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The Negligent Murder in Kentucky

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Notes and Comments

THE NEGLIGENT MURDER IN KENTUCKY

The negligent murder, although seldom so designated by the courts, has been recognized and dealt with by them through several centuries.¹ This is a crime predicated on conduct most correctly described as "conduct creating such an unreasonable risk of harm to the lives and safety of others as to be wantonly disregarding of such interests."²

It is submitted at the outset that the negligent murder is not recognized in Kentucky, although there are a few cases which at first blush indicate the contrary. The strongest of these is *Guinn v. Commonwealth*.³ There the facts reported are sparse and the opinion practically non-existent, but it would seem that the fatal shot was fired by one of a group of rowdy, drunken men engaged in an indiscriminate firing of their pistols, jeopardizing the lives of all who were in range of their shots. Decedent, intoxicated and unaware of the danger, was riding along the road on his horse when he was hit by a stray bullet. The murder conviction affirmed by the court would appear to be a case of negligent murder, but whether the court considered it as such is impossible to tell.

In *Gollither v. Commonwealth*,⁴ the defendant, bent on killing "four

¹ *Halloway's Case*, 1 Cro. Car. 131, 79 Eng. Rep. 715 (1628) where a park keeper tied a young boy to a horse's tail and whipped the horse, resulting in the boy's being dragged to death; *Hull's Case*, Ke L. 40, 84 Eng. Rep. 1072 (1644) where a laborer threw a stone from a roof, killing one below, the English court rendered dictum to the effect that had this occurred in a London street, it would have been murder; *Castell v. Bambridge*, 2 Strange 854 (1730), where a warden unnecessarily took a prisoner to a house in which there was a case of smallpox, knowing the fact and knowing the prisoner had never had the disease, by reason of which the prisoner died; *Mayes v. People*, 106 Ill. 306 (1883) where a drunken husband angrily threw a beer mug at his wife, the mug striking an oil lamp which she was carrying, starting a fire, and burning up the wife; *Wiley v. State*, 19 Ariz. 346, 170 A. 869 (1918) officer shooting at tires to stop a car killed occupant; *Bank v. State*, 85 Tex. Cr. R. 665, 211 S.W. 217 (1919), defendant fired into a freight train, killing the brakeman; *Reed v. State*, 225 Ala. 219, 142 So. 441 (1932), intoxicated defendant driving on a public street at an excessive speed, striking and killing a pedestrian. Other auto cases include *State v. Shepherd*, 171 Minn. 414, 214 N.W. 280 (1927); *State v. Trott*, 190 N. C. 674, 130 S.E. 627 (1925). Also see *I Hale P. C. 476 (1778)* where wilfully riding an unruly and vicious horse into a crowd and one of the crowd is killed, was murder. And see STEPHEN, *DIGEST OF THE CRIMINAL LAW*, art. 223 (1877) and HOLMES, *THE COMMON LAW*, 55-56 (1881).

² MORELAND, *A RATIONALE OF CRIMINAL NEGLIGENCE*, 65 n. 221 (1949).

³ 11 Ky. L. Rep. 615 (1889). Cited as *Quinn v. Comm.* in 12 S.W. 672.

⁴ 2 Duval (Ky.) 163 (1865).

damned rascals," entered a building full of people, his gun shouldered and the muzzle pointing behind him. The gun went off, killing a friend. The court said:

"If defendant had gone into the house for the felonious purpose of killing any person, and had he voluntarily fired his gun for the purpose of executing that malicious design, the killing of his friend *Rowe*, though unintended, would, nevertheless, have been murder. Or had he, without any such special purpose, *voluntarily*⁵ and recklessly fired in the crowd and killed *Rowe*, or any other person, he would have been guilty of murder."

The first sentence in the above quoted opinion may be a reference either to the doctrine of transferred intent⁶ or to the felony murder doctrine.⁷ That the second sentence is descriptive of the negligent murder may be argued, but, considering the facts, it is believed that the court is referring to that type of conduct which produces a degree of danger whereby death is substantially certain to follow. Such is not negligence, but intent as a matter of law.⁸ Similarly in *Brown v. Commonwealth*⁹ where defendant intentionally fired his pistol in a crowded room, the court said that even though the defendant had no design to kill, but merely sought diversion, if he killed anyone, it was murder.

In *Hill v. Commonwealth*¹⁰ the defendant, a traffic policeman, allegedly shot at the tires of a speeding car whose driver did not respond to his command to stop. One of the five occupants of the car was killed by the bullet. In reversing a murder conviction the court prescribed the following instruction for the next trial:

"(2) If . . . defendant . . . wilfully, feloniously and with malice aforethought *aimed* and *fired* his pistol *into* the automobile . . . when he knew or had reason to believe that there were persons therein . . . you will find him guilty of murder and fix his punishment at death or confinement in the state penitentiary for life . . .

(3) If . . . defendant . . . shot at the casing . . . and thereby shot and killed [deceased] . . . by the reckless or grossly careless handling or shooting of the pistol . . . although he did not intend to shoot [deceased] you will find the defendant guilty of voluntary manslaughter . . ." (writer's italics)

⁵ Writer's Italics

⁶ Where A delivers poisoned whiskey to B with intent to kill B, but B gives the whiskey to C, who dies as a result of drinking it, A's intent to kill B will be transferred to C. *Coston v. State*, 139 Fla. 250, 190 So. 520 (1939).

⁷ One who, in the perpetration of a felony, kills a human being may be guilty of murder though death was unintended. *Reddick v. Comm.*, 17 Ky. L. Rep. 1020, 33 S.W. 416 (1895).

⁸ *Moreland, op. cit. supra* note 2 at 65.

⁹ 13 Ky. L. Rep. 372, 17 S.W. 220 (1891).

¹⁰ 239 Ky. 646, 40 S.W. 2d 261 (1931).

It is believed that these instructions reveal a fairly accurate picture of the law as it exists in Kentucky. By instruction (2) the court provides for a conviction of murder, but, as in the *Golliher* and *Brown* cases (both of which the court cited) the court does so only where the homicide was substantially certain to follow as a result of the act. It requires that defendant *aim* his pistol *into* the automobile. It is reiterated that this is not negligent murder. Instruction (3), providing voluntary manslaughter, resembles an instruction on negligent murder; but the Kentucky court, not recognizing negligent murder, treats it as voluntary manslaughter. It appears that such is repeatedly held to be the law in Kentucky. Under the Kentucky rule voluntary manslaughter includes that which was designated negligent murder at common law.¹¹

That the negligent murder is non-existent in this Commonwealth is thus supported by the fact that no case has been found where the defendant was tried, convicted, and sentenced on an expressly recognized theory of negligent murder. For example, if the above instruction (2) be considered appropriate to negligent murder, the punishment prescribed by the court is that set out by Kentucky's only murder statute, which provides:

"Any person who commits *willful* murder shall be punished by confinement in the penitentiary for life, or by death."¹² (writer's italics).

It is believed that in Kentucky all murder is treated as within this statute, and consequently the only recognized murder is willful murder.

In the face of the cases discussed, although it is arguable that the negligent murder exists in this state, there stands a host of cases denying in effect the existence of the negligent murder. Thus where defendant playfully raised his pistol to decedent's head and pulled the trigger harder than he intended, the court said:

". . . at common law the killing in this case would be held to be murder upon the ground that malice was implied . . . But the doctrine of implied malice does not obtain in Kentucky"¹³ . . . Yet it

¹¹ This argument is made without any reference to instruction (1), which is not included in the court's opinion and the court's statement in regard to instruction (1) is extremely hard to understand. It may be subject to several explanations, but it appears that the court is including "gross negligence" in its instruction on murder committed wilfully with malice, thus including gross negligence in the statutory definition of "willful murder".

¹² KY. REV. STAT. sec. 435.010 (1948).

¹³ Two years later in *Lewis v. Commonwealth*, 140 Ky. 652, 131 S.W. 517 (1910), the court said: "Where one recklessly kills another with a deadly weapon, malice may be implied." From the tenor of the entire opinion, the court must have meant "intent" where it said "malice."

does not follow that . . . the shooting here was involuntary manslaughter . . . When we reject the doctrine of implied malice . . . the offense which would otherwise be murder becomes voluntary manslaughter . . . Accordingly . . . in Kentucky . . . where one kills another by wanton, reckless, and grossly careless use of firearms, the offense, if without malice aforethought is voluntary manslaughter, although he had no intention to kill."¹⁴

The court expresses a like attitude in the automobile homicide cases. Thus where a speeding motorist struck and killed a child returning from school, after stating the law in regard to firearms and deadly weapons, the court said:

"Automobiles . . . are not to be classed in the same category with deadly weapons, but if . . . the driver . . . operates such vehicle . . . in a manner . . . reasonably calculated to injure others using the highway, and under such circumstances reckless, wantonly, and with gross carelessness strikes and kills another, this constitutes voluntary manslaughter."¹⁵

In cases other than those involving guns and automobiles the Kentucky court has held that conduct negligent in the degree described as "reckless, wanton, and grossly careless" resulting in death is voluntary manslaughter. The court has been quite consistent in its use of these descriptive words,¹⁶ and the degree of negligence required seems to be firmly and clearly established. In *King v. Commonwealth*¹⁷ the court said:

"If the refusal to permit a wounded person to obtain aid or medical attention, or to render it where the duty to render it exists, is so

¹⁴ *Ewing v. Com.*, 129 Ky. 237, 111 S.W. 352 (1908). *Accord*: *Vires v. Com.*, 308 Ky. 707, 215 S.W. 2d 837 (1948); *Shoupe v. Com.*, 294 Ky. 254, 171 S.W. 2d 447 (1943); *Thacker v. Com.*, 263 Ky. 97, 91 S.W. 2d 998 (1936); *Com. v. Anderson*, 239 Ky. 658, 40 S.W. 2d 265 (1931); *Smiley v. Com.*, 235 Ky. 735, 32 S.W. 2d 51 (1930); *Jones and Overton v. Com.*, 200 Ky. 65, 252 S.W. 130 (1923); *Lambdin v. Com.*, 195 Ky. 87, 241 S.W. 842 (1922); *Hunn v. Com.*, 143 Ky. 143, 136 S.W. 144 (1911); *McGeorge v. Com.*, 145 Ky. 540, 140 S.W. 691 (1911); *Smith v. Com.*, 133 Ky. 532, 118 S.W. 368 (1909); *Montgomery v. Com.*, 26 Ky. L. R. 356, 81 S.W. 264 (1904); *Sparks v. Com.*, 3 Bush (Ky.) 111 (1891); *Lewis Walls v. Com.*, 12 Ky. Opin. 687 (1884); *York v. Com.*, 83 Ky. 360 (1884); *Chrystal v. Com.*, 9 Bush (Ky.) 669 (1878). All these cases involve the "wanton, reckless, and grossly careless use of firearms," and the court consistently describes the negligence requisite for voluntary manslaughter in just those words.

¹⁵ *Jones v. Com.*, 213 Ky. 356, 281 S.W. 164 (1926). *Accord*: *Hunt v. Com.*, 289 Ky. 527, 159 S.W. 2d 23 (1942); *Carnes v. Com.*, 278 Ky. 771, 129 S.W. 2d 543 (1939); *Swango v. Com.*, 276 Ky. 467, 124 S.W. 2d 768 (1939); *Largent v. Com.*, 265 Ky. 598, 97 S.W. 2d 538 (1936); *Dublin v. Com.*, 260 Ky. 412, 86 S.W. 2d 136 (1935); *King v. Com.*, 253 Ky. 775, 70 S.W. 2d 667 (1934); *Colvin v. Com.*, 247 Ky. 480, 57 S.W. 2d 487 (1933); *Elkins v. Com.*, 244 Ky. 583, 51 S.W. 2d 916 (1932).

¹⁶ The consistency is only as to the use of these terms in describing voluntary manslaughter. Admittedly these same words, although not used conjunctively (and perhaps with the exception of "wanton") have been used singularly along with other words commonly indicative of lesser degrees of negligence in describing such lesser degrees.

¹⁷ 285 Ky. 654, 148 S.W. 2d 1044 (1941).

grossly negligent or reckless as to manifest a wanton disregard for human life, rather than a specific intent to bring about the death of the specific individual, the offenders may be guilty of voluntary manslaughter."¹⁸

And so, where several friends were sitting around a hearth fire and the defendant, with no apparent reason, threw blasting powder into the fire and the ensuing explosion set fire to the house, burning to death two people and even injuring the defendant, the court affirmed a conviction of voluntary manslaughter on the ground that it was properly a question for the jury whether the defendant's act was wanton and reckless.¹⁹ In *Gibson v. Commonwealth*²⁰ the defendant left her two-month old bastard child lying in a basket in the front yard of a Louisville home, hoping someone would find it. The night was a cold, raw one, and the child had nothing but a shawl covering it. The next morning it was found dead. In affirming a conviction of voluntary manslaughter, the court did not use the words "wanton", "reckless", or "grossly careless", but said that if defendant without malice "unlawfully, willfully and feloniously" did the act, even if done with the hope that the child would be taken care of before it should freeze to death, she was guilty of voluntary manslaughter.

The conclusion is that the Kentucky court, even as it has expressly said,²¹ uniformly holds as voluntary manslaughter that which would be negligent murder at common law, there being no intent or design to kill.²² It is unnecessary to inquire how or why Kentucky arrived at this position,²³ but the rationalization frequently employed is simply that the defendant intended the natural consequence of his act.²⁴ "This argument falls before the fact that negligence, however gross, is never intent; and it is unnecessary since the crime of involuntary man-

¹⁸ *Ibid*, 659, S.W. at 1047.

¹⁹ *Embry v. Com.*, 236 Ky. 204, 32 S.W. 2d 979 (1930).

²⁰ 106 Ky. 360, 50 S.W. 532 (1899).

²¹ *Ewing v. Com.*, *supra* note 14.

²² As to whether design or purpose to kill is necessary to voluntary manslaughter, the authorities differ. All agree that the *act* must have been voluntary. 26 AM. JUR. 168, 178 (1940).

²³ It may be that the present status was reached because of an unwillingness on the part of the Kentucky court to convict of murder in a negligence case. At the same time the court may have been unwilling to convict of only involuntary manslaughter, which, in Kentucky, is treated as a common-law misdemeanor, punishable—prior to a 1950 statute (see note 26 *infra*)—by fine or imprisonment in the county jail, or both, without limit. *Sikes v. Com.*, 304 Ky. 429, 200 S.W. 2d 956 (1947); *Cottrell v. Com.*, 271 Ky. 52, 111 S.W. 2d 445 (1937); *Spriggs v. Com.*, 113 Ky. 724, 68 S.W. 1087 (1902).

²⁴ *Bates v. Com.*, 307 Ky. 357, 211 S.W. 2d 130 (1948); *Largent v. Com.*, 265 Ky. 593, 97 S.W. 2d 533 (1936); *Davis v. Com.*, 193 Ky. 597, 237 S.W. 24 (1922).

slaughter was designed to cover negligent homicide not amounting to murder."²⁵

The question now emerges: What, if anything, should Kentucky do in regard to her position as to the negligent murder?

It is submitted that the continuance of the anomalous negligent voluntary manslaughter might well be advocated, first, as a practical matter, since it is believed that the result in most, if not all, cases has been substantially the same as would have been reached under the use of the negligent murder doctrine. In fact, it is arguable that more convictions may be had under the negligent voluntary manslaughter. Secondly, as has been indicated, the Kentucky anomaly is well established and has been consistently defined. Admittedly Kentucky's position is illogical and unnecessary, but where the result is satisfactory and the law settled, unnecessary change may be more injurious than advantageous.

On the other hand, it may be argued that where anomalies and fictions are unnecessary in reaching a proper result, they should be discarded as being conducive only to confusion; that the malignant conduct involved in this type of case merits the stigma of murder rather than the brand of the lesser offense of voluntary manslaughter; and that a more severe penalty might be desired than that allowed under the voluntary manslaughter. Consequently under this argument the negligent voluntary manslaughter should be abolished and the negligent murder adopted. There would be nothing to prevent the court from embracing it as a common law crime, but such would not be feasible in view of the 1950 Kentucky statute providing:

"Any person convicted of a common-law offense the penalty for which is not otherwise provided by statute shall be imprisoned in the county jail for a term not exceeding twelve months or fined a sum not exceeding five thousand dollars or both."²⁶

If the negligent murder is to be revived in this state, the expedient method is by statute.

In view of existing uncertainty in the entire field of negligent homicide,²⁷ it is believed that Kentucky should have general statutory

²⁵ Note 39, Ky. L. J. 351, 352 (1951). As previously indicated, there is a type of conduct where the results are substantially certain to follow, and intent will be *inferred*. That is to say, defendant's conduct is considered as *equivalent* to intent whether intent exists or not. Such a homicide is willful murder, however.

²⁶ KY. REV. STAT. sec. 435.075 (1948).

²⁷ This uncertainty exists, of course, largely because of the indiscriminate use of the same words in defining the degrees of negligence requisite for different grades of homicide. Until the recent case of *Marye v. Com.*, 240 S.W. 2d 852 (1951), the expressions of the Kentucky Court, with but few exceptions (*Carnes v. Com.*, 278 Ky. 771, 129 S.W. 2d 543 (1939)) have been to the effect that ordi-

reform on the subject. Consequently, although there may be certain practical advantages in retaining the negligent voluntary manslaughter, the better course is to include the negligent murder as part of a statute covering the entire field of negligent homicide. This statute should cover negligent murder and negligent involuntary manslaughter,²⁸ and it should define and distinguish as precisely as possible the greater and lesser degrees of negligence required for the respective crimes. Language should be used which will sufficiently inform a jury that the degree of negligence in involuntary manslaughter is greater than ordinary civil negligence, and less than that extreme degree of negligence requisite to a conviction of murder. Also, it is likewise imperative that such a statute establish an appropriate standard of care for negligent murder. This negligence is of the highest degree, that type of conduct which at common law is said to evince a depraved mind and a heart devoid of social duty.²⁹

WILLIAM RICE

THE MISDEMEANOR-MANSLAUGHTER DOCTRINE IN KENTUCKY

Bracton apparently originated the general proposition that where life has been taken in the commission of an unlawful act the slayer is guilty of culpable homicide notwithstanding the death was unintentional; or, stated differently, that an unintentional homicide can in no case be held misadventure unless it happened in the commission

nary negligence is sufficient for involuntary manslaughter. *Lewis v. Com.*, 301 Ky. 269, 191 S.W. 2d 416 (1945); *Com. v. Mullins*, 296 Ky. 190, 176 S.W. 2d 403 (1943); *King v. Com.*, 285 Ky. 654, 148 S.W. 2d 1044 (1941); *Cornett v. Com.*, 282 Ky. 322, 138 S.W. 2d 492 (1940); *Embry v. Com.*, 236 Ky. 204, 32 S.W. 2d 979 (1930). In the *Marye* case the court said that voluntary manslaughter should require a finding of reckless and wanton conduct and that involuntary manslaughter should require a finding of gross negligence. Note that the court used the adjective gross, whereas it has used the same adjective in describing voluntary manslaughter in practically all cases. Of course, this is confusing, but the court made some progress in expressly overruling all cases approving a conviction of involuntary manslaughter on a finding of no more than ordinary negligence.

²⁸ Perhaps it should be pointed out that some 34 states have incorporated within their statutory law of homicide a crime designated as "negligent homicide." It covers homicide in the operation of a motor vehicle, its object apparently being to get more convictions. If such a statute be deemed expedient, it is suggested that it not preclude convictions under the ordinary negligent murder or negligent involuntary manslaughter.

²⁹ The state of mind in the negligent murder has been variously described as "general malignity of heart", "the heart regardless of social duty and deliberately bent on mischief," "a wicked, depraved, and malignant heart," etc. See note 23 Ky. L. J. 53 (1939) and citations therein.