensued therefrom, it was not manslaughter but misadventure.¹³ This distinction was helpful in reducing the severity of the rule. However, it still does not provide an accurate yardstick by which one may measure the act from which death results in order to determine if manslaughter has been committed. What does the term *malum in se* comprehend? Does it mean any act *morally* wrong in itself? May the act be something *less* than this? Or must it be something *more* than morally wrong in itself? The English courts seem to have adopted the latter view. East, writing in the early part of the nineteenth century, said

"So if one be doing an unlawful act, though not intending bodily harm to any person; as throwing a stone at another's horse; if it hit a person and kill him, it is manslaughter. Yet in such cases it seems that the guilt would rather depend on one or another of these circumstances, *either that the act might probably breed danger, or that it was done with a mischievous intent.*"¹⁴ (Emphasis writer's)

In like manner, Hawkins, in his *Pleas of the Crown*, said that if a person kills another by shooting of a gun or in other ways "which is a dangerous sport, and has not the least appearance of any good intent, or by doing any other such idle action as cannot but endanger the bodily hurt (*sic*) of some one or other, or such like rash sports, which cannot be used with-

¹² Wilner, *supra* note 4, at 827.

¹³ HALE, HISTORY OF THE PLEAS OF THE CROWN, (new edit. 1778) 475.

¹⁴ EAST, PLEAS OF THE CROWN (1803). c. V, sec. 32, p. 257.

out the manifest hazard of life, he is guilty of manslaughter."¹⁵ It would seem that the real test, as put forward by these writers, is the element of *danger* involved in the act rather than the unlawfulness of the act. If the term *malum in se* is to be used to describe an act which in itself is likely to breed danger of bodily harm to others, it is a mere phrase of art. As such it serves to confuse the law on the subject as is shown by the pronouncements of the courts which have attempted to define the phrase.¹⁶ It sets up no accurate criterion by which courts may judge the acts in question in particular cases. It is submitted therefore, that having no practical value, the terms *malum in se* and *malum prohibitum* have no place today in the law of homicide.

Since the *malum in se—malum prohibitum* test is valueless as an aid in the solution of the misdemeanor-manslaughter problem, an examination of the modern decisions applying the unlawful act doctrine in connection with manslaughter would seem appropriate at this point. The rule itself, at least as a matter of statement, is a harsh one, and, as will be shown, the courts, in many instances, have resorted to various subterfuges in order to avoid that harshness.

In avoiding the application of the doctrine, the two main arguments used are (1) that the homicide was not the natural and probable result¹⁷ of the unlawful act and (2) that the act causing the death was not unlawful enough to bring it within the doctrine¹⁸ (the *malum prohibitum* test stated in a slightly dif-

¹⁵ 1 HAWKINS, PLEAS OF THE CROWN (8th ed. 1824) c. 11, sec. 9, p. 86.

¹⁶ "An offense *malum in se* is one which is naturally evil, as adjudged by sense of civilized community; but an act *malum prohibitum* is wrong only because made so by statute." State v. Trent, 122 Ore. 444, 259 Pac. 893, 898 (1927) The Michigan court seems to adopt the idea that to be *malum in se*, the act must have been an inherently dangerous common law felony. People v. Pavlic, 227 Mich. 562, 199 N.W. 373 (1924).

¹⁷ People v. Mulcahy, 318 Ill. 332, 149 N.E. 266 (1925), Kimmel v. State, 198 Ind. 444, 154 N.E. 16 (1926), Votre v. State, 192 Ind. 684, 138 N.E. 257 (1923) (sick girl's death not the *probable* result of taking a drink offered by the defendant), People v. Pavlic, 227 Mich. 562, 199 N.W. 373, (1924), Dixon v. State, 104 Miss. 410, 61 So. 423 (1913), People v. Gaydica, 122 Misc. Rep. (N.Y.) 31, 203 N.Y.S. 243 (1923), State v. Satterfield, 198 N.C. 682, 153 S.E. 155 (1930), Commonwealth v. Aurick, 138 Pa. Super. 180, 10 A. 2d 22 (1940), Estell v. State, 51 N.J. Law (22 Vroom) 182, 17 Atl. 118 (1889).

¹⁸ People v. Sica, 76 Cal. App. 648, 245 Pac. 461 (1926), Hayes v. State, 11 Ga. App. 371, 75 S.E. 523 (1912) (second count), Thiede

ferent manner) Typical of the cases using the first argument is *Estell v State*¹⁹ where the defendant attempted to drive by a tollgate without paying. The gatekeeper in attempting to catch the team by the harness was thrown to the ground and suffered injuries, from which he died two days later. The defendant was convicted of manslaughter. In reversing his conviction, the court said that the unlawfulness of the act did not render the defendant liable for all the undesigned and improbable consequences thereof.

Another example is the case of *People v Mulcahy*.²⁰ In that case a Chicago policeman had been convicted of manslaughter by an application of the misdemeanor-manslaughter doctrine for accidentally killing a girl with whom he was eating. Known to the officer, gambling was going on in the restaurant and he unlawfully failed to stop it. Because of an alarm created by his companion, entirely unrelated to the gambling, the officer unholstered his pistol which accidentally went off and killed the deceased. The trial court permitted his conviction on the ground that the homicide took place while the officer was in the commission of an unlawful act, i.e., permitting gambling. In reversing the conviction, the Supreme Court of Illinois said, "To convict one of manslaughter for killing a person while in the commission of an unlawful act, the state must show more than a mere coincidence of time and place between the wrongful act and the death. It must also show that the unlawful act was the proximate cause of the killing."²¹

Two good examples of the cases holding that the act causing the death was not unlawful enough to come within the misdemeanor-manslaughter doctrine (category (2) above), are *Thiede v State*²² and *State v Collingsworth*.²³ In the former case, the conviction was reversed on the ground that the instruction, saying merely that if the defendant furnished liquors to the deceased and the deceased drank and died therefrom, the defendant was guilty of manslaughter, was erroneous because it did not take into consideration the factor of *recklessness* on

v. State, 106 Neb. 48, 182 N.W. 570 (1921), State v. Reitze, 86 N.J. Law, 407, 92 Atl. 576 (1914), State v. Collingsworth, 82 Ohio St. 154, 92 N.E. 22 (1910).

¹⁹ 51 N.J. Law (22 Vroom) 182, 17 Atl. 118 (1889).

²⁰ 318 Ill. 332, 149 N.E. 266 (1925).

²¹ *Id.* at —, 149 N.E. 266, 267.

²² 106 Neb. 48, 182 N.W. 570 (1921).

²³ 82 Ohio St. 154, 92 N.E. 22 (1910).

the part of the defendant. The question of whether the defendant knew or should have known that the liquor was dangerous and poisonous was for the jury. It will readily be seen from a reference to the definitions at the beginning of this note that putting a conviction on that ground would make it a negligent manslaughter rather than a misdemeanor manslaughter.

Again, in *State v Collingsworth*, *supra*, the defendant while driving his horse and wagon rapidly, in violation of an ordinance of the city of Columbus, struck and killed the deceased. The court held that the violation of a municipal ordinance was not such an unlawful act as was contemplated by the statute.

An outstanding example of a miscarriage of justice and the extreme harshness of the unlawful act doctrine is *Keller v State*.²⁴ In that case, the defendant was charged with driving an automobile while intoxicated and running over one G, causing his death. The evidence for the defendant tended to show that he was driving carefully, that G was crossing in the middle of the street, that G's appearance was unexpected and that the accident could not have been avoided in the exercise of due care by a completely sober person. A Tennessee statute made it illegal to drive while intoxicated. In affirming the conviction, the court said that causal connection was not important nor even subject to investigation when the act, during the commission of which death ensues, is *malum in se*. Had all other circumstances been the same, with the sole exception of the defendant's being under the influence of liquor, he would have been acquitted. And yet, his being under the influence of liquor had nothing to do with the death.²⁵ As long as the rule is given lip service by the courts this type of result will reoccur.

There have been numerous cases where the unlawful act doctrine has been quoted as the grounds for conviction when the same results could more logically have been obtained on the grounds of criminal negligence.²⁶ In most of these cases the act,

²⁴ 155 Tenn. 633, 299 S.W. 803 (1928).

²⁵ Cf. *People v Harris*, 214 Mich. 145, 182 N.W. 673 (1921), *State v Trent*, 122 Ore. 144, 259 Pac. 893 (1927), *State v Brown*, 205 S.C. 514, 32 S.E. 2d 825 (1945).

²⁶ *Johnston v. State*, 94 Ala. 35, 10 So. 667 (1892) (snapping "unloaded" pistol), *State v. Naylor*, 5 Boyce (Dela. Ct. Oyer & Ter.) 99, 90 Atl. 880 (1913) (shooting a pistol to scare trespasser), *People v Hubbard*, 64 Cal. App. 12, 220 Pac. 315 (1923) (use of pistol to force trespasser out of house, but reversed on other grounds), *State v Donovan*, 8 A 2d (Dela. Ct. Oyer & Ter.) 876 (1939) (defendant intended to shoot past deceased, but hit him instead), *Gray v State*,

while unlawful, was also dangerous in itself or in a number of cases was unlawful because it was dangerous. A look at a few of these cases will illustrate the point. In *Johnston v State*,²⁷ the defendant, thinking his pistol unloaded, snapped it at his child and accidentally killed his wife. He was found guilty of manslaughter in the commission of an unlawful act, pointing a pistol. Since it is so common a saying as to have become a proverb that "most people are killed with unloaded guns," the defendant here should have known that his actions were inherently dangerous. His conduct was of such a degree of negligence that it could be called reckless.²⁸ Similarly, in *People v. Hubbard*,²⁹ it was shown that the defendant was using his pistol merely to bluff the deceased into leaving the defendant's house, and in the scuffle which ensued, the deceased was killed. While the case was remanded for a new trial because of error in failing to give an instruction, Hubbard could have been found guilty of a negligent manslaughter, in that his conduct could be taken for reckless since the trespasser might have been evicted without the use of the firearm.

Another illustration of this type of decision was the case of a girl who went for a ride with her boy friend, who, while they were parked, took out a gun and threatened suicide. She told him he did not have the nerve, took the gun away from him, and aiming it past him (or so she thought), accidentally killed him. She was tried and convicted on the unlawful-act theory. The

12 Ga. App. 634, 77 S.E. 916 (1913) (firing a pistol), *State v. Custer*, 129 Kan. 381, 282 Pac. 1071 (1929) (conduct denounced by statute passed for purpose of protecting life and safety), *Commonwealth v. Couch*, 32 Ky. L. Rep. 638, 106 S.W. 830 (1908) (firing a pistol), *Sparks v Commonwealth*, 66 Ky. (3 Bush) 111, 96 Am. Dec. 196 (1868) (discharge of pistol in street), *Egbert v State*, 113 Neb. 790, 205 N.W. 252 (1925) (intentional pointing and unintentional firing of a pistol), *State v. McNab*, 20 N.H. 160, (1849) (abortion), *Black v. State*, 103 Ohio St. 434, 133 N.E. 795 (1921) (target-shooting into well travelled alley), *Porter v. State*, 50 Okla. Cr. 136, 297 Pac. 305 (1931) (drunken driving, proximate cause proved), *State v. Brown*, 205 S.C. 514, 32 S.E. 2d 825 (1945) (auto accident, defendant on the wrong side of the road), cf. *State v. Roundtree*, 181 N.C. 535, —, 106 S.E. 669, 671 (1921)

²⁷ 94 Ala. 34, 10 So. 667 (1892).

²⁸ Recklessness has been described as something "more than want of reasonable care." MORELAND, A RATIONALE OF CRIMINAL NEGLIGENCE 47 (1944) To be reckless, conduct "must be such as to manifest a heedless disregard for or indifference to the rights of others." *Neessen v. Armstrong*, 213 Ia. 378, —, 239 N.W. 56, 59 (1931)

²⁹ 64 Cal. App. 12, 220 Pac. 315 (1923)

following excerpt from the instructions to the jury will show clearly how the defendant in this case was convicted of a negligent manslaughter on the unlawful act theory

“Quite apart from the statute which has been explained to you, the law generally, that is, what is called the common law, endeavors to safeguard human life against the reckless use of firearms, and the negligent handling of a loaded firearm causing death to another is manslaughter at the common law for discharging a deadly weapon in circumstances incompatible with human life is an unlawful act.”³⁰

The automobile accident cases are prime examples of cases where the unlawful-act manslaughter is substituted for the negligent manslaughter. In *State v Brown*³¹ the defendant was convicted of manslaughter when the deceased was killed as a result of the defendant's driving on the wrong side of the road. South Carolina statute made it manslaughter when death resulted from driving on the wrong side of the road. It is true that there was a definite statute on the subject here, but it would seem to be unnecessary since such conduct, if reckless, would form the basis for a conviction without the statute. And if there are circumstances present which would render the conduct not reckless there should be no conviction in this type of case. Again in the drunken-driving cases, the defendant is often convicted under a statute making it a misdemeanor to drive while intoxicated. The same conviction could be secured under the negligence theory. The defendant was convicted under just such a statute in *Porter v State*.³² The result is correct in the majority of such cases, since the average drunken driver is negligent. However if the driver is acting without negligence, there should be no conviction.³³

Another misapplication of the misdemeanor-manslaughter doctrine sometimes occurs in cases dealing with assaults. Where the deceased has attacked the defendant with a dangerous weapon *after* the defendant began the assault, and the defendant is forced to kill the deceased to save his own life, it has been held that he is guilty of manslaughter arising from the commission of an

³⁰ *State v Donovan*, 8A. 2d 876, 880 (Dela. Court Oyer & Ter.) (1939).

³¹ 205 S.C. 514, 32 S.E. 2d 825 (1945)

³² 50 Okla. Cr. 136, 297 Pac. 305 (1931)

³³ *Contra: Keller v. State, supra* note 24.

unlawful act, i.e., the assault.³⁴ The better view of this type of case, however, is that the death is voluntary manslaughter, being an "imperfect self-defense."³⁵

In all the cases examined the overwhelming majority shows that a conviction could have been obtained under the negligence theory or the voluntary manslaughter theory as well as under the unlawful-act theory. It is submitted that in the few cases in which this could not have been done an acquittal would have been more proper.

It has been stated³⁶ that negligence in doing acts which will probably endanger life or limb may constitute such "gross and culpable" negligence that it amounts to an "unlawful act" and if such act is the proximate cause of death, manslaughter may result. This would seem to be going around the block to get next door. If the negligence is culpable, manslaughter would be the direct result without deciding that the negligence is unlawful and that a death as a result of such act was manslaughter.³⁷ This court may have been influenced by Russell's work on crimes where he said, "There are many acts so *heedless* and *incautious* as necessarily to be deemed *unlawful* and wanton, though there may not be any express intent to do mischief, and the party committing them, and causing death by such misconduct, will be guilty of manslaughter."³⁸ (italics writer's). The writer of this note has no argument with the statement that the party "will be guilty of manslaughter" but he does question the necessity of turning negligence into an unlawful act in order to secure a conviction.

In view of the foregoing, it is submitted that the misdemeanor-manslaughter rule is too harsh in its statement, evaded in its application, and should be superseded by the companion concept of the negligent-manslaughter which comprises the great majority of the cases under the misdemeanor-manslaughter doctrine, and properly excludes those under that doctrine where a conviction would be unjust. It is therefore concluded that the unlawful-act doctrine should be stricken from the law in order to

³⁴ *People v. Pursley*, 302 Ill. 62, 134 N.E. 128 (1922), *Roohana v. State*, 167 Wisc. 500, —, 167 N.W. 741, 742 (1918)

³⁵ Note, 36 Ky. L. J. 443, 446 (1948), and cases cited therein.

³⁶ *Kimmel v State*, 198 Ind. 444, 154 N.E. 16 (1926).

³⁷ *Supra*, note 2.

³⁸ 1 RUSSELL, A TREATISE ON CRIMES AND MISDEMEANORS 636 (ed. 1853)

reduce the chance of the miscarriage of justice which is possible under the present rule. The following statute is proposed as a model which will accomplish this purpose

Be it enacted that involuntary manslaughter is that homicide committed, without a design to effect death, by reason of conduct creating such an unreasonable risk to human life and safety as to be recklessly disregarding of such interests.³⁹

The statute proposed above is clothed in general terms because it is felt that this definition of the negligent manslaughter is sufficiently broad to cover all homicides which should reasonably be included in the involuntary manslaughter category.⁴⁰

J. JERALD JOHNSTON

³⁹ MORELAND, A RATIONALE OF CRIMINAL NEGLIGENCE 128 (1944).

⁴⁰ It has been suggested that the statutory provision regarding manslaughter arising from an abortion should be left on the statute books because of the public policy which frowns on illegal abortions. The basic question in this, as in any other case remains, however Will it come within the negligent manslaughter theory? The writer is of the opinion that such a homicide is comprised within the doctrine, since the fact that such an abortion is both dangerous and unnecessary is sufficient to bring it within the definition of reckless disregard of human life and safety.

