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CRIMINAL LAW — INVOLUNTARY MANSLAUGHTER — PRESENCE AS A PRE-REQUISITE TO LIABILITY FOR PERMITTING AN INCOMPETENT TO DRIVE AN AUTOMOBILE—Defendant gave his car keys to an intoxicated friend and permitted him to operate the vehicle while the defendant was at home in bed. As he was driving on the wrong side of the highway, the friend was involved in a head-on collision which resulted in the death of the drivers of both vehicles. Defendant was convicted of involuntary manslaughter¹ and of the misdemeanor of allowing an intoxicated person to operate his automobile.² On appeal, *held*, conviction of manslaughter reversed. Although one who permits an intoxicated person to drive his car is guilty of a misdemeanor, he cannot be held liable for involuntary manslaughter

¹ See MICH. COMP. LAWS § 750.321 (1948).

² See MICH. COMP. LAWS § 257.625 (b) (Supp. 1956).

unless he is present at the time of the fatal event. *People v. Marshall*, 362 Mich. 170, 106 N.W.2d 842 (1961).

Involuntary manslaughter has been defined at common law as "an unintentional homicide, committed without excuse and under circumstances not manifesting or implying malice."³ Generally, convictions for this crime have been based on two theories of criminal responsibility:⁴ (1) the misdemeanor-manslaughter rule, which states that any death resulting from the commission of an unlawful act not felonious in character is manslaughter;⁵ and (2) the concept of criminal negligence, which involves the commission of an act that might produce death or serious bodily harm without the precaution that a reasonable man would take to prevent injury.⁶ Despite the implication that liability will automatically follow under either of these approaches when all the elements necessary for conviction are present, there have been certain exceptions recognized by the judiciary,⁷ the predominant one being remoteness of causation.⁸ It would seem that use of a strict "but for" test of causation would clearly result in holding the defendant liable on the facts of the instant case.⁹ However, there is a competing consideration here, namely the reluctance of the courts to convict, without prior legislative approval, in cases where the causal factor has been thought to be too remote.¹⁰ In the principal case, apparently one of first impression, the court seemingly

³ CLARK & MARSHALL, CRIMES § 10.12, at 634 (6th ed. 1958). See WHARTON, HOMICIDE § 6 (3d ed. 1907); *State v. Pond*, 125 Me. 453, 134 Atl. 572 (1926); *People v. Ryzek*, 224 Mich. 106, 194 N.W. 609 (1923).

⁴ A third possible basis of conviction is for aiding and abetting the commission of an unlawful act so as to be either a principal or an accessory to the crime. This latter route has been seldom utilized by the judiciary in connection with involuntary manslaughter, perhaps explainable by the general disagreement as to its propriety. Compare *State v. Kennedy*, 109 S.C. 141, 95 S.E. 350 (1918) and 1 ARCHBOLD, CRIMINAL PROCEDURE 66 (8th ed. 1877) with *State v. McVay*, 47 R.I. 292, 132 Atl. 436 (1926) and 1 BISHOP, CRIMINAL LAW § 678 (8th ed. 1892).

⁵ CLARK & MARSHALL, *op. cit. supra* note 3, § 10.14 at 639. For an approach suggesting the abolition of the misdemeanor-manslaughter doctrine and the replacement of it with the concept of negligent manslaughter, see Johnston, *A Re-examination of the Misdemeanor Manslaughter Doctrine*, 38 Ky. L.J. 118 (1949).

⁶ More than mere ordinary negligence is required, however, and the test the courts ordinarily invoke is that of gross or wanton or culpable negligence. See MILLER, CRIMINAL LAW § 93 (b) at 287 (1934).

⁷ For a discussion of the exception pertaining to the nature of the unlawful act (*malum prohibitum-malum in se* distinction) see Wilner, *Unintentional Homicide in the Commission of an Unlawful Act*, 87 U. PA. L. REV. 811 (1939). See also 21 MICH. L. REV. 596 (1923). Compare PERKINS, CRIMINAL LAW 57-59 (1957).

⁸ Johnston, *supra* note 5, at 121; 21 MICH. L. REV. 596 (1923). See generally Sayre, *Criminal Responsibility for the Acts of Another*, 43 HARV. L. REV. 689, 723 (1930).

⁹ There seems to be but little question that the defendant would be civilly liable. See MICH. COMP. LAWS § 257.401 (Supp. 1956); JAMIESON & BROWN, MICHIGAN AUTOMOBILE LAW § 122 (2d ed. 1951); PROSSER, TORTS 513 (2d ed. 1955). See generally *id.* § 84, at 513.

¹⁰ See *State v. Satterfield*, 198 N.C. 682, 153 S.E. 155 (1930); PERKINS, *op. cit. supra* note 7, at 603; Johnston, *supra* note 5, at 121-22.

reflects this reluctance and establishes presence as an arbitrary dividing line for liability¹¹ in an attempt to avoid what it feels would be undue severity. Cases in which the defendant had entrusted his car to an incompetent and was present with him at the time of the fatal accident are distinguished.¹² Thus, according to the court's rationale, if the defendant is riding with the incompetent at the time the accident occurs he may be held guilty of involuntary manslaughter; but the moment he steps from the vehicle, permitting the driver to continue on, he is virtually relieved of all criminal responsibility for any death directly attributable to his unlawful or negligent act in allowing such person to take the wheel initially. When considered from the standpoint of causation, such reasoning appears to be unsound.

Remoteness of causation does not depend on the physical proximity of the accused to the scene of the crime;¹³ rather, it depends on the type of forces that have intervened between the unlawful or negligent act complained of and the resulting injury.¹⁴ In the principal case, the defendant's unlawful or negligent conduct was established when his intoxicated friend began to drive the automobile. The only intervening force between this conduct and the killing was the negligence of the friend in driving on the wrong side of the road; however, the courts, in determining liability in the past, have not deemed this sufficient to render causation so remote that the defendant's negligence would be excusable.¹⁵ It seems that the absence of the defendant in the principal case should be of no greater relevance than was the absence of a manager of a railroad from the scene of a wreck; and yet, in the latter case,¹⁶ the indictment of the manager on a manslaughter charge for permitting an inexperienced and incompetent engineer to operate the train that caused a wreck was sustained. In both cases the accused had negligently set in motion the force that made the killing possible,¹⁷ and his whereabouts at the moment the force resulted in the

¹¹ See principal case at 172, 106 N.W.2d at 843. "If defendant Marshall had been by McClary's side an entirely different case would be presented, but on the facts before us Marshall, as we noted, was at home in bed."

¹² See, e.g., *Story v. United States*, 16 F.2d 342 (D.C. Cir. 1926), *cert. denied*, 274 U.S. 739 (1927) (defendant permitted intoxicated friend to drive); *People v. Ingersoll*, 245 Mich. 530, 222 N.W. 765 (1929) (defendant permitted inexperienced driver to drive his car); *Armstrong v. State*, 48 Okla. Crim. 146, 289 Pac. 1115 (1930) (defendant slept in back seat while inexperienced friend drove); *State v. Hopkins*, 147 Wash. 198, 265 Pac. 481, *cert. denied*, 278 U.S. 617 (1928) (intoxicated friend).

¹³ See PERKINS, *op. cit. supra* note 7, at 602; Beale, *The Proximate Consequences of an Act*, 33 HARV. L. REV. 633, 643 (1920).

¹⁴ See MILLER, *op. cit. supra* note 6, at 90-91. See generally Beale, *supra* note 13, at 658.

¹⁵ Cases cited note 12 *supra*.

¹⁶ *People v. Smith*, 56 Misc. 1, 105 N.Y. Supp. 1082 (Sup. Ct. 1907).

¹⁷ See *Regina v. Dante*, 10 Cox Crim. Cas. 102 (1865) (defendant's vicious horse attacked and killed a person).

injury should be of no consequence for purposes of determining causation.¹⁸ Apart from causation, however, there might be some validity in a consideration of the presence factor. For if the defendant were present, it could be maintained that he would be in a position to exercise control over the actions of the driver and thereby possibly prevent any accident. It would seem that such an argument should be rejected as too speculative, for it is equally plausible to contend that there is even greater negligence in permitting such a person to operate an automobile by himself.

The court placed a great deal of emphasis on a need for new approaches to resolve the problem presented, and declared that these approaches "rest with the legislature not the courts."¹⁹ Although the principal case presents a somewhat unprecedented fact situation, the necessity for legislative action, in order to sustain the conviction, is by no means clear. Following either the misdemeanor-manslaughter rule or the criminal negligence approach, the guilt of the defendant appears to be inescapable. However, in drawing the line of liability at presence, the court is trying to avoid what it, no doubt, feels would be a harsh result. It is not suggested that this is undesirable, but it must be recognized that purely as a matter of law this case is indistinguishable from a number of other cases in which manslaughter convictions have been sustained.²⁰

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¹⁸ *Cf.* *People v. Botkin*, 132 Cal. 231, 64 Pac. 286 (1901) (defendant sent poisoned candy through the mail).

¹⁹ Principal case at 174, 106 N.W.2d at 844.

²⁰ Cases cited note 12 *supra*.