Volume 25 | Issue 4 Article 5

June 1918

The Effect of Medical Treatment as an Intervening Cause in Homicide

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tempting to practice and after he becomes a resident, he must submit to an examination and obtain a license. Residence in the state is made prerequisite, but no period thereof is prescribed or indicated. Requirement of a license before attempting to practice indicates purpose to allow the examination at any time after the change of residence."

THE EFFECT OF MEDICAL TREATMENT AS AN INTERVENING CAUSE IN HOMICIDE.—In a recent case[1] decided by the West Virginia Supreme Court of Appeals, some old and familiar principles of criminal law are applied to a novel combination of circumstances. After the subject of the homicide was shot, but while his symptoms were still normal, an exploratory operation was performed to determine whether the abdominal cavity had been penetrated. It was found that the abdomen had not been penetrated, but that the appendix was diseased. The operating physician, *sua sponte*, removed the appendix. The next day, alarming symptoms developed and death suddenly ensued. The trial court submitted to the jury the question whether removal of the appendix was the sole, or only a contributing, cause of death; holding, by way of refusal of defendant's instructions, that, in order to constitute a defense, removal of the appendix must have been found to have been the *sole cause* of death.

Whether the effect of medical or surgical treatment, as an intervening cause, will prevent an original act from being murder or manslaughter depends upon its relation to the original act. For purposes of discussion, the relationship between the original and the intervening act may be analyzed as follows: (1) they may be contributing causes; (2) the intervening act may be the sole cause necessarily consequent upon the original act and proximately connected with it; or (3) the intervening act may be the sole cause only casually connected with the original act and fortuitously consequent upon it.

Although the wound be not mortal when inflicted, if it afterward become so and result in death by reason of negligent or improper treatment, the original act constitutes murder or manslaughter.[2] However, it is not essential that the improper treat-

[1]State *v.* Snider, 94 S. E. 981 (W. Va. 1918).

[2]1 HALE, P. C. 428; State *v.* Bantley, 44 Conn. 537, 26 Am. Rep. 486 (1877); Crum *v.* State, 64 Miss., 1, 1 So. 1, 60 Am. Rep. 44 (1886); Clark *v.* Com., 90 Va. 360, 18 S. E. 440 (1893); State *v.* Scott, 12 La. Ann. 274 (1857); State *v.* Baker,

ment operate solely by causing mortality in the wound.[3] It is sufficient if the wound, although at no time mortal by itself,[4] contribute to the death along with the improper treatment.[5] In such cases, since the criminal liability is based upon the present contributing effect of the original act, it is immaterial whether the orignal wound be mortal.[6] If death result solely from necessary and proper medical treatment, liability of the accused may be predicated upon two different theories which, in the final analysis, are essentially the same: (1) the original wound may be considered the *antecedent*, as distinguished from a *contemporaneous*, contributing cause; or (2) it may be looked upon merely as a *causa causans*, necessarily imposing the medical treatment. In either view, the medical treatment is the natural, necessary and proximate consequence of the wound.[7] Hence the original wound may bear two different relations to the intervening medical treatment sufficient to resolve the original act into criminal homicide: (1) the relationship of joint contributory causes and (2) the relationship of one act being proximately consequent upon the other.

Greater difficulty arises where death results *solely* from *unnecessary* or *improper* medical treatment. The authorities seem to be uniform to the effect that, if the original wound was not mortal at any time, and death resulted wholly from the improper treatment, there can be no conviction of homicide upon the original act.[8]

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1 Jones 267 (N. C. 1854); 3 GREENLEAF, EV. § 139; 1 MICHIE, HOMICIDE § 5 (6), pp. 14 *et seq.*

[3]See citations in note 5, *infra.*

[4]Quinn *v.* State, 64 So. (Miss. 1914) 738.

[5]State *v.* Morphy, 33 Iowa 270, 11 Am. Rep. 122 (1871); Kee *v.* State, 28 Ark. 155 (1873); Com. *v.* Hackett, 2 Allen 136 (Mass. 1861); People *v.* Lewis, 124 Cal. 551, 57 Pac. 470, 45 L. R. A. 783 (1899); People *v.* Cook, 39 Mich. 236, 33 Am. Rep. 380 (1878); People *v.* Kane, 213 N. Y. 260, 107 N. E. 655 (1915); 1 MICHIE, HOMICIDE § 5 (6), pp. 14 *et seq.*

[6]Downing *v.* State, 114 Ga. 30, 39 S. E. 927 (1901); Hamblin *v.* State, 115 N. W. 850 (Neb. 1908).

[7]Com. *v.* McPike, 3 Cush. 181, 50 Am. Dec. 727 (Mass. 1849). The necessity and propriety of the treatment is determined by the *apparent* condition of the wound. *Ibid.* Also, see Clark *v.* Com., 90 Va. 360, 18 S. E. 440 (1893); Coffman *v.* Com., 10 Bush. 495 (Ky. 1874); Com. *v.* Eisenhower, 181 Pa. 476, 37 Atl. 521, 59 Am. St. Rep. 670 (1897); Odeneal *v.* State, 157 S. W. 419 (Tenn. 1913). The idea of causal connection has been judicially expressed by the West Virginia Supreme Court of Appeals as follows: "The rule violated is the same where the negligence of a responsible agent intervenes to cause the death, as in the case of surgeons, but not if death results from proper surgical or medical aid, for death resulting from that cause is one of the consequences of the previous unlawful act, and does not excuse the one responsible therefor." State *v.* Angelina, 73 W. Va. 146, 80 S. E. 141, 51 L. R. A. (N. S.) 877 (1913).

[8]State *v.* Morphy, 33 Iowa 270, 11 Am. Rep. 122 (1871); Com. *v.* Hackett, 2 Allen 136 (Mass. 1861); People *v.* Cook, 39 Mich. 236, 33 Am. Rep. 380 (1878);

And, on principle, it would seem that, although the original wound were mortal, if improper medical treatment intervened as a sole, not a contributing, cause of death, it would preclude homicide based on the original act; granting that in most cases it would be difficult *to prove* that such a wound did not actually contribute in some degree to the death.[9] In such a case, obviously, the wound has no contemporaneous contributory effect. Although improper medical treatment is a foreseeable result of the wound, it would be rather a harsh stigma upon the medical profession to say that it is the usual or proximate consequence of the wound. Hence, it may be said that, while the improper treatment resulted from the original act of the accused, still it is only a casual, not a proximate, result; that the original act gave an *opportunity* for the improper treatment, but that the improper treatment was not a necessary or *proximate consequence* thereof; that only proper treatment would be the proximate result of the injury. While no cases have been found broadly asserting such a theory, still a strong tinge of the doctrine may be observed permeating many of the authorities.[10]

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2 BISHOP, NEW CR. LAW § 639; 1 MICHIE, HOMICIDE § 5 (7) p. 16. In State *v.* Gabriella, 144 N. W. 9 (Iowa 1913), it is said that an improper operation will not excuse, but the facts of the case show that the wound was a contributing cause, and hence the operation was not the sole cause.

[9]Coffman *v.* Com., 10 Bush. 495 (Ky. 1874). "If the wound be not mortal, but with ill application by the party, or those about him, of unwholesome salves or medicines, the party dies, if it clearly appears that the medicines, and not the wound, was the cause of the death, it seems it is not homicide, but then it must clearly and certainly appear to be so." HALE, P. C. 428. This passage from Hale is quoted in many of the cases. It seems to have established the impression that, if the wound is mortal, the improper treatment will not prevent the infliction of the wound from being homicide. The positive language of Hale expresses only the effect of a wound not mortal. He likely had in mind precedents applying only to such wounds. If he had intended to apply a converse rule to mortal wounds, and had authority to support such a proposition, it does not seem likely that he would have left the assertion to mere implication. To undertake to sustain such a rule on the familiar principle of constructive intent—that one will be taken to intend the natural and probable consequences of his act—and so avoid the effect of the intervening act as a sole cause, would be to beg the question. In other words, the homicide must be established before such intent will be implied. In fact, the full intent may be conceded, but it has not been executed. The cases are uniform in holding that an independent intervening act of another as a sole cause will prevent the original act, although the wound be mortal from constituting homicide. There would seem to be nothing to differentiate improper medical treatment from any other intervening cause. See CLARK and MARSHALL, THE LAW OF CRIMES 324, and 1 MICHIE, HOMICIDE § 5 (7), p. 16, where no distinction, in stating the rule, is made between wounds mortal and wounds not mortal. It has been said that, if the wound is not mortal, there *must* be an intervening cause. 2 BISHOP, NEW CR. LAW § 639. But it does not follow that, if the wound is mortal, there cannot be an intervening cause.

[10]1 WHARTON, CRIMINAL LAW, 11 ed., 245 *et seq.* In general, see the cases cited, *supra*. It would seem that the measure of the physician's or surgeon's negligence

However, the effect of the improper treatment may be interpreted in the light of another mode of reasoning.

It is axiomatic that two homicides cannot be committed upon the same person. If a physician or surgeon causes the death of a person through negligent or improper treatment, he himself is guilty of manslaughter. Therefore the accused could not be guilty of an independent murder or manslaughter upon the same person. To hold the physician or surgeon guilty of manslaughter, and, at the same time, to hold the accused guilty of murder or manslaughter, upon the ground of foreseeability of improper treatment or any other ground, would be to have a homicide within a homicide, which cannot be. On the other hand, they could not be held jointly guilty of one homicide because there is no community of intent or act. The improper treatment is the sole cause emerging from an independent volition.[11] And such a mode of reasoning may be taken as fortifying the proposition that the improper treatment is not the proximate consequence of the original wound.

In the principal case, the incision and examination of the abdomen may have been proper treatment under the circumstances. If so, they were the proximate result of the original wound. If death resulted from the incision and examination, or either of them, or from any detail of treatment necessarily consequent thereupon, the defendant was guilty of criminal homicide. If the incision was wholly and obviously unnecessary and death resulted exclusively therefrom, the defendant was not guilty of homicide, although he may be guilty of an assault with intent to kill. In such event, his act is neither a proximate nor a contributing cause to the death. Whether the incision and examination were proper treatment or not, if the original wound was a contributing cause of death, the defendant is guilty. So far, the principal case presents only features often illustrated in the criminal law. But the removal of the appendix involves an unusual complication. Clearly, such an act, however meritorious on the part of the surgeon, was in no

would be a criterion as to guilt of the accused. A test which has been laid down is that of an ordinarily prudent and skilled surgeon or physician. State *v.* Scott, 12 La. Ann. 274 (1857). A more stringent rule is stated in a recent decision: "The rule on this subject, supported by the weight of authority, is that, to exonerate the accused from the charge of causing death by a dangerous wound unlawfully inflicted, it must appear, not only that the operation was performed in a grossly negligent and unskillful manner, but also that it was the sole cause of death, * * * ". Odeneal *v.* State, 157 S. W. 419 (Tenn .1913). The former rule is in accord with the rule in torts.

[11] 1 WHARTON, CRIMINAL LAW, 11 ed., 245 *et seq.*

sense treatment of the original wound. In relation to the act of the defendant, it is an independent intervening act—as much so as if the deceased had been maliciously wounded by another person than the accused—and is only casually consequent upon either the original wound or the incision. Hence, as the court instructed the jury, if the removal of the appendix was the sole cause of death, the defendant is not guilty. However, where the independent act of another party intervenes, it shifts liability from the original assailant only where it is the sole cause of death. Although removal of the appendix may have been a contributing cause of death, still, if the wound inflicted by the defendant contributed to the death, he is guilty. And it necessarily follows from what has been said that, if either the original wound, or the incision and its proximate consequences (provided the incision was proper treatment of the wound), contributed with the removal of the appendix to produce death, the defendant is guilty of homicide. In other words, the original wound may be a contributing cause, either directly or through its proximate consequences as manifested in the intervening act. Hence, the Court properly refused the defendant's instructions. —L. C.

RIGHTS OF TENANT IN COMMON WHERE OIL IS EXTRACTED UNDER UNAUTHORIZED LEASE FROM CO-TENANT.—In *Paxton* v. *Benedum-Trees Oil Co.*,[1] it is apparently held, where one tenant in common of the oil and gas in place under certain land makes an oil and gas lease without the consent of his co-tenant, and the lessee enters and produces oil under the lease, that, on an accounting against the lessor and lessee the co-tenant can recover as damages only one-eighth of his share of the oil taken from the land. In this case the wronged co-tenant, Kemper by name, apparently was not a party to the suit though the decision purports to adjudicate his rights. It would seem that since the lessee and lessor are liable for waste under the statute, if there was not a wilful violation of Kemper's rights, then he ought to have the right to elect to take either the value of the oil at the surface of the ground less the reasonable cost of production[2] or his proportionate share of the

[1] 94 S. E. 472 (W. Va. 1917).

[2] Williamson *v.* Jones, 43 W. Va. 562, 27 S. E. 411 (1897); McNeely *v.* South Penn Oil Co., 58 W. Va. 438, 52 S. E. 480 (1905).