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Criminal Law—Involuntary Manslaughter—Unlawful Act as Basis for Conviction

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the re-examination of the requisites of due process [as found in *International Shoe Company v. Washington*].'"[19]

Case law in Montana is still at the stage prior to the *International Shoe* case.[20] If the rather orthodox decision in *LeVecke v. Griesedieck Western Brewing Company* is used as persuasive authority in the Montana courts, adoption of the progressive and preferable "minimum contacts" test will be unfortunately postponed.

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CRIMINAL LAW—INVOLUNTARY MANSLAUGHTER—UNLAWFUL ACT AS BASIS FOR CONVICTION.—Appellant, while driving on the wrong side of the highway, collided with an oncoming gasoline truck and caused the death of the driver. She was convicted of involuntary manslaughter based upon both criminal negligence in driving while under the influence of intoxicating liquor and upon the unlawful act of driving to the left of the center line.[1] On appeal to the Montana Supreme Court, *held,* reversed and remanded for a new trial. An instruction authorizing a manslaughter conviction for the unlawful act of driving on the wrong side of the road is erroneous because criminal negligence is an essential element of the crime of involuntary manslaughter. *State v. Strobel,* 304 P.2d 606 (Mont. 1956) (Chief Justice Adair and Justice Bottomley dissenting).

Bracton's thirteenth century writings stated that criminal liability attached for homicide committed by misadventure in the course of an unlawful act.[2] Coke recognized that homicide in the course of an unlawful act was necessarily either voluntary or involuntary, but stated both were punishable alike as murder.[3] Hale subsequently recognized a definite distinction between voluntary and involuntary manslaughter, and in his time

[19]Perkins v. Benguet Consolidated Mining Co., 342 U.S. 437 (1952) ; Traveler's Health Ass'n v. Virginia, 339 U.S. 643 (1950).

[20]Montana case law is also limited to a few decisions on the subject. The theories of "implied consent" and "constructive presence" appear in the companion cases State *ex rel.* Am. Laundry Machinery Co. v. District Court, 98 Mont. 278, 41 P.2d 26 (1934), *cert. denied,* 295 U.S. 744 (1935), and State *ex rel.* Taylor Laundry Co. v. District Court, 102 Mont. 274, 75 P.2d 772 (1936). In the first case summons was quashed where it appeared that the corporation's dealings were limited to several isolated transactions. The corporation also was not shown to have appointed an agent for the purpose of service of process. The second case was tried on findings of new facts that the corporation had actually been engaged in continuous activity. The sale of goods, replacement of worn out parts, and adjustments and repairs to machinery enabled the court to infer that it was "present." By the time of the second suit the corporation had a regular agent upon whom process could be served in accord with R.C.M. 1921, § 9111(2).

The most recent Montana decision is State *ex rel.* Schmidt v. District Court, 111 Mont. 16, 105 P.2d 611 (1940). The corporation involved there had previously complied with the statutory requirement for appointment of an agent upon whom process could be served but failed to appoint a replacement when the original man died. This case adhered to the theory of "implied consent" and certainly did not require a broad rule in view of the corporation's long business contact with the state.

The most recent decision involving a Montana party and a foreign corporation is Clapper Motor Co. v. Robinson Motor Co., 119 F. Supp. 79 (D. Mont. 1954). The court there relied on the older theory of "constructive presence."

[1]REVISED CODES OF MONTANA, 1947, §§ 31-108 (19), 32-1102, and 32-1104, statutes then in force.

[2]BRACTON, DE LEGIBUS, 120b, 136b (1569) (written 1250's).

[3]COKE, 3d INSTITUTE No. 56 (1641).

the punishment for the latter was moderated.[4] Blackstone stated the modern rule that involuntary manslaughter could be predicated on either an unlawful act or on negligence, and the language of the present Montana statute can be traced to his discussion.[5] Revised Codes of Montana, 1947, section 94-2507, defines manslaughter as "the unlawful killing of a human being, without malice. It is of two kinds: . . . 2. Involuntary, in the commission of an unlawful act not amounting to felony; or in the commission of a lawful act which might produce death, in an unlawful manner, or without due caution or circumspection."

A strong majority of the courts hold that a conviction for involuntary manslaughter may be based on either an unlawful act not amounting to felony or on negligence (usually described as gross or criminal negligence).[6] Only a few jurisdictions concur with the rule of the instant case in requiring criminal negligence in every instance.[7] Although the older Montana cases have based an involuntary manslaughter conviction squarely on the ground of negligence,[8] the more recent decisions have typically used an unlawful act and criminal negligence as conjunctive grounds for conviction, without attempting to analyze the statute carefully.[9] There have been two clarifying exceptions: (1) In quoting the statute in one case, the court italicized the "or" following the semicolon between the unlawful act clause and the negligent lawful act clause, indicating recognition of them as independent alternative grounds.[10] (2) In a later case the court held that not every unlawful act could be the basis for an involuntary manslaughter conviction.[11]

In the instant case the Montana Supreme Court concluded the evidence showed the defendant was not intoxicated, but the reversal was based mainly

[4]HALE, PLEAS OF THE CROWN 466, 471 (ed. of 1778).
[5]BLACKSTONE, COMMENTARIES *191, 192.
[6]State of Maryland v. Chapman, 101 F. Supp. 335 (D. Md. 1951); Champion v. State, 35 Ala. App. 7, 44 So. 2d 616 (1949); Wiley v. State, 19 Ariz. 346, 170 Pac. 869, 1918D L.R.A. 373 (1918); Comer v. State, 212 Ark. 66, 204 S.W.2d 875 (1947); People v. Penny, 44 Cal. 2d 861, 285 P.2d 926, 930, 931 (1955); State v. Arnold, 3 Terry 47, 27 A.2d 81 (Del. Ct. Oyer & Ter. 1942); Perry v. State, 78 Ga. App. 273, 50 S.E.2d 709 (1948); State v. Scott, 72 Idaho 202, 239 P.2d 258 (1951); People v. Garman, 411 Ill. 279, 103 N.E.2d 636 (1952); Minardo v. State, 204 Ind. 422, 183 N.E. 548 (1932); State v. Champ, 172 Kan. 737, 242 P.2d 1070 (1952); Commonwealth v. Mullins, 296 Ky. 190, 176 S.W.2d 403 (1943); State v. Hamilton, 149 Me. 218, 100 A.2d 234 (1953); People v. Wardell, 291 Mich. 276, 289 N.W. 328 (1939); People v. Nelson, 309 N.Y. 231, 128 N.E.2d 391 (1955); State v. Bournais, 240 N.C. 311, 82 S.E.2d 115 (1954); Williams v. State, 97 Okla. Crim. 229, 263 P2d 527, 532 (1953); State v. Nodine, 198 Ore. 679, 259 P.2d 1056 (1953); Commonwealth v. Russin, 171 Pa. Super. 268, 90 A.2d 395 (1952); Valentine v. Commonwealth, 187 Va. 946, 48 S.E.2d 264 (1948); State v. Wilson, 301 P.2d 1056 (Wyo. 1956); State v. Boston, 233 Iowa 1249, 11 N.W.2d 407, 410 (1943) (dictum); State v. Sill, 47 Wash. 2d 647, 289 P.2d 720, 723 (1955) (dictum); State v. Bail, 88 S.E.2d 634, 648 (W. Va. Sup. Ct. App. 1955) (dictum). New Jersey and Ohio apparently base involuntary manslaughter convictions solely on unlawful acts. State v. Brown, 22 N.J. 405, 126 A.2d 161, 163 (1956) (dictum); State v. Laswell, 66 N.E.2d 555, 557 (Ohio Ct. App. 1946) (dictum).
[7]State v. Peterson, 116 Utah 362, 210 P.2d 229 (1950). FLA. STAT. § 782.07 (1949) makes negligence the sole basis for involuntary manslaughter. Miller v. State, 75 So. 2d 312 (Fla. 1954). *Cf.* State v. Bolle, 201 S.W.2d 158 (Mo. 1947).
[8]State v. Allison, 122 Mont. 120, 199 P.2d 279 (1948); State v. Kuum, 55 Mont. 436, 178 Pac. 288 (1919); Territory v. Manton, 8 Mont. 95, 19 Pac. 387 (1888).
[9]State v. Messerly, 126 Mont. 62, 244 P.2d 1054 (1952); State v. Souhrada, 122 Mont. 377, 204 P.2d 792 (1949); State v. Darchuck, 117 Mont. 15, 156 P.2d 173 (1945).
[10]State v. Powell, 114 Mont. 571, 138 P.2d 949 (1943) (by implication).
[11]State v. Bosch, 125 Mont. 566, 576, 242 P.2d 477 (1952).

on the erroneous instruction. The court incorrectly stated that the rule requiring criminal negligence in all cases of involuntary manslaughter had been previously declared in Montana. This case originates the rule requiring criminal negligence in every case. The court also cited the recent California case of *People v. Penny*[12] in support of the rule, yet that case specifically recognizes that a manslaughter conviction can be based on an unlawful act aside from negligence. The instant decision defined criminal negligence as an act done with disregard for human life, indifference to consequences, recklessness, or marked disregard for the safety of others.

The Montana Court bases the new rule on the proposition that involuntary manslaughter requires *mens rea,* and that only intent or criminal negigence can satisfy that requirement. It is evident that specific intent cannot be an element of involuntary manslaughter, because it is by definition an unintentional crime. An eminent writer, however, has recognized that *mens rea* is a mental state, the specific elements of which vary with the definitions of the various crimes. He indicates that the *mens rea* may be the intent to do the deed which constitutes the *actus reus* of the crime involved, or some other mental element recognized by law as a substitute for intent in that particular crime.[13] It is submitted that in the case of involuntary manslaughter, criminal negligence is not the only mental element which can be substituted for intent as a form of *mens rea.*

If an involuntary homicide is non-negligent, the only actual intent which can be involved is the intent to commit the unlawful act which resulted in the death. If *mens rea* is to be required at all in such cases, the requirement can be fulfilled in either of two ways: (1) by reasoning that the intent to commit the unlawful act which caused the homicide is transferred to the homicide itself,[14] or (2) by requiring only a general *mens rea,* in which case the generally bad or "man-endangering" state of mind present in the commission of the basic unlawful act is sufficient to make the actor chargeable with all proximate results.[15] One writer argues that either of the above alternatives is at least partially fiction; that no *mens rea* is required under either the felony-murder or the misdemeanor-manslaughter doctrines, because both punish for a wholly unintended and often unforseeable result, solely on the basis of the *actus reus.*[16]

The next question is, What unlawful acts merit punishment as manslaughter if unintended death results? Except during the very early common law period of absolute criminal liability, the involuntary homicide has not usually been criminally punished unless the basic unlawful act was particularly blameworthy.[17] Historically, only acts *malum in se*—wrong in themselves—were so punished. Now the *malum in se-malum prohibitum* distinction has become so amorphous and indistinct as to be useless as a delineator,

[12]44 Cal. 2d 861, 285 P.2d 926, 930, 931 (1955).
[13]Perkins, *A Rationale of Mens Rea*, 52 HARV. L. REV. 905, 908, 909 (1939). See also BURDICK, CRIME § 129e (1946).
[14]King v. State, 89 Ga. App. 626, 80 S.E.2d 493, 495 (1954); 26 AM. JUR., *Homicide* § 188 (1940).
[15]*Cf.* People v. Barrett, 261 Ill. 232, 103 N.E. 969, 971 (1913); State v. Woodward, 84 Iowa 172, 50 N.W. 885 (1891).
[16]Mueller, *Mens Rea and the Law Without It*, 58 W. VA. L. REV. 34, 43 (1955).
[17]*Id.* at 42.

though it is still followed by many courts.[18] Courts which have abandoned the practice of basing involuntary manslaughter convictions on unlawful acts have done so precisely because of the lack of an adequate criterion. But the fundamental reasons for making an unlawful act an alternative basis for conviction—the moral reprehehensibility of certain unlawful acts, and the loss to society caused by deprivation of members as a result of such acts[19] —still exist and are as forceful as ever.

A new test is needed to determine what homicides resulting from unlawful acts should be punished as manslaughter. It is obvious that no panacea can be discovered, but a workable test can be based on a determination of whether the act involves moral turpitude. Most involuntary homicides undoubtedly do involve negligence, and in such cases the rule of the principal case will suffice. But there is a class of cases, involving moral turpitude, in which the death may unintentionally result from a completely reprehensible unlawful act, and yet no negligence be involved.

Suppose, for example, that a nurse becomes a "pusher" of naroctics, and illegally administers morphine to an adult addict. The injection is given with the greatest of skill, but the addict has previously had an overdose and this injection is sufficient to cause death from morphine poisoning. If the nurse has no knowledge of the victim's prior overdose, and the quantity of the drug injected is normal for an addict, no negligence is involved.[20] Yet if she has no prior narcotic convictions, the death is an involuntary homicide, resulting from an unlawful act not amounting to a felony.[21] Under previous Montana decisions the nurse could be found guilty of involuntary manslaughter. Under the rule of the instant case she would go free. In a similar Georgia case a manslaughter conviction was sustained.[22]

The new test for criminal negligence stated in the principal case also presents some difficulty. When criminal negligence is defined in terms of disregard for human life, indifference to consequences, and recklessness, the line between involuntary manslaughter based on criminal negligence, and second degree murder based on implied malice tends to become shadowy and indistinct.[23] Malice may be implied from an act or omission which the actor knows may cause death or gross bodily harm, even if accompanied by a hope against harm.[24]

The rule enunciated in the instant case has two undesirable effects. First, and most important, it emasculates the code definition of involuntary manslaughter so as to preclude basing a conviction on an unlawful act if the homicide is not negligent. This will either prevent manslaughter convictions

[18]CLARK & MARSHALL, CRIMES 13 (5th ed. 1952); Sayre, *Public Welfare Offenses*, 33 COLUM. L. REV. 55, 70, 71 (1953).

[19]Wilner, *Unintentional Homocide in the Commission of an Unlawful Act*, 87 U. PA. L. REV. 811, 815, 816 (1939).

[20]Negligence is the breach of a duty toward another, and "the risk reasonably to be perceived defines the duty to be obeyed. . . ." Cardozo, C.J., in Palsgraf v. Long Island R.R. Co., 248 N.Y. 339, 162 N.E. 99 (1928).

[21]REVISED CODES OF MONTANA, 1947, §§ 54-102, 54-118, 54-125.

[22]State v. Silver, 13 Ga. App. 722, 79 S.E. 919 (1913).

[23]A very similar test for criminal negligence was stated in the case of People v. Penny, 44 Cal. 2d 861, 285 P.2d 926 (1955), a case relied on in the instant decision. That definition has likewise been criticized as blurring the distinction between involuntary manslaughter and second degree murder. 8 STAN. L. REV. 463 (1956).

[24]People v. Copley, 32 Cal. App. 2d 74, 89 P.2d 160 (1939); STEPHEN, DIGEST OF CRIMINAL LAW 225, 226 (1926).

in some cases which would seem to merit such punishment, or will force the courts to overextend the definition of negligence in order to include such cases within the rule. Second, unless the courts are very careful to define implied malice so as to require wilfulness as distinguished from negligence, and actual knowledge of probable injury as distinguished from constructive knowledge of likely harm, the line between involuntary manslaughter and second degree murder based on implied malice will become confused.

CHARLES W. WILLEY

CRIMINAL PROCEDURE — INDICTMENT AND INFORMATION — SUFFICIENCY OF CHARGING OFFENSE IN THE LANGUAGE OF THE STATUTE.—The defendant, a county surveyor, made a claim to and received from Missoula county $600 for work on the county airport. The claim was made in the name of a fictitious company and the defendant signed a name other than his own, as secretary of such company. He was convicted of obtaining money by false pretenses. On appeal to the Supreme Court of Montana, *held,* reversed. An information alleging presentation of a "false and fraudulent claim," without specifying facts showing some material representation is insufficient. *State v. Hale,* 291 P.2d 229 (Mont. 1955) (Justice Angstman specially concurring; Chief Justice Adair and Justice Bottomly dissenting separately).

During the early years of the common law crimes were punishable with the greatest severity, because a private party was the prosecutor and the moving influence was revenge. Gradually the public reaction against the increasing number of executions for relatively petty offenses influenced the courts to construe criminal indictments and informations more strictly.[1] Thereafter it became necessary to state the offense charged with great particularity. Technicalities were of the utmost importance and as a result the criminal was often released.[2]

When the harshness of criminal penalties was ameliorated, the reason for the highly technical rulings on criminal pleading was gone and consequently the legislatures substituted new systems of pleading and practice which contained the necessary elements of the common law system but did away with the superfluous technicalities.[3]

By the Constitutions of the United States[4] and Montana[5] the accused is entitled to be apprised of the nature and the cause of the accusation against him. This is accomplished by the use of an indictment or information which must, under both common and statutory law, serve three general purposes: (1) inform the accused of the charge against him in order to enable him to prepare for his trial, (2) protect the accused from double jeopardy, and (3) enable the court to rule on evidence and upon conviction to pronounce just sentence.[6] An information that does not embody these requirements is insufficient and a conviction is subject to reversal.[7]

[1]PUTTKAMMER, ADMINISTRATION OF CRIMINAL LAW 125-130 (1953).
[2]See State v. Gondeiro, 82 Mont. 530, 268 Pac. 507 (1928).
[3]ORFIELD, CRIMINAL PROCEDURE 200 (1947).
[4]U.S. CONST. amend. VI.
[5]MONT. CONST. art. III, § 16.
[6]State v. Cox, 244 N.C. 57, 92 S.E.2d 413 (1956).
[7]*Id.* at 60, 92 S.E.2d at 416.