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Criminal Law--Misdemeanor-Manslaughter Doctrine: Effect of "Unlawfulness of the Act" on Liability for Manslaughter

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STUDENT NOTES

CRIMINAL LAW—MISDEMEANOR-MANSLAUGHTER DOCTRINE: EFFECT OF "UNLAWFULNESS OF THE ACT" ON LIABILITY FOR MANSLAUGHTER

Under the statutes of the several states, involuntary manslaughter is variously defined, but the meanings seem to be substantially the same as that of the common law definition. The crime, as defined by the common law, is the unintentional killing of another occasioned by a person engaged at the time in doing some *unlawful act not amounting to a felony and not likely to endanger life,* or engaged in the doing of a lawful act in an unlawful manner.[1]

Although the inference may be gathered from the common law rule that a homicide committed by one engaged at the time in an unlawful act amounting to a misdemeanor is never excusable, the law is neither that strict nor that simple; and adequate defenses to a misdemeanor-manslaughter charge may be predicated upon (1) the nature of the unlawful act and (2) the absence of a causal relation between the death and the unlawful act.

The degree of unlawfulness of the act that the wrongdoer was engaged in at the time the killing occurred is usually said to be determinative of the grade of homicide, and is the basis of the modern felony-murder and misdemeanor-manslaughter doctrines.[2] At the common law the unlawful act relied upon to render the accompanying death manslaughter should be less than a felony; however, several of the states have passed statutes which more explicitly define the boundary between murder and manslaughter. Some of the statutes name certain crimes and specify that if a death shall occur collocatively thereto it shall be murder, otherwise it shall be manslaughter. A larger number of the statutes place the line of demarcation between murder and manslaughter upon the distinction between felony and misdemeanor.

In those jurisdictions that do not follow the strict misdemeanor-manslaughter doctrine, misdemeanors are generally divided into two classes: (1) acts *mala in se* and (2) acts *mala prohibita.* In such jurisdictions most authorities agree that the degree or nature of the unlawfulness of the act necessary to sustain a conviction of involuntary manslaughter must amount to an act *malum in se* as contrasted

[1] Commonwealth v. Couch, 32 Ky. L. Rep. 638, 106 S.W 830 (1908), Copeland v. State, 154 Tenn. 7, 285 S.W 565 (1926), State v Weisengoff, 85 W Va. 271, 101 S.E. 450 (1919)

[2] Wilner, *Unintentional Homicide in the Commission of an Unlawful Act,* 87 U. OF PA. L. REV. 811 (1939)

to one merely *malum prohibitum.* An act *malum in se,* according to one writer, is an offense which " mischievously affects the person or property of another, or openly outrages decency, or disturbs public order, or is injurious to public morals, or is in breach of official duty when done corruptly "[3] The court in *Commonwealth* v *Adams*[4] suggested that the only things which may be termed *mala prohibita* are those acts or omissions forbidden by statute, but not otherwise wrong. Another court has said that definitions of this nature cause a fallacious impression to be obtained that only acts can be classified as *mala in se* which the common law makes criminal but that this is not the test.[5] Therefore, it may be readily seen, due to the diversity of opinion as to what is *malum in se* and what is *malum prohibitum,* that there can be no uniformity of conviction in the various courts where a killing occurs collocatively to the commission of some misdemeanor.

After it has been determined that the defendant committed an unlawful act, the nature of which is sufficient to sustain a manslaughter conviction, it is still necessary to ascertain whether a causal relation exists between the death and the unlawful act. That mere coincidence in time or place is insufficient is aptly shown in the following case: A policeman, while committing an offense *malum in se* by failing to arrest certain persons, accidentally killed a girl. His conviction of involuntary manslaughter was reversed because of the absence of a causal relation between the death and the unlawful act.[6] However, some of the courts plainly ignore the causal relation between the death and the unlawful act which should be a prerequisite to conviction and adhere blindly to the rule that a killing by one engaged at the time in an unlawful act is manslaughter.[7]

The felony-murder doctrine, a parallel development to the misdemeanor-manslaughter doctrine, can be traced back beyond the time of Coke, and although some of the more recent writers have incorporated the doctrine in their treatises on criminal law, they are highly critical of it. Judge Stephen, in the case of *Regina* v. *Serne,*[8] was successful in eliminating the felony-murder doctrine in England almost sixty-one years ago; however, the rule remains in force in the majority of the jurisdictions of the United States.[9] The misdemeanor-manslaughter doctrine is just as fallacious as the felony-murder doctrine and may be subjected to practically the same criticisms. The following rule is thought to be a more logical and practical basis for solving the cases: Homicide is manslaughter if the death ensues

[3] 1 WHARTON, A TREATISE OF THE CRIMINAL LAW OF THE UNITED STATES 3 (6th ed. 1868).

[4] Commonwealth v. Adams, 114 Mass. 323 (1873).

[5] State v Horton, 139 N.C. 588, 51 S.E. 945 (1905)

[6] People v Mulcahy, 318 Ill. 332, 149 N.E. 266 (1925).

[7] Keller v State, 155 Tenn. 633, 299 S.W 803 (1927).

[8] 16 Cox C.C. 311 (1887).

[9] Note, 36 KY. L.J. 106 (1947)

as the consequence of the perpetration of a misdemeanor or other unlawful act, more than ordinarily dangerous to human life and safety

Those who have never paused to consider the common law rule and its ramifications may remonstrate that the above proposal is lacking in precedent and that its adoption would cause an atomic change in what is otherwise a settled field of the law; but for those, some of the older authorities provide an answer. Russell cites a case where a gentleman came to town in a chaise, and before he got out, fired his pistols into the ground, accidentally killing a woman. He was convicted of manslaughter because the act was *likely to breed danger* and was manifestly improper.[10] Since such terminology is seen in practically all the old treatises, it is perceptible that the authors were cognizant of the test of dangerousness, but because the old common law test of unlawfulness of the act was so deeply ensconced in the law, an inhibition was placed on those writers; hence, the antiquated rule was enunciated despite its anachronisms.

Another writer, Bevill, who stolidly recapitulated the law of homicide in his volume, said, "When a man in doing any act which is unlawful and *malum in se*, by accident kill any person, and there is no probability that it will occasion death or a personal injury to anyone, it is manslaughter."[11] This statement of the law, made in 1799, accurately depicts the status of the present law, and probably because of its hoary age remains unscathed. In other words, the jurists of England thought that if the unlawful act was dangerous the accused was guilty of murder, and they had a quasi-logical reason for so thinking. In England, where the original felony-murder doctrine (and the misdemeanor-manslaughter doctrine) was devised, it made no difference whether the defendant was convicted for the unlawful act or the homicide, because, in either case, he suffered a serious penalty—usually decapitation—and as a man can tolerate his head to be severed only once, the unlawful act and the homicide were combined.[12] Therefore, those who have a great abhorrence of constructive crime should bestow their vehemence upon the English rather than the American Courts. But since penalties are not now so serious and the modern concept of punishment is to act as a deterrent as well as retribution, the basic concept of constructive crime should be examined to determine if there is sufficient reason to retain it in all its severity. Although the courts perfunctorily recite the rule that one is guilty of manslaughter if he kills another while doing an unlawful nonfelonious act not likely to en-

[10] 1 RUSSELL, A TREATISE ON CRIMES AND MISDEMEANORS 636 (7th ed. 1853).

[11] BEVILL, A TREATISE ON THE LAW OF HOMICIDE, AND OF LARCENY AT COMMON LAW 55 (1799).

[12] In Blackstone's time approximately 120 offenses were punishable by death. Commonwealth v Sampson, 130 Pa. Super. 65, —, 196 Atl. 564, 567 (1938).

danger life, do they really mean what they say? If such a statement clearly expresses their view, it would seem that the accused is being punished for the unlawful act rather than the homicide. There is no valid reason for doing this in the form of a prosecution for homicide when all jurisdictions provide adequate recourse against an erring citizen who commits either a felony or a misdemeanor.

Some of the courts, when a case arises where conviction is not advisable, rather than apply the rule "not likely to endanger life" and all the inflexibility and harshness inherent therein, seek a loophole in order to excuse the defendant—generally remoteness, i.e., the absence of a causal relation between the death and the unlawful act.[13] Of course, remoteness is an adequate defense, but to use the theory to masquerade practically all acquittals is absurd. In this connection, the two following cases, which demonstrate the problem of determining causal relation, should be studied: A husband was held guilty of manslaughter, in the lower court, for so frightening his wife that she left home, thinly clad on a very cold night, and died of exposure.[14] In still another case, the defendant unlawfully fired at random in the highway, and so frightened an *enceinte* woman that she had a miscarriage and died. The court held that the death was not the natural and probable consequence of the shooting and acquitted the accused of the manslaughter charge.[15] In both cases it is possible to conclude that an intervening factor caused the death, and in that event, the results are not harmonious. In practically all the cases, causation could be utilized in order to attain the desired result, but why resort to such an intangible method in order to secure an acquittal? Why not say that under the circumstances the act is not sufficiently dangerous to life to warrant conviction?

Several of the courts, however, have reached a gratifying conclusion without mobilizing fiction and have used the proper terminology in so doing. One court, in reaction to a factual situation wherein the defendant unlawfully sold the deceased whiskey, the drinking of which, followed by exposure, caused his death, said, "Notwithstanding the fact that the statute has declared it to be a felony, it is an act not in itself directly and naturally dangerous to life. So if one in the commission of such an act unintentionally causes the death of another, he is not guilty of murder, nor is he guilty of manslaughter unless he commits the act carelessly and in such a manner as manifests a reckless disregard of human life."[16] Definitely this case satisfies all the requirements of the common law definition of manslaughter since the killing resulted from an unlawful act not likely to endanger life, but it is thought that no prudent

[13] *Compare* Hubbard v Commonwealth, 304 Ky 818, 202 S.W 2d 634 (1947), *with* Letner v. State, 156 Tenn. 68, 299 S.W 1049 (1927).

[14] Hendrickson v Commonwealth, 85 Ky. 281, 3 S.W 166 (1887)

[15] Commonwealth v Couch, 32 Ky L. Rep. 638, 106 S.W 330 (1908).

[16] People v. Pavlic, 227 Mich. 562, —, 199 N.W 373, 374 (1924).

court would have convicted in this situation. If the courts adhered to the rule as it is recited, conviction would necessarily follow in such a case, but the theory of remoteness may be and ordinarily is used to defeat conviction. *Dicta* of cases decided in Mississippi[17] and Pennsylvania[18] follow the language of the above case, and if they have not already changed their position, those jurisdictions have an excellent opportunity to do so by virtue of the transitory language contained therein.

Furthermore, the attendant difficulties in determining whether a misdemeanor is *malum in se* or merely *malum prohibitum*, in those jurisdictions that make the distinction, would be obviated by using the test of dangerousness. Those courts that do not observe the distinction between misdemeanors but follow the strict misdemeanor-manslaughter doctrine[19] have disposed of the difficulty, but they are more harsh in their treatment of offenders. But in either event, the fact that the unlawful act was a felony, or a misdemeanor *malum in se*, or a misdemeanor *malum prohibitum* may be one of the circumstances to be considered in determining whether the act was sufficiently dangerous to support a conviction for homicide. It is not, however, the controlling circumstance as under the present status of the law. Moreover, the *malum in se* and *malum prohibitum* test to determine whether the unlawful act satisfies the requisites of the rule is not founded upon sound principle, " for it is equally unfit, that a man should be allowed to take advantage of what the law says he ought not to do, whether the thing be prohibited, because it is against good morals, or whether it be prohibited because it is in the interest of the state."[20]

Of course, the courts that contend that they follow the common law rule do not exact penalties in accordance with the rigid inflexibility thereof, in view of the fact that a stratagem will present itself upon vigilant search; but why should a modern court dogmatically insist that it is following a certain rule but yet find a loophole when the circumstances so warrant? All that is necessary to be done is to formulate a more elastic rule that will take care of the cases. The jurists who have a phobia against deviating from the hallowed common law will immediately insist that one should never sacrifice a clear, impeccable rule for what they term a vague generality; but if a rule will allow each criminal case to stand on its facts and each circumstance to speak for itself, certainly justice can be more nearly perfected by individualizing each case, rather than coldly saying, "You killed a man while committing a felony; your punishment

[17] *See* Dixon v. State, 104 Miss. 410, —, 61 So. 423, 423 (1913).

[18] *See* Commonwealth v. Sampson, 130 Pa. Super. 65, —, 196 Atl. 564, 567 (1938).

[19] Thompson v. State, 131 Ala. 18, 31 So. 725 (1902), Sparks v Com., 3 Bush 111 (Ky. 1867), Brittain v. State, 36 Tex. Cr. R. 406, 37 S.W 758 (1896).

[20] Note, 21 CAN. B. REV. 503, 505 (1943).

shall be life imprisonment or death," or "You committed a homicide while doing a misdemeanor; you are guilty of manslaughter." For example, one may find a felony which is no more serious than a misdemeanor *malum in se* committed under aggravating circumstances, yet the punishment in the former is far excessive of the latter. Certainty in the law should be of prime importance in commercial and property law and perhaps other phases of the civil law, but criminal law should attempt to extol justice rather than certainty; and hence, "hard and fast rules" should be secondary

As has been previously shown, the common law rule, although repeatedly cited, is not strictly followed because of the courts' propensity to use some device when an acquittal is desired, whereas it would be tantamount to conviction to follow the old rule; but why should one's actions be disguised when the same thing that is being done indirectly may be done directly merely by an assertion that the offense shall depend upon the dangerousness of the act rather than the unlawfulness thereof? Although the majority of the cases are opposed to the proposed rule, reason should be substituted for number and the law of constructive crime examined to determine if the welfare of society is being adequately protected by the law as written in Coke's era.

It is submitted, therefore, that for the ancient misdemeanor-manslaughter rule there should be substituted the more rational and direct test of whether the act is more than ordinarily dangerous to human life and safety in determining whether a defendant is guilty of manslaughter in homicide cases coming within this category.

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