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Manslaughter and Other Homicides

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MANSLAUGHTER AND OTHER HOMICIDES

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The last article discussed the crimes of murder and aggravated murder, as well as the legal definitions of birth and death. See 3 Katz & Giannelli, Baldwin's Ohio Practice Criminal Law ch. 95 (1996). This article examines other types of homicides and causation issues.

COMMON LAW

Voluntary Manslaughter

At common law, voluntary manslaughter was defined as an intentional killing of a person upon adequate provocation. 2 LaFave & Scott, Substantive Criminal Law § 7.10 (1986). The killing must have occurred while the offender was subject to a sudden heat of passion, for which there had not been a sufficient "cooling off" period. The common law courts were restrictive in recognizing circumstances where the provocation was deemed adequate. Often, provocation was limited to two instances: (1) where the accused reacted to a battery or mutual combat, and (2) where the accused discovered his spouse in bed with another man. "Mere words" were not considered adequate provocation; this rule was later modified to permit the jury to decide the issue.

Involuntary Manslaughter

At common law, involuntary manslaughter included two types of homicides. The first involved a death caused by "criminal negligence." Id. § 7.12. The courts were divided over whether this offense required recklessness (a subjective awareness of the risk of death) or gross negligence (an objective standard based upon whether a reasonable person would have been aware of the risk). There was, however, general agreement that involuntary manslaughter required more culpability than simple negligence, the civil tort standard. Typical examples of involuntary manslaughter included drunk driving and drag racing.

The second type of involuntary manslaughter involved the "unlawful act" doctrine or "misdemeanor-manslaughter rule." Id. § 7.13. This offense was analogous to the felony-murder rule; a killing during the commission of a misdemeanor was manslaughter. Frequently, this offense was limited by requiring that the misdemeanor be malum in se, or if malum prohibitum, that the death be foreseeable.

VOLUNTARY MANSLAUGHTER

Voluntary manslaughter proscribes knowingly causing the death of another under the influence of sudden passion or in a sudden fit of rage brought on by serious provocation reasonably sufficient to incite the person into using deadly force. R.C. 2903.03(A). "The element of provocation mitigates the offender's culpability." State v. Tyler, 50 Ohio St.3d 24, 37, 553 N.E.2d 576 (1990), cert. denied, 498 U.S. 951 (1990). See also State v. Huertas, 51 Ohio St.3d 22, 553 N.E.2d 1058 (1990), cert. denied, 498 U.S. 336 (1991); State v. Toth, 52 Ohio St.2d 206, 371 N.E.2d 831 (1977).

Sudden Passion or Rage

The 1974 Criminal Code adopted the Model Penal Code's approach, using the phrase "extreme emotional stress" to expand the circumstances in which murder could be reduced to voluntary manslaughter: "[T]he former offense of voluntary manslaughter contemplated killings done in a sudden fit of rage or passion. This section includes such killings, but also includes homicides done while under extreme emotional stress which may be the result of a build-up of stress over a period of time." Legislative Service Commission (1973).

The statute was amended in 1982, substituting the present language, "sudden passion or in a sudden fit of rage," for the phrase "extreme emotional stress." The amendment reflected a legislative reconsideration of its 1974 decision to expand voluntary manslaughter to include homicides committed under extreme emotional stress, which could develop over a period of time. Even before the amendment, the Ohio Supreme Court had reduced the impact of the "extreme emotional stress" language by ruling that the act must be performed under the influence of sudden passion or in the heat of blood, without time for reflection or for passions to cool. State v. Muscatello, 55 Ohio St.2d 201, 378 N.E.2d 738 (1977).

Consequently, the issues raised under the amended statute are the same as those that existed in the pre-1974 statute: (1) whether the provocation was adequate, (2)

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whether the provocation triggered sudden passion or a sudden fit of rage, (3) whether the killing was a result of such provocation, and (4) whether the killing occurred before a reasonable "cooling-off" time had elapsed.

Provocation By The Victim

Under the Ohio statute, the provocation must be caused by the victim. State v. Shane, 63 Ohio St.3d 630, 590 N.E.2d 272 (1992). An offender who kills the victim because he is provoked into a sudden rage by a third person does not qualify for manslaughter. See 2 LaFave & Scott, Substantive Criminal Law § 7.10(g) (1986).

Sufficient Provocation

At common law, the courts were restrictive in recognizing circumstances where the provocation was deemed adequate. Often, provocation was limited to two instances: (1) where the accused reacted to a battery or mutual combat, and (2) where the accused discovered his spouse in bed with another man. "Mere words" were not considered adequate provocation.

In Ohio, there is both an objective and a subjective aspect to the provocation requirement. The subjective component focuses on whether the particular defendant was actually under the influence of a sudden passion or sudden fit. The objective component focuses on whether the provocation is sufficient to arouse the passions of an ordinary person beyond the power of his or her control. Id. In most situations, words alone are not sufficient, even if one spouse informs the other spouse of adultery. State v. Shane, 63 Ohio St.3d 630, 590 N.E.2d 272 (1992).

Cooling-Off Period

What constitutes a reasonable time for passions to cool is typically a question for the trier of fact and is not a matter of law, unless (based on the evidence) reasonable persons could not differ as to what constitutes a reasonable time. State v. Robinson, 161 Ohio St. 213, 118 N.E.2d 517 (1954). A woman who shoots her husband as he lay sleeping several hours after their last argument is not entitled to an instruction on voluntary manslaughter as there is no evidence of suddenness. State v. Manning, 74 Ohio App.3d 19, 598 N.E.2d 25 (1991).

In State v. Mack, 82 Ohio St.3d 198, 201, 694 N.E.2d 1328 (1998), the Supreme Court commented: "[W]e find the evidence insufficient, as a matter of law, to establish provocation that is reasonably sufficient to incite the use of deadly force . . . Mack testified that he had been told that Chris had made threats to him in the past. However, past incidents or verbal threats do not satisfy the test for reasonably sufficient provocation when there is sufficient time for cooling off. In this case, there is no evidence that any past incidents provoked appellee into a sudden passion or fit of rage . . . Fear alone is insufficient to demonstrate the kind of emotional state necessary to constitute sudden passion or fit of rage."

Burden of Proof

In some jurisdictions, provocation is considered an element of voluntary manslaughter and once raised at trial, the prosecution must prove beyond a reasonable doubt that adequate provocation did not exist. Ohio, however, follows a different approach. In State v. Rhodes, 63 Ohio St.3d 613, 620, 590 N.E.2d 261 (1992), the Ohio Supreme Court ruled that "a defendant on trial for murder or aggravated murder bears the burden of persuading the fact finder, by a preponderance of the evidence, that he or she acted under the influences of sudden passion or in a sudden fit of rage." In State v. Benge, 75 Ohio St.3d 136, 140, 661 N.E.2d 1019 (1996), cert. denied, 519 U.S. 888 (1996), the Court commented that the statute "permits a defendant to mitigate a charge of aggravated murder or murder to manslaughter if the defendant establishes the mitigating circumstances" and the "jury should have been instructed to consider the mitigating evidence to determine whether appellant proved voluntary manslaughter." In other words, the crime of voluntary manslaughter comprises elements which must be proven by the state and mitigating circumstances that the defendant must establish. State v. Crago, 93 Ohio App.3d 621, 639 N.E.2d 801 (1994), app. dismissed, 70 Ohio St.3d 1413, 637 N.E.2d 90 (1994), cert. denied, 513 U.S. 1172 (1995). In a murder prosecution, the trial court misstated the law by stating that it was the state's burden to prove that the defendant did not act under the influence of sudden passion or in a fit of rage. State v. Cuttiford, 93 Ohio App.3d 546, 639 N.E.2d 472 (1994).

The allocation of the burden of persuasion to the defendant raises a constitutional issue in addition to the statutory issue. In Mullaney v. Wilbur, 421 U.S. 684 (1975), the United States Supreme Court ruled that allocating the burden of proving "heat of passion" to a homicide defendant violated due process. The Court viewed the "heat of passion" issue as an element of the crime as defined in Maine. Under Maine law, if the prosecution proved the homicide was both intentional and unlawful, "malice aforethought" was conclusively implied — unless the accused proved by a preponderance of the evidence that he acted in the heat of passion on sudden provocation, which could reduce the crime to manslaughter.

Two years later, however, in Patterson v. New York, 432 U.S. 197 (1977), the Court ruled that a New York law that allocated the burden of proving an "extreme emotional disturbance" to a homicide defendant did not violate due process. The "extreme emotional disturbance" requirement is merely a modern formulation of the "heat of passion" rule; it reduces murder to manslaughter. The Court distinguished *Wilbur* on the grounds that Maine, but not New York, had defined "malice aforethought" as an element of murder. As such, due process prohibited shifting the burden of persuasion on this element to the accused. This distinction was criticized as "formalistic" because a state remained free to define crimes in ways to avoid the *Wilbur* result. 2 McCormick, Evidence § 347, at 483 (4th ed. 1992). See also 1 LaFave & Scott, Substantive Criminal Law § 1.8(b), at 71 (1986) ("So the argument goes, if the state has it in its power to redefine the crime so as to transform an 'element' into an 'affirmative defense,' then there is no reason — other than excessive formalism — to prohibit the state from instead leaving that particular in the statute as an element and merely assigning the burden of proof as to it to the defendant.").

In State v. Rhodes, 63 Ohio St.3d 613, 620, 590 N.E.2d 261 (1992), the Ohio Supreme Court held that the allocation of the burden of persuasion to the defendant did not violate due process.

Diminished Capacity

"Provocation" is the only grounds in Ohio for reducing an intentional killing to manslaughter; the partial defense of diminished capacity is not recognized in Ohio. State v. Wilcox, 70 Ohio St.2d 182, 436 N.E.2d 523 (1982). See 3 Katz & Giannelli, Baldwin's Ohio Practice Criminal Law § 87.16

(1996) (diminished capacity).

Accident Defense

In State v. Lazich, 117 Ohio App.3d 477, 479, 690 N.E.2d 977 (1997), app. dismissed, 78 Ohio St.3d 1512, 679 N.E.2d 308 (1997), the court of appeals held that the record supported "the defense theory that appellant accidently discharged the pistol while attempting to protect himself from the decedent's attack. Therefore, the prosecution did not prove beyond a reasonable doubt that appellant 'knowingly' caused the decedent's death."

Lesser-Included Offenses

Voluntary manslaughter is technically not a lesser included offense of murder, because it requires *additional* elements (mitigating circumstances) not included in the definition of murder. State v. Shane, 63 Ohio St.3d 630, 632, 590 N.E.2d 272 (1992). It is a "lesser-degree offense" of murder. State v. Rhodes, 63 Ohio St.3d 613, 617, 590 N.E.2d 261 (1992) ("Voluntary manslaughter is . . . an inferior degree of murder."); State v. Tyler, 50 Ohio St.3d 24, 37, 553 N.E.2d 576 (1990) ("As with lesser included offenses, a defendant is entitled to an instruction on an inferior degree of the indicted offense when the evidence is such that a jury could both reasonably acquit him of the indicted offense and convict him of the inferior offense."); State v. Deem, 40 Ohio St.3d 205, 533 N.E.2d 294 (1988) (syllabus, para. 2).

If the jury in a murder trial finds that the defendant purposely killed the victim, the crime is murder. If, however, the jury also finds that this killing was the product of sudden passion or sudden fit of rage brought about by serious provocation, the crime is voluntary manslaughter.

If aggravated murder is charged, the jury may have three options: (1) A purposeful killing committed with prior calculation or design is aggravated murder; (2) A purposeful killing without prior calculation or design is murder; (3) A purposeful killing in a sudden heat of passion or fit of rage upon sufficient provocation is voluntary manslaughter. See Legislative Service Commission (1973).

INVOLUNTARY MANSLAUGHTER

There are two types of involuntary manslaughter.

Felonies as the Predicate Offense

The first type is defined as proximately causing the death of another while committing or attempting to commit a felony. R.C. 2903.04(A) ("No person shall cause the death of another as a proximate result of the offender's committing or attempting to commit a felony."). This provision includes felonious assault, State v. Morris, 105 Ohio App.3d 552, 556, 664 N.E.2d 950 (1995) and child endangerment, State v. Kamel, 12 Ohio St.3d 306, 308-10, 466 N.E.2d 860 (1984); State v. Evans, 93 Ohio App.3d 121, 637 N.E.2d 969 (1994); State v. Legg, 89 Ohio App.3d 184, 187-88, 623 N.E.2d 1263 (1993).

Misdemeanors as the Predicate Offense

The second type of involuntary manslaughter is identical, except it involves a misdemeanor. R.C. 2903.04(B) (first, second, third, or fourth degree or a minor misdemeanor). At one time, the Ohio Supreme Court had ruled that a minor misdemeanor could not serve as the predicate offense for involuntary manslaughter. State v. Collins, 67 Ohio St.3d 115, 616 N.E.2d 224 (1993); State v. Kuhajda, 67 Ohio St.3d 450, 619 N.E.2d 1016 (1993). The statute, however, has since been amended.

In State v. Campbell, 117 Ohio App.3d 762, 766, 691 N.E.2d 711 (1997), the court of appeals ruled the involuntary manslaughter statute unconstitutional if the underlying minor misdemeanor is a strict liability offense. In such a case, the punishment for manslaughter is grossly disproportionate and thus violates the Cruel and Unusual Punishment Clause. See also State v. Brown, 117 Ohio App.3d 6, 689 N.E.2d 979 (1996) (rejecting an Equal Protection challenge), app. dismissed, 78 Ohio St.3d 1452, 677 N.E.2d 813 (1996).

Common Law

The statute incorporates the common law unlawful act doctrine. See Legislative Service Commission (1973) ("This section defines an offense substantially equivalent to the former offense of involuntary manslaughter, except that for penalty purposes it distinguishes between homicides resulting from felonies and those resulting from misdemeanors.").

Common-law manslaughter, however, also included a death caused by criminal negligence (recklessness) — e.g., drunk driver fatality. There is no provision for this type of manslaughter in Ohio. Nevertheless, the Ohio negligent homicide and vehicular homicide statutes encompass much of the conduct that fell within this type of common-law involuntary manslaughter.

Mens Rea

No distinct culpable mental state need be proven for the element of death. State v. Tanner, 90 Ohio App.3d 761, 630 N.E.2d 751 (1993). The culpable mental state is the intent to commit the underlying crime. State v. Campbell, 74 Ohio App.3d 352, 598 N.E.2d 1244 (1991), dismissed, 62 Ohio St.3d 1431, 578 N.E.2d 823 (1991); State v. Losey, 23 Ohio App.3d 93, 491 N.E.2d 379 (1985); Stanley v. Turner, 6 F.3d 399 (6th Cir. 1993).

Proximate Causation

Proximate cause is required for culpability. The death must be directly associated with the underlying crime as part of one continuous transaction. State v. Cooper, 52 Ohio St.2d 163, 370 N.E.2d 725 (1977), vacated on other grounds, 438 US 911 (1978). Thus, a victim's death caused by fright or shock over an attempted burglary can be considered the proximate result of the burglary within the meaning of this statute. State v. Losey, 23 Ohio App.3d 93, 491 N.E.2d 379 (1985). This standard has been interpreted to mean that where a person sets in motion a sequence of events, the foreseeable consequences of which were known or should have been known to that person at the time, the person is criminally liable for the direct and reasonably inevitable consequence of death resulting from the original criminal act. State v. Chambers, 53 Ohio App.2d 266, 373 N.E.2d 393 (1977).

Lesser-Included-Offenses

The primary difference between aggravated murder (felony-murder) and involuntary manslaughter (felony-manslaughter) is that aggravated murder requires the *purpose* to kill, while involuntary manslaughter requires only a death as the proximate result of a felony. State v. Campbell, 69 Ohio St.3d 638, 630 N.E.2d 339 (1994), cert. denied, 513 U.S. 913 (1994). Accordingly, involuntary manslaughter is a lesser offense of aggravated murder if the jury finds that the defendant lacked the purpose to kill. State v. Scott, 61 Ohio St.2d 155, 400 N.E.2d 375 (1980) (defendant an aider and abettor); State v. Mabry, 5 Ohio App.3d 13, 449 N.E.2d 16 (1982) (defendant a principal offender).

Moreover, a defendant is entitled to an instruction on the lesser included offense of involuntary manslaughter, where there is evidence of the defendant's intoxication while committing an armed robbery and homicide because intoxication might lead a jury to conclude that the defendant did not act with the purpose to kill. State v. Young, No. C-830757 (1st Dist. Ct. App., 5-14-86). An instruction on involuntary manslaughter as a lesser included offense of aggravated murder is justified only when the jury can reasonably find against the prosecution on the element of purpose and still find that the defendant's act proximately caused the death. State v. Campbell, 69 Ohio St.3d 38, 630 N.E.2d 339 (1994), cert. denied, 513 U.S. 913 (1994).

Recent Amendment

R.C. 2903.02(B) now defines murder to also include a death that is the proximate result of the offender's committing or attempting to commit an offense of violence that is a felony of the first or second degree and that is *not* a violation of R.C. 2903.03 (voluntary manslaughter) or R.C. 2903.04 (involuntary manslaughter). An "offense of violence" is defined in R.C. 2901.01(A)(9). The relationship between this type of murder and involuntary manslaughter is unclear. Which felonies for murder are *not* felonies for voluntary manslaughter?

NEGLIGENT HOMICIDE

Negligent homicide is defined as negligently causing the death of another by means of a deadly weapon or dangerous ordnance. See R.C. 2923.11(A) ("Deadly weapon" defined as "any instrument, device, or thing capable of inflicting death, and designed or specially adapted for use as a weapon, or possessed, carried, or used as a weapon."); R.C. 2923.11(K) & (L) (defining "dangerous ordnance"). The legislative note explains:

> This section adds a new offense of homicide negligently committed, in which the instrumentality is a deadly weapon or dangerous ordnance . . . Children are frequently killed while playing with "unloaded" guns, and this section would apply to a person who, because of a substantial dereliction from due care, leaves a loaded firearm in a place where childish curiosity has a tragic result. Also, the hunter who fails to make sure of his target and kills someone, and the person who points a firearm in jest and kills the unfortunate at whom it is aimed, would be guilty of a violation of this section. Legislative Service Commission (1973).

Actus Reus: Omissions

As indicated by the above passage, a failure to take proper precautions, where there is a legal duty to do so, satisfies the act requirement. As a general principle, the failure to act (an omission) cannot be the basis for criminal liability. The exception to this rule occurs in those cases where the common law judges found a "legal duty" to act. The Ohio statute recognizes this exception. R.C. 2901.21(A)(1) ("liability is based on conduct which includes either a voluntary act, or an omission to perform an act or duty which he is capable of performing"). The statute, however, does not define the phrase "legal duty." Nevertheless, a fairly well-developed body of common law precedents have been decided. See 3 Katz & Giannelli, Baldwin's Ohio Practice Criminal Law § 85.4 (1996) (omission to act).

Mens Rea

The negligence required by the Criminal Code is not ordinary negligence but rather involves a substantial departure from due care. See State v. Lovejoy, 48 Ohio Misc. 20, 357 N.E.2d 424 (Muni., 1976). "Playfully" chasing others around a yard without checking to see if a gun is loaded constitutes a substantial departure or lapse from due care. In re Jackson, 45 Ohio App.2d 243, 344 N.E.2d 162 (1975).

A defendant who entered into a suicide pact with his girlfriend was not guilty of negligent homicide after she killed herself with the defendant's gun; the legislative history does not indicate that the statute was intended to apply to assisting, aiding, or abetting suicide, and the fact that the death was the result of a suicide pact provided a complete defense. City of Akron v. Head, 73 Ohio Misc.2d 67, 657 N.E.2d 1389 (Muni.,1995).

VEHICULAR HOMICIDES

Aggravated vehicular homicide, R.C. 2903.06, is defined as recklessly causing the death of another while operating a motor vehicle, motorcycle, snowmobile, locomotive, watercraft, or aircraft. The drafters observed:

> This section is roughly analogous to the former crime of first degree homicide by vehicle, but expands upon the former offense in two important respects.
>
> First, it covers recklessness with respect not only to motor vehicles, but also with respect to motorcycles, snowmobiles, locomotives, watercraft, and aircraft. Former law covered motor vehicles and watercraft, and also included a locomotive manslaughter provision which was unenforceable because the penalty was uncertain. Second, the section does not predicate liability on the violation of a safety statute, but on the whole spectrum of reckless conduct as defined in section 2901.22. Former law made the offense dependent on a violation of the laws against drunk driving, reckless operation, and drag racing. Legislative Service Commission (1973):

Vehicular homicide is a lesser included offense of aggravated vehicular homicide. The two offenses are identical except the culpable mental state for vehicular homicide is negligence, rather than recklessness. See Legislative Service Commission (1973). See also State v. Long, 7 Ohio App.3d 248, 455 N.E.2d 534 (1983) (violation of a city ordinance, driving while intoxicated, is not a lesser included offense of aggravated vehicular homicide).

Actus Reus

The culpable act is either (1) operating or (2) participating in the operation of the vehicle. "Participating" in the operation of the vehicle requires a strong common interest with the operator; the interest may not be too remote or passive. That interest is sufficient where the defendant participates in a crime and flees in a speeding vehicle recklessly driven by a person whom the defendant has good reason to believe is not a competent operator; the defendant may be an aider and abettor. State v. Hann, 55 Ohio App.2d 267, 380 N.E.2d 1339 (1977).

A survivor of a drag-race accident, whose only contribution to the death of the other participant was his own participation in the race, has not violated this statute. State v. Uhler, 61 Ohio Misc. 37, 402 N.E.2d 556 (C.P., 1979).

Mens Rea

The culpable mental state for aggravated vehicular homicide is recklessness. Recklessness requires a known risk and the disregard of that risk. State v. Gates, 10 Ohio

App.3d 265, 462 N.E.2d 425 (1983); State v. Dudock, 6 Ohio App.3d 64, 453 N.E.2d 1124 (1983). See R.C. 2901.22(C) ("A person acts recklessly when, with heedless indifference to the consequences, he perversely disregards a known risk that his conduct is likely to cause a certain result or is likely to be of a certain nature.")

In State v. Whitaker, 111 Ohio App.3d 608, 676 N.E.2d 1189 (1996) (upholding conviction for vehicular homicide), the court of appeals indicated that excessive speed by itself is rarely sufficient to establish recklessness. The court cited: State v. Caudill, 11 Ohio App.3d 252, 464 N.E.2d 605 (1983) (speed, erratic driving, driving under the influence); State v. Stinson, 21 Ohio App.3d 14, 486 N.E.2d 831 (1984) (speed, wet pavement, curving road, car in disrepair, driving under the influence). See also Akers v. Stirn, 136 Ohio St. 245, 25 N.E.2d 286 (1940) (proof of excessive speed is not itself sufficient to constitute "wantonness"); Morrow v. Hume, 3 N.E.2d 39 (1936) (same); State v. Earlenbaugh, 18 Ohio St.3d 19, 21-22, 479 N.E.2d 846 (1985) ("wantonness" substantially similar to definition of "recklessness").

Driving a car under the influence of alcohol is reckless, State v. Stinson, 21 Ohio App.3d 14, 486 N.E.2d 831 (1984), but the prosecution must prove the defendant's awareness of that risk. State v. Gates, 10 Ohio App.3d 265, 462 N.E.2d 425 (1983). Operating a motor vehicle known to be unroadworthy is sufficiently reckless to support a conviction for aggravated vehicular homicide; the defendant's vehicle had a nonfunctioning brake, inadequate brakes on the remaining wheels, no emergency brake, a leaking master cylinder, and impaired steering. State v. Laub, 86 Ohio App.3d 517, 621 N.E.2d 585 (1993).

The culpable mental state for vehicular homicide is negligence. See R.C. 2901.22(D) ("A person acts negligently when, because of a substantial lapse from due care, he fails to perceive or avoid a risk that his conduct may cause a certain result or may be of a certain nature."). See also State v. Self, 112 Ohio App.3d 688, 693, 679 N.E.2d 1173 (1996) (definition in R.C. 2901.22(D) requires "a higher degree of negligence than ordinary negligence because it requires a substantial lack of due care. The determination of whether a lapse of due care is substantial is a question for the trier of fact.") (citing State v. Ovens, 44 Ohio App.2d 428, 430-31, 339 N.E.2d 853 (1974)).

Proximate Cause

To prove vehicular homicide, the prosecution must establish that the death was proximately caused by the lack of due care. State v. Vaught, 56 Ohio St.2d 93, 382 N.E.2d 213 (1978) (reversing conviction because of insufficient evidence of "causal link between appellant's driving speed and the victim's death").

CAUSATION

Most crimes are defined in terms of specific conduct, rather than in terms of a result. A few crimes, however, require a specific result. Homicide is the most important crime of this type; it requires that the accused cause death. See State v. Swiger, 5 Ohio St.2d 151, 155, 214 N.E.2d 417 (1966) ("The state cannot, and does not, take issue with the proposition that a necessary element in a conviction of murder in the first degree is that the death which resulted was proximately caused by something that was done by defendant."), cert. denied, 385 U.S. 874 (1966); State v. Cochrane, 151 Ohio St. 128, 130, 84 N.E.2d 742 (1949) ("Causal connection between the blow of the defendant and the death of the decedent was an essential element of the proof to warrant conviction . . ."). Other crimes, such as battery and arson also fall into this category.

"With these crimes it is not enough for criminal liability that the defendant conduct himself with an intention to produce the specified result, or that he conduct himself in such a manner that he recklessly or negligently creates a risk of that result." 1 LaFave & Scott, Substantive Criminal Law § 3.12(a), at 391 (1986). Where the defendant's conduct cannot be proved beyond a reasonable doubt to be the cause of death, the defendant must be acquitted. State v. Bynum, 69 Ohio App. 317, 43 N.E.2d 636 (1942). See also State v. Self, 112 Ohio App.3d 688, 691, 679 N.E.2d 1173 (1996) (Testifying coroner did not conduct autopsy and autopsy report not admitted: "In this instance, where the record clearly supports the conclusion that Osborne died from a head injury caused by his collision with appellant's automobile, we find that the coroner's testimony concerning his observations at the scene of the accident are sufficient proof of the cause of death.").

There are two requirements for criminal culpability: (1) factual causation and (2) legal (proximate) causation.

Factual Causation

For factual causation, the accused must cause the specific result. A "but for" test is used in this context: "but for" the conduct of the accused, the result would not have occurred. For example, a husband who intentionally gives his wife a glass of wine in which he has added poison does not cause her death if she does not drink the wine but dies naturally of a heart attack while holding the glass. It cannot be said that "but for" his conduct his wife would be alive. The husband, however, could be convicted of attempted murder. See 3 Katz & Giannelli, Baldwin's Ohio Practice Criminal Law ch. 93 (1996)(attempt).

In State v. Burke, 73 Ohio St.3d 399, 404, 653 N.E.2d 242 (1995), cert. denied, 517 U.S. 1112 (1996), the Ohio Supreme Court considered a causation argument: "[T]here was testimony that McBride died as a result of being stabbed. The deputy coroner clearly stated that the victim's death was caused by an irregular beating of the heart as a result of all of the stab wounds to his body. Thus, the twelve stab wounds suffered by the victim collectively resulted in his heart failure and death."

See also State v. Garland, 116 Ohio App.3d 461, 468, 688 N.E.2d 557 (1996) ("Appellant argues that if Pennington had not been speeding, the two never would have met in the intersection at the precise moment of the [fatal] collision. However, by the same token, if appellant had not run the stop sign, the accident never would have occurred. Since it cannot be said that the accident was the sole proximate result of Pennington's speed, it was not an abuse of discretion for the trial court to exclude such evidence on the basis of relevancy."); State v. Bynum, 69 Ohio App. 317, 321, 43 N.E.2d 636 (1942) (victim died 188 days after assault) ("That the cause of death was meningitis, in the absence of any other testimony on the subject, we assume; but that the meningitis causing death was the result of any blow suffered on March 15th or thereabouts is not supported by any competent evidence in the record.").

In State v. Beaver, 119 Ohio App.3d 385, 392, 695 N.E.2d 332 (1997), there was no direct evidence that the shooting caused the blood loss, organ failure, fluid in the lungs, and infection because the expert was not permitted to testify that the one caused the others. The court stated:

"The cases in this area are in agreement that the state must produced evidence to support each link in the chain of causation between the defendant's criminal act and the eventual death of the victim." Nevertheless, the evidence of causation was sufficient: "There was circumstantial evidence . . . upon which the jury could have inferred that the shooting caused these complications. Butler was shot three times, once in his chest, an extremely vital portion of his body. Expert medical evidence is not necessary in cases where the injuries are severe enough that the jury can infer that the injuries caused the death." Id. at 393 (citing State v. Carter, 64 Ohio St.3d 218, 226, 594 N.E.2d 595 (1992)).

Year-And-A-Day Rule

The common law developed a special causation rule called the "year and a day" rule: a person could not be guilty of murder if the victim lived for a year and a day after the conduct that caused the injury. Ohio has abolished this rule. State v. Sandridge, 5 Ohio Op.3d 419, 365 N.E.2d 898 (C.P., 1977) (holding that the retention of the year and a day rule is an anachronism).

Proximate Causation: In general

While factual causation is necessary, alone it is insufficient for criminal liability. Legal or "proximate" causation is also required. Proximate causation issues arise when the injury to the victim occurs in an unintended manner. 1 LaFave & Scott, Substantive Criminal Law § 3.12(c) (1986). See also State v. Ashenbener, No. 57900, 57901 (8th Dist. Ct. App., 2/7/91) (rejecting defendants' claim that victim's own drunkenness and stumbling over his boots was the cause of death rather than the blow to victim's head; involuntary manslaughter includes the doctrine of foreseeability).

There are several tests to determine proximate causation. The common law typically specified that all "natural and probable" results are proximately caused. The foreseeability test provides that a person is criminally liable if the harm caused should have been foreseen as being reasonably related to his acts. The Model Penal Code provides that causation is established if "the actual result involves the same kind of injury or harm as that designed or contemplated and is not too remote or accidental in its occurrence to have a [just] bearing on the actor's liability or on the gravity of his offense." Model Penal Code § 2.03(2)(b). This is a variation on the foreseeability test.

The test in Ohio is not whether a defendant should have foreseen the consequences, but whether a reasonable prudent person in light of all the circumstances would have anticipated the consequence. 4 Ohio Jury Instruction 409.55(4); State v. Taylor, No. 65711 (8th Dist. Ct. App., 11/9/95). See also State v. Burchfield, 66 Ohio St.3d 261,611 N.E.2d 819 (1993) ("The O.J.I. foreseeability instruction should be given most cautiously in future murder cases.").

Proximate Causation: Acts of Nature

Most acts of nature sever the causal relationship between the accused's act and the victim's death. Assume that a person drives negligently. To avoid that person's swerving car, another driver takes a different route home and is stuck by lightning and dies. The fact that lightning struck is a mere coincidence and breaks the causal connection.

Proximate Causation: Acts by Third Party

Assume the defendant intends to kill another but merely wounds the victim. Assume further that the victim receives negligent medical treatment at a hospital and dies. Despite improvements in medical care, negligent care remains a foreseeable risk. "In short, mere negligence in medical treatment is not so abnormal that the defendant should be freed of liability." 1 LaFave & Scott, Substantive Criminal Law §3.12(f)(5), at 409 (1986).

The Ohio Supreme Court has also said that medical treatment for homicide victims is not an intervening cause. State v. Carter, 64 Ohio St.3d 218, 594 N.E.2d 595 (1992), cert. denied, 507 U.S. 938 (1993); State v. Johnson, 56 Ohio St.2d 35, 40, 381 N.E.2d 637 (1978). See also State v. Beaver, 119 Ohio App.3d 385, 394, 695 N.E.2d 332 (1997) ("Assuming *arguendo* that the infection was, in fact, caused by the negligence of the attending surgeons, this alone is not sufficient to break the chain of direct causation. The injuries inflicted by the defendant need not be the sole cause of death.").

However, if the victim dies due to gross, wilful mistreatment, the defendant would not be the legal cause of the death. State v. Jamison, No. 3-89-24, 3-89-25 (3rd Dist. Ct. App., 1/9/91) (medical treatment not intervening cause where hospital-acquired pneumonia was the result of treatment and therapy for the burns caused by the defendants).

Proximate Causation: Acts by Victims

Assume that "A approaches B with a deadly weapon and a murderous intent to kill, so that B, in order to escape, 'voluntarily' jumps out a window." 1 LaFave & Scott, Substantive Criminal Law § 3.12(f)(4), at 407 (1986). A is criminally liable for the death of B. Because such instinctive acts to avoid a possible harm are normal, A is the legal or proximate cause of the consequences.

In State v. Swiger, 5 Ohio St.2d 151, 155, 214 N.E.2d 417 (1966), the victim while hospitalized from the beating (May 5) fell out of bed and fractured her cheekbone and jawbone (May 9). She suddenly died on May 20 as she was about to be discharged. The cause of death was a massive pulmonary embolism (blood clot in the lungs), but the experts varied as to whether the beating received by the deceased on May 5 was the proximate cause of death. The Court upheld the conviction, noting: "[T]he records undeniably show that deceased died from a massive pulmonary embolism, that the embolism could form in any person if that person were confined in bed, that deceased would not have been likely to develop the embolism that took her life if she had not been so restricted to bed, and that deceased was so confined as a direct result of the injuries she received on May 5, 1963."