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Harry B. Crytzer

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HOMICIDE BY NONFEASANCE

Homicide is the killing of one human being by another human being. The killing may be justifiable, excusable, or felonious. We are here concerned with the latter kind of homicide, which is criminal. Felonious homicide is subdivided into murder and manslaughter. Murder, both first and second degree, is homicide with malice aforethought; malice meaning those states of mind and circumstances which the courts have held necessary to make homicide murder. These attributes of malice are set out by statute in Pennsylvania¹ but recourse to the common law is necessary for precise interpretation.

Manslaughter is homicide without malice. At common law and in Pennsylvania manslaughter may be either voluntary or involuntary. While some states by statute subdivide manslaughter into degrees², no such division existed at common law. Voluntary manslaughter is first degree murder ameliorated because committed in a passion under sufficient provocation before expiration of time for the blood to cool. Involuntary manslaughter is homicide unintentionally caused and without malice, but which results from the commission of an unlawful act not amounting to a felony, or from negligence, or from lack of caution³. The definition includes killings resulting from malfeasance, from misfeasance, and from nonfeasance⁴.

Involuntary manslaughter by malfeasance occurs when one is unintentionally killed as a result of the commission of an unlawful act by another. The unlawful act must be criminal, but must not be a felony. Pennsylvania courts conflict as to whether or not it need be *malum in se*, with a majority of cases holding the act need not be. A Pennsylvania statute⁵ tersely stating, "Involuntary manslaughter, happening in consequence of an unlawful act . . ." is of little help, but a Purdon's note⁶ shows the tangle of judicial minds on the type of act necessary to invoke liability for manslaughter.

Homicide by misfeasance and homicide by nonfeasance are both forms of negligent homicide, misfeasance being the negligent doing of an act and nonfeasance being a negligent omission to act.

The problem involved in this field is presented nicely in the case of *Johnson v. State*.⁷ A bicyclist hurled down the village street at dusk at the "mad speed" of

¹18 P. S. 2221.

²Texas Penal Code, arts. 579-590 state four degrees of manslaughter.

³18 P. S. 2226.

⁴The foregoing summary is developed from the lectures of Dean W. H. Hitchler, Dickinson School of Law.

⁵1929, P. L. 513.

⁶18 P. S. 2226 and 1936 Supplement.

⁷66 Ohio St. 59; 61 L. R. A. 277.

twenty miles an hour, giving no warning by light or bell, struck and catapulted a pedestrian fifteen feet, killing him. No ordinance made such riding unlawful, so the death was caused by a lawful act done negligently — a case of misfeasance. The reasoning of the Supreme Court marks the objections to convicting on either form of negligent homicide. There was no common law homicide in Ohio, and the statute required that death result from an unlawful act. The lower court held that a lawful act could be done with such gross negligence that it became unlawful, and convicted the defendant of manslaughter.

The Supreme Court held that to convict one of manslaughter for negligently causing death, without having a prior certain definition of such negligence is an *ex post facto* determination of the crime. Their solution is to let the legislature make certain acts of commission and omission criminal, so that a prisoner's freedom need not depend upon what interpretation a jury puts on certain acts. But juries interpret other uncertainties such as malice and intent in criminal trials; why not the degree of negligence?

To quote the court: "What acts or omissions in early years (of the state) were harmless, owing to sparsity of population and character of property and business then owned and conducted, afterwards, as population increased and business relations became diversified, became injurious to others; and in other respects the good order of society and the protection of life and property demanded and received appropriate legislation. That department of our government has kept pace with the wrongs, the vices, and immoralities of our social and industrial life. It has made criminal many acts and omissions which before belonged to the field of negligence, as witness many provisions regarding the management of railroads, factories, mines, and other branches of business where labor is employed. Many acts or omissions to act which before were subject to the charge of negligence are made penal by statute. Then it is no longer necessary to turn to the common law to find what act or acts it is unlawful to commit.

"If the state's contention is tenable, criminal dockets of our courts will soon be flooded. The gross negligence of one may unintentionally cause the death of many. If such negligence is an unlawful act, the killing of each becomes a separate crime. And so it would proceed and the cases multiply according to the judgment of men as to when acts or omissions of others are or are not grossly negligent."

The Ohio view has not found favor in other American and English jurisdictions. However, there is an appreciable variance between the readiness of the courts to impose liability for misfeasance and their hesitancy to hold one guilty who permits death to overtake another by the defendant's nonfeasance. The courts are almost unanimous in holding that one can do a lawful act with such gross negligence that the act becomes unlawful and the actor criminally liable

where death results from such act.⁸ A Pennsylvania case⁹ repudiates the Ohio doctrine and concisely develops a point apparently overlooked in *Johnson v. State*: "To collide wantonly and recklessly in a grossly negligent manner, although unintentional, is assault and battery—manslaughter is simply assault and battery where death results from the crime." This view is iterated by later Pennsylvania cases¹⁰. A Texas case¹¹ goes much farther and imputes malice sufficient to convict for second degree murder from a drunken man's waving a gun (an act likely to cause death or great bodily harm) where a friend was killed by the accidental discharge of the gun. The court refused to charge as to manslaughter in spite of the fact that handling a gun was not even a misdemeanor!

More reluctance has been evidenced to impose criminal liability where death has resulted from the defendant's failure to act—such passivity and omission constituting what this note terms nonfeasance. During the last seventy years a well defined rule has been developed: where a particular duty is imposed on one by relationship or contract, and his failure to perform that duty results in death to another, he is liable criminally for the death.¹² Some courts have gone beyond the rule here stated and have imposed liability where neither contract nor relationship existed. Most jurisdictions by statutes have made unlawful the omissions of certain classes, as parents, railroad employes, mine owners, and physicians, to perform certain duties. If death results from such omissions, we have the peculiar situation of homicide by malfeasance growing out of the defendant's nonfeasance.

A few pertinent citations may clarify the preceding summary. The relationship duty may thus be expressed: "If a person who sustains to another the legal relation of protection, as husband to wife, parent to child, master to seaman, etc., knowing such person to be in peril of life, wilfully and negligently fails to make such reasonable and proper efforts to rescue him as he might have done without jeopardizing his own life or the lives of others, he is guilty of manslaughter at least, if by reason of his omission of duty, the dependent person dies. . . . So one who from domestic relationship, public duty, voluntary choice, or otherwise has the custody and care of a human being, helpless either from imprisonment, infancy, sickness, age, imbecility, or other incapacity of mind or body, is bound to

⁸*Chrystal v. Commonwealth*, 72 Ky. 669; *York v. Commonwealth*, 82 Ky. 360; *Lee v. State*, 4 Tenn. 62; *Burton v. State*, 92 Ga. 449; *State v. Vance*, 17 Iowa 138; *Reg. v. Whitehead*, 3 Car. & K. 202; *White v. State*, 84 Ala. 421; *Thomas v. People*, 2 Color. App. 513, 31 Pac. 349; *State v. Brown*, *Houst. Crim. Rep. (Del.)* 539; *Reg. v. Salmon*, 14 Cox C. C. 494; *Blalock v. State*, 49 S. W. 100 (Tex); *State v. Justus*, 11 Or. 178; 61 L. R. A. 277.

⁹*Smith v. Commonwealth*, 100 Pa. 324.

¹⁰*Com. v. Smith*, 27 Pa. Super. Ct. 232; *Com. v. Coccodralli*, 74 Pa. Super. Ct. 327; *Com. v. Greevy*, 75 Pa. Super. Ct. 138; *Com. v. Mamula*, 4 D. & C. 514.

¹¹*Houston v. State*, 14 S. W. 352.

¹²1 Bishop *Crim. Law*, 6th Ed. Sec. 217; 2 Bishop *Criminal Law Sec.* 659; 21 *Am. & Eng. Ency. Law*, pg. 99; *Wharton Criminal Law*, 7th Ed. Sec. 1011; *Thomas v. People*, 31 Pac. 349; (*Color.*); *State v. Noakes*, 70 Vt. 247; 13 L. R. A. (N. S.) 1020.

execute the charge with proper diligence, and will be held guilty of manslaughter if by culpable negligence, he lets the helpless creature die."¹³

A Montana court convicted a husband of manslaughter for leaving his intoxicated wife, on a winter's night, lying in the snow, from which exposure the wife died.¹⁴ Where a husband failed to provide clothing, fire, and shelter for an insane wife in winter, and she died, the husband was guilty of manslaughter.¹⁵ Many cases have held parents liable where their failure to provide food or shelter for their children has resulted in the child's death.¹⁶ An English case carries the doctrine far in convicting a parent of manslaughter where the parent furnished sustenance to a third person for the child and the child died because the third person withheld the supplies, the parent knowing this and not interfering.¹⁷

A change in legal views is illustrated by the "faith cure" cases. In England where one on whom the duty of providing medical care was imposed by relationship and he failed to provide such care due to his religious beliefs, he was held not liable.¹⁸ Later where a statute was passed requiring parents to furnish necessities, those who relied on faith alone to heal were convicted of manslaughter.¹⁹ Pennsylvania, without a statute imposing liability (beyond the poor laws), declared a father may be convicted for the death of his child due to his failure to call in a physician²⁰. He may be so convicted though he may believe prayer was all that was needed²¹. Christian Science treatments are discussed in *State v. Marble*^{21a}.

There are few cases in the reports where the obligation neglected was one imposed by contract. *State v. O'Brien*²² was the trial of a switch-tender whose neglect of contract-imposed duty resulted in a wreck which killed several passengers. In the manslaughter conviction the court charged: "It is not necessary for the omission to be wilful or of purpose. It is a question of fact for the jury whether the defendant was or was not guilty of negligence; or whether his conduct evinced, under the circumstances such care and diligence as were proportionate to the danger to life impending." In a Colorado case²³ the gang boss neglected to shore an excavation and four workers were killed by the resulting cave-in.

¹³21 Am. & Eng. Ency. Law, 2nd Ed., Pg. 197 (notes & cases).

¹⁴*Territory v. Manton*, 19 Pac. 387 (Mont.).

¹⁵*State v. Smith*, 65 Me. 257.

¹⁶*State v. Belum*, 72 Iowa 533; *Gibson v. Com.*, 106 Ky. 360; *Reg. v. Jones*, 19 Cox C. C. 678; *Reg. v. Conde*, 10 Cox C. C. 547; *Rex v. Squire*, 3 Russell's Crimes Pg. 13; *Pallis v. State*, 26 So. 339 (Ala.); 61 L. R. A. Pgs. 290-2.

¹⁷*Reg. v. Bulb*, 4 Cox C. C. 455.

¹⁸*Reg. v. Senior*, 1 Q. B. 289 (1889); *Reg. Downes*, 1 Q. B. 25 (1889).

¹⁹*Rex v. Brooks*, 9 Brit. Col. 13; *Rex. v. Lewis*, 23 Can. L. T. 257. Note these are cases where nonfeasance is made malfeasance by statute.

²⁰*Com. v. Hoffman*, 29 Pa. C. C. 65 (1904).

²¹*Com. v. Breth*, 44 Pa. C. C. 56 (1915).

^{21a}2 Ann. Cas. 898.

²²32 N. J. L. 169.

²³*Thomas v. People*, 31 Pac. 349 (Color.).

In reversing the manslaughter conviction, the upper court held that "the defendant was not directed to do anything which would have prevented it; nor was there by omission such gross negligence necessary to the commission of the crime." Both of these cases require that the omission be viewed from its likelihood of causing death in addition to the obligation being one imposed by contract. Where a workman's duty was to cover a mine shaft, which he neglected to do, and in consequence of such neglect a truck load of bricks fell into the shaft, killing a worker below, the negligent workman was guilty of manslaughter.²⁴ We may further note that the contract need not be with the person killed in order to convict the negligent party because of his nonfeasance.

The third type of duty imposed, the non-performance of which may sustain criminal liability, is one neither of relationship nor of contract. The duty is such as arises under special circumstances, and concerning which the law is indefinite, unsettled, and uncertain. Thus when one picks up a waif and then so neglects it that death results, the duty of support is imposed. Here no true relationship nor technical contract existed, and yet there are elements of both. So where one mixed poison with whiskey, contemplating suicide, and then exposed the mixture where another was likely to find and drink it, the mixer by omitting to hide or throw away the potion was held criminally liable for the death of the drinker.²⁵ One view is that where a duty is imposed by statute, contract, or relationship and failure to perform the duty results in death, the one negligent is liable and hence he should be liable where a duty is imposed by other circumstances. In opposition to this view is the conviction that criminal law should be certain and a clear line of demarcation should be drawn between legal and non-legal duties.

A few cases will show the conflict: An overseer of the poor was held liable for the starvation of a person within his district²⁶; a deputy warden was held not guilty for the starvation of a prisoner²⁷; a nurse was held not liable for failing to remove whiskey which she knew would cause the patient's death²⁸; an insane asylum attendant was not liable for failing to make the patient get out of scalding bath water the attendant had turned on²⁹; where an expectant mother failed to care for herself so that the child died soon after birth, she was not liable³⁰; one taking a child for hire who neglects to provide medicine for it is guilty of manslaughter³¹; failure of master to rescue a fallen seaman is a violation of a moral

²⁴Reg. v. Hughes, 7 Cox. C. C. 301.

²⁵State v. Lindsey, 5 Pac. 822 (Nev.).

²⁶Rex. v. Booth, 1 Russ. & R. C. C. 47 N.

²⁷Rex. v. Huggins, 2 Ld. Raym. 1574.

²⁸People v. Anderson, 63 Pac. 668 (Cal.).

²⁹Reg. v. Finney, 12 Cox C. C. 625.

³⁰Reg. v. Knights, 2 Fost. C. F. 46.

³¹Reg. v. Jones, 19 Cox C. C. 678.

duty, not a legal duty, and master is not liable³²; a master is not liable for failing to provide in childbirth for a child born to his servant under the master's roof³³; a niece was liable for failing to provide food for an aged aunt with whom the niece lived³⁴; a brother was held to be under no legal duty to provide food and warmth to his brother, though the latter was a helpless idiot and dwelling under the roof of the former, and the negligent one escaped all liability for the idiot brother's starvation³⁵. In *Michigan v. Bearsley*³⁶ a defendant engaged in a weekend drunken orgy with a woman. When he notified her that his wife was about to return she took morphine tablets. The defendant did nothing and the court refused to convict him for the woman's death because he owed her no duty of protection.

Enough has been said to show the error of extending the rule to cover liability when the duty is imposed by "special circumstances." Statutes, relationship, and contracts should define the duty. Ordinances, federal and state statutes have imposed obligations in particular fields and nonfeasance here becomes malfeasance. These obligations are imposed in the use of ways and streets³⁶; in the management of railways, locomotives, etc.,³⁷; in the navigation and management of vessels;³⁸ in practicing medicine and surgery³⁹; in factories, mines, etc.

What is the Pennsylvania law in reference to homicide by nonfeasance? The Pennsylvania statute⁴⁰ provides punishment for involuntary manslaughter happening in consequence of an "unlawful act." *Commonwealth v. Gill*⁴¹ says "unlawful acts" includes those acts done in an unlawful manner and without due caution, implying along with negligence an element of rashness or recklessness approximating an unlawful act; "reckless" importing more than carelessness or negligence and denoting "rashly negligent" or an "utterly heedless" act. This is homicide by misfeasance. However, by dicta, several Pennsylvania cases⁴² say that manslaughter consists in killing another by a negligent omission to perform a legal duty, clearly adopting the doctrine of criminal homicide by nonfeasance. Where statutes have made a nonfeasance or failure to act criminal and death re-

³²U. S. v. Knowles, 4 Sawy. 517; Fed. Case No. 15,540.

³³State v. Noakes, 70 Vt. 247.

³⁴Reg. v. Instan, 17 Cox C. C. 607.

³⁵113 N. W. 1128, 13 L. R. A. (N. S.) 1020.

³⁶61 L. R. A. 279-81.

³⁷Act of March 22, 1865, P. L. 30; Com. v. Cook, 8 Pa. C. C. 486; Com. v. Hamilton, 26 Phila. Leg. Int. 68; Com. v. Kuhn, 1 Pittsb. 13.

³⁸U. S. Act of 1838 Sec. 12 (5 Stat. 304); U. S. v. Taylor, 5 McLean 242; U. S. v. Warner, 4 McLean 463; Com. v. Bilderbach, 2 Pars. Eq. Cas. (Pa.) 447; U. S. Rev. Stat. Sec. 4477 (U. S. Comp. Stat. 1901, Pgs. 3052 to 3069).

³⁹Dec. Digest, Homicide. 111—Manslaughter Sec. 74; 61 L. R. A. 387-290.

⁴⁰18 P. S. 2226 and note.

⁴¹120 Pa. Super. Ct. 22; 182 A. 103.

⁴²Com. v. McLaughlin, 293 Pa. 218 (1928); Com. v. McTague, 112 Pa. Super. Ct. 471 (1934); Com. v. Mayberry, 290 Pa. 195; Com. v. Hoffman, 29 C. C. 65 (1904); Com. v. Breth, 44 C. C. 56 (1915).

sults from such omission, the Pennsylvania courts agree in convicting the one violating such statutes. Statutes impose obligations in the management of railways^{42a} and in navigation⁴³. Although the poor laws impose an obligation on parents to provide medical care for their children, the courts convicting the parents for the deaths of their children due to failure to provide medical care did not base their convictions on disobedience of the statute imposed duty, but apparently adopted the theory of liability for failure to perform a duty imposed by relationship⁴⁴. No Pennsylvania case discusses the failure to perform a contract imposed duty as being a criminal act.

To conclude: the negligent performance of a duty or the negligent omission to perform a duty is regarded as an unlawful act. If death is thereby caused, the one negligent is criminally liable, though there was no criminal intent, provided: (1) the duty was his personal duty, (2) the duty was a positive duty imposed by (a) statute, (b) contract, (c) relationship or (d) certain special circumstances. If homicide is caused by the violation of a duty imposed by statute, it is homicide by malfeasance. If homicide is caused by actively doing a lawful act in a grossly negligent manner, it is homicide by misfeasance. If the homicide is caused by an omission to perform a duty imposed by contract, relationship, or by special circumstances, it is homicide by nonfeasance.

—Harry B. Crytzer.

^{42a}See footnote 37.

⁴³Com. v. Bilderbach, 2 Pars. Eq. Cas. (Pa.) 447.

⁴⁴Com. v. Hoffman, 29 Pa. C. C. 65; Com. v. Breth, 44 Pa. C. C. 56.