




1952

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## Recommended Citation

Rice, William (1952) "The Misdemeanor-Manslaughter Doctrine in Kentucky," *Kentucky Law Journal*: Vol. 41 : Iss. 1 , Article 15.  
Available at: <https://uknowledge.uky.edu/klj/vol41/iss1/15>

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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,<sup>28</sup> 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.<sup>29</sup>

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

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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.

<sup>28</sup> 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.

<sup>29</sup> 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.

of a lawful act not negligently performed.<sup>1</sup> From this principle evolved the felony-murder and misdemeanor-manslaughter doctrines, which state that the degree of homicide of which one is guilty when death results from his doing an unlawful act is murder if such act was a felony, or manslaughter if such act was a misdemeanor.<sup>2</sup> Hale and Foster qualified the rule by requiring that the unlawful act must be *malum in se*<sup>3</sup> and not merely *malum prohibitum*.<sup>4</sup> Although the early writers apparently used the phrase *malum in se* to mean "dangerous in itself,"<sup>5</sup> it was later given the meaning of "morally wrong in itself," "naturally evil in itself," "socially bad in itself," or the like.<sup>6</sup> Although unfortunately it is impossible to say just what these phrases meant, it is undoubtedly true that they did not mean "dangerous in itself." Illustrative of the error in diverging from the original intended meaning is the following supposition:<sup>7</sup> S attempts suicide in the middle of a hundred acre field. Unknown to S, a tramp is asleep in a nearby clump of bushes, and the tramp is killed by S's poorly aimed shot. The moral evil attributed to suicide would place such act in the category of *malum in se* and S would be guilty of manslaughter although obviously the act was not dangerous per se. Such a result was suggested in *State v. Horton*.<sup>8</sup> There the defendant, while hunting on another's land in violation of a statute, committed an unintentional homicide. The jury found that the defendant's act was not in itself dangerous to human life and was free from any criminal negligence. The North Carolina court properly reversed a conviction of manslaughter based on the unlawfulness of the act, but it also said that where one engaged in an unlawful act free from negligence and the act is not in itself dangerous, an unintentional homicide in the commission of the act is a criminal offense only where the act is *malum in se* and not merely *malum prohibitum*. Stated affirmatively the court has said that the perpetrator of a non-negligent unlawful act resulting in the death of another is guilty of homicide if the act is *malum in se*.

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<sup>1</sup> Wilner, *Unintentional Homicide in the Commission of an Unlawful Act*, 87 U. OF PA. L. REV. 811 (1939).

<sup>2</sup> 26 AM. JUR. 284 et seq. (1940).

<sup>3</sup> FOSTER, CROWN LAW 259 (2nd ed. 1791).

<sup>4</sup> 1 HALE, PLEAS OF THE CROWN 475 (Ed. of 1778).

<sup>5</sup> MORELAND, THE LAW OF HOMICIDE 187 (1952).

<sup>6</sup> *People v. Townsend*, 214 Mich. 267, 183 N.W. 177, 179 (1921) where the court considered an act *malum in se* as one which is "condemned as wrong in and of itself by very sense of common decency and good morals. . . ."; *State v. Horton*, 139 N.C. 588, 51 S.E. 945, 946 (1905) where the court said: "An offense *malum in se* is properly defined as one which is naturally evil as adjudged by the sense of a civilized community. . . ."

<sup>7</sup> MORELAND, *op. cit. supra* note 5, 189.

<sup>8</sup> 139 N. C. 588, 51 S.E. 945, 946 (1905).

Thus the court clearly has used *malum in se* to mean something other than dangerous in itself. In most cases dealing with the subject of homicide committed in the perpetration of an unlawful act, danger does actually exist to a greater or lesser degree, but the language of the courts in attempting to employ the unlawful act doctrine has resulted in ambiguity.

The Kentucky court has stated the general proposition by defining involuntary manslaughter as "the killing of another in doing some unlawful act but without an intention to kill,"<sup>9</sup> and, more narrowly, "the killing of one by another, in doing some unlawful act not amounting to a felony *nor likely to endanger human life* and without intention to kill."<sup>10</sup> (Writer's italics) A typical situation in which the rule is applied is that where the defendant assaults another, causing his death, though there is no intent to kill.<sup>11</sup> In such cases there is generally the reckless conduct necessary for a conviction of homicide in some degree, and whether Kentucky, or indeed most any court, will convict of involuntary manslaughter on the sole ground that the homicidal act was committed in the perpetration of an unlawful act where there was in fact no negligence is doubtful. The language used in the cases indicates that it might; the facts suggest that it might not.<sup>12</sup> Usually the negligence and unlawfulness of the act are spoken of so conjunctively that it is difficult to tell whether either would have been sufficient for a conviction without the other. Thus in *Sparks v. Commonwealth*<sup>13</sup> the defendant, apparently for sport, recklessly fired his pistol in the streets of a town, killing his cousin. Although the defendant's reckless conduct would have been sufficient for a manslaughter conviction, the court said:

"If a man, contrary to law and good order and public security, fire off a pistol in the streets of a town, and death be thereby produced, he must answer criminally for it, whether it be *malum in se* or *merely malum prohibitum*; and especially so when he knows . . . he is violating the law. . . ."<sup>14</sup>

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<sup>9</sup> *Wiley v. Com.*, 229 Ky. 63, 16 S.W. 2d 496 (1929); *Lewis v. Com.*, 140 Ky. 652, 131 S.W. 517 (1910); *Trimble v. Com.*, 78 Ky. 176 (1879); *Conner v. Com.*, 76 Ky. (13 Bush) 714 (1878).

<sup>10</sup> *Com. v. Owens and Evans*, 198 Ky. 655, 249 S.W. 792 (1923); *Westrup v. Com.*, 123 Ky. 95, 93 S.W. 646 (1906).

<sup>11</sup> *Conner v. Com.*, *supra*, where defendant killed deceased by striking him with a croquet mallet in an altercation occurring during a game of croquet.

<sup>12</sup> There are, of course, numerous cases where a deadly weapon or an automobile was used in a reckless or wanton manner and a conviction of manslaughter was based solely on the ground of such negligence with little, or no, reference to the unlawfulness of the act.

<sup>13</sup> 66 Ky. (3 Bush) 111, 96 Am. Dec. 196 (1868).

<sup>14</sup> *Id.* at 116, 96 Am. Dec. at 199.

As to whether the defendant intended to fire the pistol or whether he drew it for the purpose of firing it and it went off before he intended, the court said that the purpose to shoot the gun in town was unlawful and thus "unlawful conduct, in either case, would be the primary cause of the homicide. . . ."<sup>15</sup> Perhaps the court is using "unlawful" synonymously with "reckless".

In *Ellison v. Commonwealth*<sup>16</sup> the defendant, under the influence of whiskey, unintentionally killed his kinsman who was trying to restrain him from recklessly flourishing his pistol. The court said that the facts did not warrant an instruction on involuntary manslaughter because the "act was not simply unlawful, it also tended to the destruction of human life and was calculated to result in injury. . . ."<sup>17</sup> The court thus implied that if the act had been *simply unlawful*, it would have been involuntary manslaughter. However, it is highly probable that the court merely meant that defendant's conduct was of a greater degree of negligence than ordinary negligence, which, prior to the 1951 case of *Marye v. Commonwealth*,<sup>18</sup> was all that was necessary in Kentucky for the negligent involuntary manslaughter. Similar language was used where the deceased died as a result of the defendant's attempt to procure an abortion.<sup>19</sup> The court said that it was not properly a case of involuntary homicide, as the "act was not only immoral, violative of the law of nature, and deliberate in character, but reckless of life, and wrongful *per se*. . . ."<sup>20</sup> Again the court has implied that if the act had been immoral but not reckless, it would have been a case of involuntary homicide. But the court added:

"This doctrine [that death resulting from an attempted abortion is murder] should not be based upon the rule of law, that whenever an unlawful act, one *malum in se*, is done in the prosecution of a felonious intention; or the perpetration of a collateral felony, and death ensues, it is murder . . . but upon the fact that it is a deliberate act, endangering her life."<sup>21</sup>

The court went on to say that if the act was done in such a way that it was not likely to injure her, "but through negligence in the operation death does ensue, we incline to the opinion . . . that it is but manslaughter. . . ."<sup>22</sup>

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<sup>15</sup> *Id.* at 116, 117, 96 Am. Dec. at 200.

<sup>16</sup> 12 Ky. Opin. 665 (1883).

<sup>17</sup> *Id.* at 666.

<sup>18</sup> 240 S.W. 2d 852 (1951).

<sup>19</sup> *Peoples v. Com.*, 87 Ky. 487, 9 S.W. 509 (1888). *Accord: Wilson v. Com.*, 22 Ky. Law Rep. 1251, 60 S.W. 400 (1901).

<sup>20</sup> *Id.* at 490, 9 S.W. at 510, 511.

<sup>21</sup> *Id.* at 492, 9 S.W. at 511.

<sup>22</sup> *Id.* at 492, 493, 9 S.W. at 511.

In the final analysis, danger seems to be the test. Thus where the defendant officer killed a fleeing misdemeanant and claimed that he had tried to shoot over his head to frighten him, the court, although quoting the rule that involuntary manslaughter is the killing of another in doing some unlawful act with no intent to kill, actually prescribed the following instruction for the new trial:

“ . . . if Lewis . . . failed to exercise reasonable care in handling or shooting his pistol, and so shot Puckett, they should find him guilty of involuntary manslaughter.”<sup>23</sup>

But in *Ewing v. Commonwealth*,<sup>24</sup> where the defendant playfully raised his pistol to the deceased's head and pulled the trigger harder than he intended, the court stated the rule in its baldest form:

“It was unlawful for defendant to point it at her whether it was loaded or unloaded. When a homicide is committed in the doing of an unlawful act, the offense is involuntary manslaughter, if the facts are not sufficient to constitute murder or manslaughter.”<sup>25</sup>

Again the act was criminally negligent regardless of whether it was unlawful or not.

Thus the question whether a conviction will be had where there is an unlawful act perpetrated without negligence remains unanswered, since in practically all cases where the court has employed the misdemeanor-manslaughter doctrine, unlawfulness and negligence concur.<sup>26</sup> But the courts should meet the issue squarely and require an affirmative showing of negligence in each case without regard to the unlawfulness of the act.<sup>27</sup> It is often said that there must be a causal connection between the unlawful act and the death.<sup>28</sup> But causal connection alone should not be enough to support a conviction.<sup>29</sup> It should

<sup>23</sup> *Lewis v. Com.*, 140 Ky. 652, 657, 131 S.W. 517, 519 (1910).

<sup>24</sup> 129 Ky. 237, 111 S.W. 352 (1908). *Accord*: *McGeorge v. Com.*, 145 Ky. 540, 140 S.W. 691 (1911).

<sup>25</sup> *Id.* at 246, S.W. at 355.

<sup>26</sup> Courts have more or less naturally or unavoidably developed an unlawful act doctrine since criminally negligent acts are either misdemeanors or felonies.

<sup>27</sup> *Regina v. Franklin*, 15 Cox C. C. 163 (1883).

<sup>28</sup> 26 AM. JUR. 283 (1940).

<sup>29</sup> *In Com. v. Couch*, 32 Ky. Law Rep. 638, 106 S.W. 830, 16 L.R.A. (N.S.) 327 (1908), defendant fired a pistol upon a public highway, frightening Jimmie Holliday, who was quick with child. She gave premature birth to the child, became sick, and died. A demurrer to the indictment for murder was sustained on the ground that her death may have been due to improper attention or disease or other cause following her confinement, that death was not the “natural and probable consequences” of defendant's act. It is always difficult to tell what a court means when it speaks in terms of “probable cause” and “natural and probable consequences.” It may mean that there were intervening causes, or that defendant was not negligent *as to* the injured party, or that the consequences of the act were unforeseeable. Thus the court merely means that defendant was not culpably negligent. What if deceased in the Couch case had died from fright im-

also be necessary that defendant's act was so dangerous in itself as to constitute criminal negligence. The real danger in employing the misdemeanor-manslaughter doctrine lies in the probability that convictions will be had where defendant's conduct is not dangerous in itself, or at least not dangerous in the degree required for criminal liability. Thus it is concluded that the misdemeanor-manslaughter doctrine is worthless and in some cases might work injustice, that it should be repudiated, and that convictions should be frankly based on criminal negligence.

WILLIAM RICE

### CONTRACTS BY RAILWAY COMPANIES GRANTING TO TAXICAB COMPANIES THE EXCLUSIVE PRIVILEGE OF SOLICITING BUSINESS ON DEPOT GROUNDS

In the recent case of *Yellow Cab Co. of Ashland v. Murphy*<sup>1</sup> the Kentucky Court of Appeals overruled the holding of earlier cases in regard to the right of a railway company to grant to a taxicab company by contract the exclusive privilege of entering and using the railway company's grounds to solicit business. The Cab Company had entered into a contract with the Chesapeake and Ohio Railway whereby the former was granted the exclusive privilege of going on the depot grounds to solicit the transportation of passengers and baggage. The Company sought to enjoin the defendants from interfering in any way with the exclusive privilege granted by the contract. The defendants relied on the case of *McConnell v. Pedigo*<sup>2</sup> in which the court had declared a similar contract invalid. In the instant case the court rejected the reasoning of the *Pedigo* case and thus aligned Kentucky with the decided weight of authority on this question.

By the terms of the contract in the *Pedigo* case, McConnell was granted the privilege of standing his hacks at the railway company's

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mediately upon the firing of the shot? In the only case directly in point (*Com. v. Owens and Evans*, 198 Ky. 655, 249 S.W. 792 (1923)) the indictment charged involuntary manslaughter of a woman known to defendants to be afflicted with heart trouble by going to her house and "raising a racket, fuss and altercation" with her. The court, after stating its usual definition of involuntary manslaughter, sustained the demurrer to the indictment on the ground that the allegations that defendants raised a racket and altercation were simply conclusions, "Without determining the question of whether one may be guilty of homicide in any of its degrees by the commission of some unlawful act which produces in the victim excitement, irritation, anger, terror or agitation. . . ."

<sup>1</sup> 243 S.W. 2d 42 (Ky. 1951).

<sup>2</sup> 92 Ky. 465, 18 S.W. 15 (1892).