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INVOLUNTARY MANSLAUGHTER BY MALFEASANCE IN PENNSYLVANIA

Background

Although at common law the crime of manslaughter was separated from murder and given the general definition of "unlawful homicide without malice aforethought", the early Pennsylvania courts, following the prior English decisions, made no distinction between voluntary and involuntary manslaughter. Both were embraced under the term manslaughter and were punishable as a felony within benefit of clergy.¹ Prior to the time of Blackstone, the crime of manslaughter resembled an uncharted ocean, bounded on one shore by murder and on the other by excusable and justifiable homicide, with only a few diverse courses being plotted on its unmarked expanse. And even today, although many thousands of cases have been heard and decided in the intervening centuries, some of the early enigma has survived, and our learned courts, counselors and legal scholars still encounter some difficulty in defining and marking its boundaries with certainty, in explaining its intricacies to lay juries, and in earmarking it for future reference in the criminal archives. This note is written with the hope of charting more clearly the storm centers which await the uninitiated traveler who seeks to navigate the still-troubled surface of this crime of involuntary manslaughter.

Sir William Blackstone seems to have been the first to divide manslaughter into two classes, voluntary and involuntary, and in discussing the latter, said:

"The second branch, or *involuntary* manslaughter, differs also from homicide excusable by misadventure in this, that misadventure always happens in consequence of a lawful act, *but this species of manslaughter in consequence of an unlawful one.*"²

The revered commentator then gave his classic example, still cited by our courts today:³

"As if two persons play at sword and buckler, unless by the king's command, and one of them kills the other, this is manslaughter, because the original act was unlawful, but it is not murder for the one had no intent to do the other any personal mischief."⁴

In spite of the exactitude and clarity of this definition and example, the courts, in our early murder cases, generally referred to manslaughter only in passing, saying that it was distinguished by the absence of malice, and that it might involve

¹ *Com. v. Gill*, 120 Pa. Super. 22, 27, 182 A. 103 (1935).

² 4 BL. COMM. *192 (italics added).

³ E.g., *Com. v. Gill*, *Supra*, note 1, at p. 30; *but see* criticism by Gibson, J., in his dissenting opinion to *Com. v. Gable*, 7 Serg. & R. 423, 434, (Pa. 1821).

⁴ *Supra*, note 2.

provocation and passion (this being our crime of voluntary manslaughter) or "perhaps homicide *per infortunium* where too much force was used in chastising a servant or child."⁶

Legislative and Judicial Definition

Fortunately, the Pennsylvania legislature recognized the necessity for distinction and by the Act of April 22, 1794,⁶ manslaughter was divided into two classes, voluntary manslaughter (§7) and "*Involuntary manslaughter happening in consequence of an unlawful act*" (§8). It was provided as to the latter that the attorney general could waive the felony and charge the person guilty of such act with a misdemeanor.⁷ This statutory definition of the crime, in spite of its brevity, was incorporated without change except as to punitive provisions in section 79 of our Criminal Code of 1860,⁸ as amended in 1929.⁹ By the present Criminal Code of 1939,¹⁰ the statutory limits of the crime were increased slightly to recognize and include the modification long before set forth by our courts, *viz.*, that the unlawful act causing the death could be either unlawful in its inception, such as the violation of a statute, or it could be a lawful act performed in such a manner as to become unlawful,¹¹ as where a workman throws down a piece of timber into a street where people are continually passing, though he gives loud warning. Our present statute thus reads:

" . . . whoever is convicted of involuntary manslaughter happening in consequence of an unlawful act, or the doing of a lawful act in an unlawful way, is guilty of a misdemeanor. . . . The district attorney may charge both voluntary and involuntary manslaughter in the same indictment, in which case the jury may acquit the party of one and find him guilty of the other charge."¹²

Since the statute sacrifices clarity for the sake of a terse, brief identification of the crime, our courts have contributed the necessary definition:

"Involuntary manslaughter consists in 'the killing of another without malice and unintentionally, but in (1) doing some unlawful act not amounting to a felony nor naturally tending to cause death or great bodily

⁶ *Penna. v. Honeyman*, Add. 147, 149 (Pa. 1793); *Penna. v. McFall*, Add. 255 (Pa. 1794).

⁶ 3 Sm. L. 186.

⁷ This statute was construed in *Com. v. Gable*, *supra*, note 3, Chief Justice Tilghman saying, at p. 426, "When it is said he may waive the felony, it is intended that he shall waive it. This is not a new construction of the word 'may', and if there ever was a case in which that word ought to receive imperative signification, it is the present."

⁸ Act of Mar. 31, 1860, PL 382, §79.

⁹ Act of Apr. 11, 1929, PL 513.

¹⁰ Act of June 24, 1939, PL 872, §703; 18 PS 4703.

¹¹ This was recognized as early as 1821 by Tilghman, C.J., *supra*, note 3, who said at p. 428, "Involuntary manslaughter is where it plainly appears that neither death nor any great bodily harm was intended, but death is accidentally caused by some unlawful act or an act not strictly lawful (unlawful?) in itself, but done in an unlawful manner and without due caution." See also the dissenting opinion of Mr. Justice Gibson, which shows clearly that then, at least in the mind of that eminent jurist, the distinctions as to manslaughter could not be clearly drawn and that by the Act of 1794, he found *three* types of manslaughter, voluntary, general (an intermediate degree) and involuntary, the latter being least serious of the three.

¹² *Supra*, note 10.

harm, or (2) in negligently doing some act lawful in itself, or (3) by the negligent omission to perform a legal duty'.¹³

By this definition, accepted generally by the Pennsylvania courts,¹⁴ involuntary manslaughter is resolved into three types, often referred to as manslaughter by: (1) malfeasance, (2) misfeasance, and (3) nonfeasance. Homicide by malfeasance occurs when death results from the performance of some act usually declared to be lawful by statute; misfeasant manslaughter is caused as a consequence of the defendant's negligence, and that by nonfeasance happens as a result of the failure to perform a legal duty. Because the courts still cling tenaciously to the general common law and statutory definition of "death happening in consequence of an unlawful act", acts of both malfeasance and misfeasance have been held by our courts to supply the requisite degree of unlawfulness, and therefore both will be discussed here, although it is the primary aim of the writer to outline the Pennsylvania views regarding the specific crime of involuntary manslaughter by malfeasance.¹⁵ Since manslaughter by nonfeasance, the crime of omission, is more readily distinguished from its sister crimes of commission, and since the latter subject has already been ably discussed by a previous contributor to our Law Review, it will receive no further mention.¹⁶

Distinguished From Murder

In beginning, the general distinction between murder and manslaughter must be clearly understood. While a defendant may be indicted separately for murder, voluntary, and involuntary manslaughter, all indictments being tried at the same trial, they are separate crimes unto themselves and though the lesser may often be included in the greater, the converse is never true. A defendant, acquitted of murder, may later be indicted, tried, and convicted of involuntary manslaughter on the same facts,¹⁷ but a defendant, once acquitted of manslaughter, cannot later be tried for murder. The elements which separate murder from involuntary manslaughter are *malice*, express or implied, and *intent*, either to kill or to inflict serious bodily harm.¹⁸ Voluntary manslaughter may be readily distinguished from the other types of unlawful homicide because it is a crime of limited application, being found only where there is an intentional killing committed in the heat of passion caused by a legally adequate provocation, and before the expiration of a reasonable cooling time.¹⁹

¹³ (Parenthetical numbers added) Shaffer, J., in *Com. v. Mayberry*, 290 Pa. 195, 198, 138 A. 686 (1927), quoting from 29 CJ 1148, and citing: 273 Pa. 474, 117 A. 211 (1922); 7 Serg. & R. 422 (Pa. 1821); 13 RCL 784.

¹⁴ *Com. v. Williams*, 133 Pa. Super. 104, 1 A. 2d 812 (1938); *Com. v. Samson*, 130 Pa. Super. 65, 196 A. 564 (1938); *Com. v. McLaughlin*, 293 Pa. 218, 222, 142 A. 213 (1928).

¹⁵ For a very thorough discussion of this crime generally, without emphasis on particular jurisdiction, see Wilner, "Unintentional Homicide in the Commission of An Unlawful Act", 87 U. OF PA. L. REV. 811 (1939).

¹⁶ Note, "Homicide by Nonfeasance", 41 DICK. L. REV. 126 (1937).

¹⁷ *Com. v. Carroll*, 326 Pa. 135, 191 A. 610 (1937); *Com. v. Greevy*, 271 Pa. 95, 114 A. 511 (1921); *Com. v. Duerr*, 158 Pa. Super. 484, 45 A. 2d 235 (1946).

¹⁸ 40 CJS Homicide §56.

¹⁹ 40 CJS Homicide §40-54; 331 Pa. 145, 200 A. 632 (1938).

In referring to the first element which separates murder from involuntary manslaughter, Mr. Justice Agnew said in the now-classic Pennsylvania case, *Commonwealth v. Drum*, that, while murder is committed with malice aforethought,

"Manslaughter is never attended by legal malice or depravity of heart—that condition or frame of mind . . . exhibiting wickedness of disposition, recklessness of consequences, or cruelty."²⁰

In *Commonwealth v. Gibson*, it was said:

"Malice aforethought is an element of murder in either degree, and distinguishes it from manslaughter."²¹

Though the element of malice may have been distinctive when these judicial expressions were uttered, it is a boundary which is rapidly being effaced under modern treatment of the problem. One need only ponder for a moment such phrases as "depravity of heart" or "wickedness of disposition" to realize the ephemeral qualities which the word connotes. The late Dean Trickett, in his work on *Pennsylvania Criminal Law*, criticized the futility of distinguishing malice as an element of murder and demonstrated the basic inaccuracy involved by giving examples of at least eight different types of human emotion that would fulfill the definition of malice.²² And its identification is not made easier by the fact that, rather than being found expressly, it is often said to be implied by the circumstances surrounding the killing. Our courts have realized this, and have declared that once the homicide is proved to be felonious, malice is presumed and the burden will devolve upon the defendant to come forward with sufficient evidence to disprove the presumption. Malice may be presumed merely because death resulted from the use of a deadly weapon even though the actual killing was unintentional.²³ In other words, while lip service is given to this requirement of malice, as a practical matter, it has been almost eliminated if the other elements of murder are present, and it will be found that the demarcation between murder and manslaughter is more often dependent on intent, even though some obeisance to the evanescent requirement of malice may still be seen in the opinions.

A specific intent then, either to kill or commit serious bodily injury, is the significant factor distinguishing murder from involuntary manslaughter.²⁴ It must be understood, however, that while this is said to be the distinguishing factor, the mental element is not completely lacking in the crime of involuntary manslaughter. It is rather a different type of intent from that which must be present to support

²⁰ 58 Pa. 9, 17 (1868). This case often referred to as the basis for the court's charge in murder trials.

²¹ 275 Pa. 338, 342, 119 A. 403 (1923), italics added. *Accord*, *Com. v. Kelly*, 333 Pa. 280, 289, 4 A. 2d 805 (1939).

²² Trickett, 2 PENNSYLVANIA CRIMINAL LAW 835-854 (1908).

²³ See *Com. v. Wucherer*, 351 Pa. 305, 41 A. 2d 574 (1945), for the latest judicial discussion of this presumption. See also 292 Pa. 16, 21, 22, 140 A. 537 (1928); 333 Pa. 65, 71, 72, 3 A. 2d 398 (1939); 350 Pa. 375, 385, 386, 39 A. 2d 372 (1944); *Com. v. Malone*, 354 Pa. 180, 47 A. 2d 445 (1945).

²⁴ 160 Pa. Super. 211, 212, 50 A. 2d 720 (1947); 273 Pa. 474, 477, 117 A. 211 (1922); 40 CJS Homicide §56; 134 Pa. Super. 62, 68, 4 A. 2d 164 (1939).

a murder conviction. With the involuntary homicide, the defendant must at least have intended to commit the unlawful act which causes the death, although it is not necessary that he shall have intended to violate the law.²⁵ This requisite mental element, as differentiated from the intent to kill or inflict injury which is required for murder, is generally inferred from the very fact that the defendant committed the unlawful act in question. It is interesting to note that the commonwealth's burden in proving the intent involved in a charge of involuntary manslaughter is much easier than sustaining the same burden in the case of aggravated assault and battery—with manslaughter it need not be proved that the defendant intended to invade his victim's bodily security. Also, the manslaughter defendant cannot take refuge in the defense that he did not intend the death or serious injury to occur, for if such intent could be established, his offense would rise to that of second, or even first, degree murder.²⁶

Thus, the facts and circumstances surrounding an unlawful killing will not support a charge of murder if they do not disclose: (1) malice, express or implied, and (2) intent to kill or inflict serious bodily harm. Once it is seen that these elements are not present, or more particularly, that the element of specific intent is lacking, the possibility of proving involuntary manslaughter becomes important. Briefly, to convict for involuntary manslaughter by malfeasance, the commonwealth must establish that: (1) defendant committed an unlawful act, and (2) the unlawful act was the proximate cause of the death. Let us examine these requisites in greater detail.

The Unlawful Act

The *Mayberry* opinion,²⁷ in referring to manslaughter by malfeasance, said that it occurred while "doing some unlawful act not amounting to a felony nor naturally tending to cause death or great bodily harm." Others of our appellate benches have said that "the gist of the offense (involuntary manslaughter) is the *unlawful act*"²⁸ and that "the *very essence* of the crime is death. . . . in consequence of an *unlawful act*."²⁹ Another opinion states that,

*"The unlawfulness of the act in connection with which the killing occurs is the element which distinguishes involuntary manslaughter from a killing excusable by accident or misfortune."*³⁰

Since it would thus seem to be of great importance, this unlawful act should receive closer scrutiny. In the early days, Lord Coke said that a homicide committed while doing *any* unlawful act was murder. However, this thought did not long survive its author, and Foster and Hale said that when the act was not felonious, no

²⁵ *Supra*, note 15, at p. 820; 40 CJS Homicide §57.

²⁶ *Com. v. Coccodralli*, 74 Pa. Super. 324 (1920); *Com. v. Ireland*, 149 Pa. Super. 298, 27 A. 2d 746 (1942).

²⁷ *Supra*, note 13.

²⁸ *Com. v. Carroll*, 131 Pa. Super. 357, 364, 200 A. 139 (1938), (italics added).

²⁹ *Maxey, C.J.*, in *Com. v. Aurick*, 343 Pa. 282, 286, 19 A. 2d 920 (1941), (italics added); see also 155 Pa. Super. 120, 124, 38 A. 2d 494 (1944).

³⁰ *Com. v. Flax, supra*, note 19.

malice aforethought could be implied and the homicide was not greater than manslaughter.³¹ The unlawful act contemplated in the modern crime of involuntary manslaughter by malfeasance cannot be readily defined. It has been said that it connotes no particular offense known to the common law or created by statute,³² but that it must be forbidden by law, illegal, contrary to law,³³ and that it is a thing which one has no right to do.³⁴ Unlike the felonies which are part of the felony-murder doctrine, the act may be one which was not unlawful at the time the involuntary manslaughter statute was enacted, but which has since become unlawful by the passing of a subsequent statute.³⁵ Taking the negative approach, it is obvious that the unlawful act cannot amount to a felony—this is specific in our definition, and *a fortiori*, if such act were one of the five felonies listed in our murder statute, rape robbery, burglary, arson, or kidnapping, the homicide would be first degree murder.³⁶ Likewise, the unlawful act cannot threaten death or serious bodily harm, because as mentioned above, such an act will supply the requisite intent for a murder conviction. It is well settled, however, that the act must at least be unlawful, which can most generally be defined as contrary to some statutory law, because if the act be lawful, homicide happening as a consequence will be excusable or justifiable,³⁷ such as a killing in self defense, or the shooting of a fleeing felon.

The Pennsylvania courts have held the crime to be involuntary manslaughter by malfeasance where death resulted from the explosion of a still used in the illegal production of alcoholic beverages,³⁸ selling poison without the label required by law,³⁹ hunting without a license,⁴⁰ practicing medicine without a license,⁴¹ and the playful pointing of a firearm.⁴² Many violations of the vehicle code have been held to be unlawful acts within the purview of the involuntary manslaughter statute: driving beyond the range of one's headlights,⁴³ driving while intoxicated,⁴⁴ driving without a license,⁴⁵ reckless driving,⁴⁶ driving with improper license plates,⁴⁷ passing on the crest of a hill,⁴⁸ and of course, driving at excessive speed.⁴⁹

³¹ 2 BURDICK, LAW OF CRIME §465 (1946).

³² *Com. v. Aurick*, 138 Pa. Super. 180, 185, 10 A. 2d 22 (1939).

³³ *Com. v. Gill*, *supra*, note 1.

³⁴ *Supra*, note 29, at p. 285.

³⁵ *Supra*, note 22, at p. 186.

³⁶ Act of June 24, 1939, PL 872, §701, 18 PS 4701.

³⁷ Classed by Blackstone and later writers as Homicide *Per Infortunium* and Homicide *Se Defendendo*, 4 BL. COMM. *182-188.

³⁸ *Com. v. Ernesto*, 93 Pa. Super. 339 (1928); *Com. v. Mango*, 101 Pa. Super. 385 (1931).

³⁹ *Com. v. Sheriff*, 16 Phila. 518 (1884).

⁴⁰ *Com. v. McCawley*, 46 Pa. C. C. 306 (1918).

⁴¹ *Com. v. Jameson*, 5 Haz. Pa. Reg. 382.

⁴² *Com. v. Whildin*, 17 Pa. D. & C. 370 (1931).

⁴³ *Supra*, note 32.

⁴⁴ *Com. v. Tole*, 25 Pa. Dist. 957 (1916); *Com. v. McHonahy*, 151 Pa. Super. 26, 29 A. 2d 348 (1942).

⁴⁵ *Com. v. Romig*, 22 Pa. D. & C. 341 (1934); *but see contra*, *Com. v. Williams*, *supra*, note 14.

⁴⁶ *Com. v. Godshalk*, 76 Pa. Super. 500 (1921).

⁴⁷ *Com. v. Bemserfer*, 39 Lanc. 418 (Pa. side Report).

⁴⁸ *Com. v. Waters*, 148 Pa. Super. 473, 25 A. 2d 756 (1942).

⁴⁹ *Com. v. Mayberry*, *supra*, note 13.

It would thus seem that any act prohibited by law will fulfill the requirement, but one writer has expressed the opinion, though no Pennsylvania cases support his view, that the violation of a municipal ordinance will *not* be of sufficient unlawfulness to sustain a conviction.⁶⁰

While little difficulty is encountered in labeling the unlawful act where it is a statutory infringement, as seen in the cases above cited, more trouble arises where the defendant's negligent, reckless conduct is held to constitute an unlawful act. Chief Justice Maxey said in a recent opinion that:

*"It is immaterial whether the unlawful act which is an essential of involuntary manslaughter was unlawful in its inception, as, e.g., discharging a deadly weapon into a crowded street, or become unlawful after it was begun, as, e.g., driving a car in a public street and so accelerating its speed as to make it naturally tend to cause death or great bodily harm to persons in that street."*⁶¹

The Chief Justice's example was well chosen here, for it would seem that this latter type of unlawful act is found most often by our courts in automobile cases.⁶² Actually this class of unlawfulness is manslaughter by misfeasance, and properly falls within section (2) of the *Mayberry* definition, *supra*, *i.e.*, ". . . in negligently doing some act lawful in itself", but since the term "unlawful act" is used indiscriminately and perhaps carelessly in the cases within this category, they must also be noted in our discussion.

Sometimes the unlawful act by misfeasance will be used for conviction where the quantum of proof to find an unlawful act by malfeasance is lacking. In *Commonwealth v. Matteo*,⁶³ where the evidence was contradicted as to whether defendant had driven through a stop sign at 50 mph, the court held that there was at least sufficient proof of his "rash, reckless conduct essential to a conviction for involuntary manslaughter." Similarly, in *Commonwealth v. Samson*, where a tenement collapsed, killing several occupants, defendant-landlord was accused of violating a statute requiring a tenement license, the procuring of which involved an inspection of the premises. The Commonwealth's contention was that if defendant had applied for a license, the necessary inspection would have revealed that his tenement was unfit for occupancy unless certain repairs were made, and that such repairs would have prevented the building's collapse. Here, because of defendant's argument that the commonwealth had failed to establish positively that his statutory violation had caused the deaths, the court held that even if defendant's failure to comply with the statute did not constitute a basis for conviction, the verdict would be sustained because there was sufficient evidence that his negligence in disregarding the safety of his tenants "approximated" an unlawful act.⁶⁴

⁶⁰ *Supra*, note 15, at p. 821.

⁶¹ *Supra*, note 34, (*italics added*).

⁶² For exhaustive general discussion of this topic, see Robinson, "Manslaughter by Motorists", 22 MINN. L. REV. 755 (1938).

⁶³ 130 Pa. Super. 524, 197 A. 787 (1938).

⁶⁴ *Supra*, note 14; *but see* Com. v. Aurick, *supra*, note 29, as to use of word "approximate".

In these cases wherein misfeasance has been termed an unlawful act, the courts have sought through the years to define this degree of negligence which supplies the requisite element of unlawfulness. That such negligence cannot be exactly defined is shown by the changes which have been made in it through the successive decisions. Chief Justice Tilghman said it must be "an act not strictly unlawful in itself, but done in an unlawful manner and without due caution."⁵⁵ In 1927, Judge Linn, speaking for the Superior Court, said that "negligence as an element of involuntary manslaughter . . . denotes the absence of due care in the circumstances"⁵⁶—this would seem to signify the type of ordinary negligence which imposes civil liability for a tort. Then in *Commonwealth v. Gill* and the cases following,⁵⁷ the same court said that the defendant's acts must not only be careless or negligent, but also so rash and reckless as to "approach"⁵⁸ or to "approximate"⁵⁹ an unlawful act. Note that the degree of negligence would seem to have changed, but the ubiquitous synonym, "unlawful act", is still used. In the now well-known *Aurick* case, the Supreme Court found fault with the language of its brethren of the lower bench, and held, in the words of the present Chief Justice, that it is not sufficient if the defendant's commission of a rash, reckless act "approximates" or "comes near" to being unlawful, but that "in order to sustain a charge of involuntary manslaughter, it must amount to unlawfulness of conduct."⁶⁰ The learned Chief Justice then approved a definition which states:

" . . . the negligence must be such a departure from what would be the conduct of an ordinary prudent or careful man under the same circumstances as to evidence a disregard of human life or an indifference to consequences."

It is submitted that this degree of negligence which is said to constitute such an unlawful act as is required for involuntary manslaughter approaches dangerously close to that degree of conduct which is said to impute malice, and therefore, second degree murder, defined in *Commonwealth v. McLaughlin*, as " . . . acts or omissions exhibiting reckless, wicked, and wanton disregard of the safety of others."⁶¹ The dividing line between these two types of conduct is obviously difficult to draw, and as yet, no definitive separation has been attempted by our courts.

⁵⁵ *Supra*, note 7, at p. 427.

⁵⁶ *Com. v. Ochs*, 91 Pa. Super. 528, 532 (1927).

⁵⁷ *Com. v. Gill*, *supra*, note 1; *Com. v. Mayberry*, *supra*, note 13; *Com. v. Matteo*, *supra*, note 53; *Com. v. Smith*, 138 Pa. Super. 448, 11 A. 2d 197 (1940).

⁵⁸ *Com. v. Smith*, *supra*, note 57.

⁵⁹ *Com. v. Gill*, *supra*, note 1.

⁶⁰ *Supra*, note 29, at p. 290; cited and followed: *Com. v. Dellcese*, 155 Pa. Super. 120, 38 A. 2d 494 (1947). *And see*, 46 DICK. L. REV. 59 (1941); 16 TEMP. L. Q. 96 (1941).

⁶¹ *Supra*, note 20; see also the cases wherein the courts have said that when a defendant's unlawful act constitutes rash, reckless conduct, contributory negligence of the victim is NOT a defense, but that it IS admissible as a circumstance in determining whether the defendant was guilty of manslaughter: 149 Pa. Super. 289, 27 A. 2d 742 (1942); 127 Pa. Super. 166, 193 A. 77 (1937); 144 Pa. Super. 249, 19 A. 2d 560 (1941).

Proximate Cause

Whether the unlawfulness of the act is inherent in its very nature and purpose, and is therefore malfeasance, or whether it arises only from the manner of performing the act, thus being misfeasance, the principle seems now to be firmly enconced in our law that the unlawful act must be the natural and probable consequence of the homicide. In the words of an eminent authority:

"That death follows an unlawful act does not necessarily make it manslaughter. *There must be some probable and natural connection between the death and the unlawful act. The death must also be the proximate result of the act and not some intervening cause.*"⁶²

This is one of the few points regarding involuntary manslaughter which may be inferred directly from the words of the statute—" . . . happening *in consequence of an unlawful act.*" In 1938, the Superior Court in *Commonwealth v. Williams* was called upon to decide a case of first impression since no previous Pennsylvania appellate court opinion had discussed the necessity of a causal relation between the unlawful act and the death. The defendant was indicted for involuntary manslaughter by malfeasance on the ground that he had killed a pedestrian while engaged in the unlawful act of driving without a driver's license. At the trial, defendant's negligence was neither alleged nor proved, the Commonwealth relying solely on the fact that the death had been caused by his auto which he was driving in violation of the vehicle code. In reversing the conviction imposed in the lower court, it was held:

"In our opinion, the language of the above cited statutes (vehicle code re driver's license requirement, and the involuntary manslaughter statute) and cases implies more than that the unlawful act should be a remote unit in a sequence of events culminating in a fatality, *and requires such act to be something more than a factor which might be denominated more properly as an attendant condition than a cause of death.* . . . It is obvious that the testimony was insufficient . . . to establish that the death was the natural result or probable consequence of appellant's unlawful act."⁶³

The court then pointed out, in ordering the defendant's acquittal, that the cause of the death was the skid and resulting crash occasioned by the defendant's prudent attempt to avoid an oncoming car, rather than his lack of a driver's license.

Although earlier cases left some doubt as to this proximate cause requirement,⁶⁴ the law on this point has thus been stabilized by the *Williams* case, *supra*, and the principles outlined therein are now accepted by our courts.⁶⁵

⁶² *Supra*, note 31.

⁶³ Rhodes, J., in *Com. v. Williams, supra*, note 14.

⁶⁴ *Esp. Com. v. McCawley*, 46 Pa. C. C. 306 (1918), where defendant was convicted of involuntary manslaughter by malfeasance when he killed another while hunting w/o a license; and see *Com. v. Romig*, 22 Pa. D. & C. 341 (1934), another driver's license case, wherein the court circumvented the proximate cause requirement by holding that the unlawful act was driving the auto, since it is unlawful to drive without a license. Of a similar vein was *Com. v. Tole*, 25 Pa. Dist. 957 (1916). *But see* criticism of these cases in 10 TEMP. L. Q. 67 (1935), the latter being cited in the *Williams* case, *supra*, note 14.

Malum in Se or Malum Prohibitum?

One other element was formerly added to the crime of manslaughter by the common law courts' requirement that the unlawful act be *malum in se*, especially if its causal relation to the death was uncertain. While it is now definite that the unlawful act must always be the proximate cause of the death, as outlined above, some authorities still include this *malum in se* element in their definition,⁶⁶ and some states require it by statute.⁶⁷ While Blackstone differentiated acts *malum in se* from those *mala prohibita* on the basis of moral guilt,⁶⁸ the definition and classification of crimes into these two categories cannot be made so readily today. For this reason, the requirement that the unlawful act be *malum in se* has been criticized⁶⁹ and termed "illogical",⁷⁰ and has been abandoned by some of our courts.⁷¹ In *Commonwealth v. Samson*,⁷² wherein defendant's unlawful acts consisted of failing to get a tenement license and in negligently maintaining a tenement house, *supra*, our Superior Court recognized the distinction made at common law, but held that it was no longer important, especially where the violated statute is intended to prevent injury to the person, and there is a direct causal connection between the unlawful act and the death. In reference to this latter point, Judge Baldridge said:

"There was a sound basis for the common law discrimination between acts *malum in se* and *malum prohibitum*, which does not prevail now, for in Blackstone's time there were approximately one hundred and twenty offenses punishable by death. In modern times, punishment is supposed to 'fit the crime' . . . If an act is dangerous to human life, we can see no reason why the guilt should be based only on moral turpitude arising from a violation of what Blackstone termed a 'superior law'. This is especially true, in view of the great number of deaths and injuries due to a violation of speed, traffic, and other laws designed to protect the public, which constitutes but *malum prohibitum*. . . ."

In two earlier lower court cases,⁷³ the differentiation was likewise considered and held not controlling, emphasis in both cases being placed on causation, the issue being whether the unlawful act was the proximate cause of the death, and *not* whether it was *malum in se* or *malum prohibitum*. Since the *Samson* case, the point has received little, if any, treatment in our manslaughter cases, and the main

⁶⁵ E.g., *Com. v. McConaghy*, 151 Pa. Super. 26, 29 A. 2d 348 (1942), where the court held there was sufficient evidence to sustain the verdict that defendant's unlawful violation of the vehicle code had caused the death, it seemingly being taken for granted that such causal relation was a prerequisite to conviction.

⁶⁶ *Supra*, note 31, §464.

⁶⁷ *State v. Budge*, 126 Me. 223, 227, 137 A. 244, 246 (1925).

⁶⁸ 1 BL. COMM. *57, 58.

⁶⁹ *Supra*, note 15, at p. 830.

⁷⁰ 1 BURDICK, LAW OF CRIME §88, p. 91 (1946).

⁷¹ It is said in 1 WHARTON, CRIMINAL LAW §157 (12th ed.), note 10, "... distinction taken in the old books between *malum in se* and *malum prohibitum*. is now exploded. A man who inflicts injury incidentally to attempting a statutory crime is, on the reasoning of the text, as responsible as is the man who inflicts injury incidentally to a common law crime."

⁷² *Supra*, note 34, at p. 71.

⁷³ *Com. v. Lowans*, 21 Pa. D. & C. 66 (1934); *Com. v. Romig*, *supra*, note 64.

issues have involved the unlawfulness of the act or the causal connection between the act and death. The modern Pennsylvania rule would thus appear to be that it matters not whether the act is *malum in se* or *malum prohibitum*, as long as it is in fact unlawful, as determined by our previously discussed standards, and death results as the natural and probable consequence of this act.

Conclusion

From the foregoing discussion, the following conclusions may be drawn concerning the crime of involuntary manslaughter by malfeasance in Pennsylvania:

1. At common law, the crime of manslaughter was much confused, falling somewhere between murder and excusable and justifiable homicide.

2. Involuntary manslaughter is now a separate misdemeanor by statute in Pennsylvania, the definition of this crime being furnished by our courts.

3. Involuntary manslaughter is distinguished from murder in that it does not involve malice, express or implied, nor intent, either to kill or to commit serious bodily harm. It is readily differentiated from voluntary manslaughter in that there is no provocation, passion, or cooling time, and from justifiable or excusable homicide in that it must happen in consequence of an unlawful, as opposed to a lawful, act.

4. The gist of the crime of involuntary manslaughter is death occurring in consequence of an unlawful act. This unlawfulness may involve either malfeasance, misfeasance, or nonfeasance.

5. The requisite unlawful act by malfeasance has never been clearly defined, but it is generally construed to be the violation of any statute enacted by our legislature. It cannot be an act amounting to a felony nor one which involves death or great bodily harm.

6. The courts often term misfeasance, or negligence, an unlawful act, and define the necessary degree of negligence as that which is rash and reckless, evidencing a disregard for human life and indifference to the consequences. It is more than the slight or ordinary degrees of negligence which will sustain a civil action of trespass for personal injuries.

7. Whatever the nature of the unlawful act, such act must be the proximate cause of the death, and death cannot result from some intervening cause.

8. It is unimportant whether the act is *malum in se* or *malum prohibitum*, as long as it is unlawful according to the previously discussed standards, and there is direct causal connection between it and the resulting death.

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