

3-1-1964

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Recommended Citation

Criminal Liability Of Participants In Fatal Russian Roulette, 21 Wash. & Lee L. Rev. 121 (1964),
<http://scholarlycommons.law.wlu.edu/wlulr/vol21/iss1/11>

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CRIMINAL LIABILITY OF PARTICIPANTS IN FATAL RUSSIAN ROULETTE

To uphold a conviction of involuntary manslaughter, it is necessary that the defendant's act caused the death.¹ In establishing the necessary causal connection, a problem exists as to the degree of participation that is necessary to warrant a conviction. This problem is further complicated where the deceased's own actions are a contributing cause of death.

The recent case of *Commonwealth v. Atencio*² involved a game of "Russian roulette." The defendants, James Atencio and James Marshall, spent the day with Stewart Britch in his room drinking wine. During the course of the day Marshall brought a revolver into the room and some hours later a game of "Russian roulette" was suggested. In turn, each spun the chamber of the gun, which contained a single bullet, pointed it at his head and pulled the trigger. There were no adverse results until the pistol was passed to Britch who repeated the process. When he pulled the trigger the gun went off and he fell over dead. Both defendants were charged with and convicted of involuntary manslaughter.

The Supreme Judicial Court of Massachusetts affirmed the conviction recognizing that the conduct involved was wanton and reckless so as to be sufficient to sustain a conviction of involuntary manslaughter. The essence of such conduct was said to be "intentional conduct, by way either of commission or omission where there is a duty to act, and which conduct involves a high degree of likelihood that substantial harm will result to another."³ The court rejected the defendant's argument that there were three games of solitaire rather than one game of "Russian roulette," and declined to consider the deceased's taking of the gun as an independent intervening act. The court also distinguished the defendant's analogy of the situation to auto racing cases in which a defendant is usually held not guilty of manslaughter where his competitor is killed as a result of the race.⁴ The court reasoned that drag racing involves a large amount of skill on the part of the participants, whereas "Russian roulette" is based solely on chance.

¹26 Am. Jur. Homicide § 45 (1940).

²189 N.E.2d 223 (Mass. 1963).

³189 N.E.2d at 224; *Commonwealth v. Welansky*, 316 Mass. 383, 55 N.E.2d 902 (1944); *Commonwealth v. Bouvier*, 316 Mass. 489, 55 N.E.2d 913 (1944).

⁴*Thacker v. State*, 103 Ga. App. 36, 117 S.E.2d 913 (1961); *Commonwealth v. Root*, 403 Pa. 571, 170 A.2d 310 (1961).

Involuntary manslaughter is the unintentional killing of another occasioned by the doing of an unlawful act, not amounting to a felony, or by a lawful act done in a negligent manner, or by negligently omitting to perform a legal duty.⁵ It is homicide's "catch-all concept."⁶ But, in spite of the broad definition, there are limitations based on causation, since a person is not criminally responsible for a homicide unless his act can be said to be the cause of death.⁷

It is submitted that in the principal case, the court has failed to consider sufficiently the important factor of causation. The mere fact the defendants were acting in a wanton and reckless manner does not by itself establish the needed causation on which to base criminal liability. If the court had given sufficient consideration to this problem, it might very well have found the defendants not guilty.

Professor Beale has discussed the problem of causation as applied to criminal law.⁸ He points to two situations in which the defendant's act may be connected by causation with the harmful result.⁹ First, the defendant may actively have created a force from which the direct result follows.¹⁰ This is the closest possible causal connection, as the active force caused the direct result. Secondly, the defendant may have created a condition upon which the final force directly acted.¹¹ The "defendant's force is really continuing in active operation, by means of the force it stimulated into activity."¹²

To distinguish these situations: in the first, the force created remains active to cause the result directly; in the second, the force cre-

⁵26 Am. Jur. Homicide § 18 (1940); 40 C.J.S. Homicide § 55 (1944). Though most states have their own statutory definitions of involuntary manslaughter, the basic common law definition is still generally applicable.

⁶Perkins, *Criminal Law* 56 (1957).

⁷"For conviction of manslaughter...the state must do more than establish mere coincidence between such an act and the fact of death. It must establish the 'causal connection' between the violation and the loss of life." Perkins, *Criminal Law* 59 (1957). Here, Professor Perkins is speaking of a situation where the homicide resulted from the defendant's commission of a misdemeanor, but the statement is also applicable where the conduct is wanton or reckless. See also, 26 Am. Jur. Homicide § 45 (1940).

⁸Beale, *The Proximate Consequences of an Act*, 33 Harv. L. Rev. 633 (1920).

⁹Id. at 643-58.

¹⁰Id. at 643-44. For example, a defendant would be criminally liable where he assaulted a victim and as a result of the fright the victim died of a heart attack.

¹¹Id. at 646-47. For instance, a man's conduct would be the proximate cause of the resulting harm where he, by threats of violence, causes his wife to run through the house and jump out of a window; or where A, the defendant, employs B to kill C. The wife's panic, causing her to run through the house, and B's act of killing are the actual active forces, intervening after the defendant's acts. But, defendant's behavior is proximate as it caused the intervening force.

¹²Id. at 646.

ated was responsible for a new active force which actually caused the result. Relating the factual situation of the principal case to Beale's two situations concerning causation, it would fall under the second category; the defendants themselves did not directly cause Britch's death, but at most their participation in the game of "roulette" established a condition and force upon which the resulting death may be based.

However, as there are numerous causes for every result, an effort must be made to determine the dominant one, or the cause to which liability may attach.¹³ This requires examining the facts to determine if there has been any intervening or superseding cause¹⁴ that would relieve the defendant of liability. In the principal case, it is believed that the decedent's act was a superseding cause of his death. The following described cases involved situations in which the decedent's own behavior has been a contributing cause of his death. Some courts have found the behavior goes so far as to be a superseding cause; others have not.

In *People v. Freudenberg*,¹⁵ the defendant and his wife had been drinking and quarrelling most of the day. A reconciliation was reached, and in jest the wife stated, "You make me so mad, I could kill you." The defendant said, "I can fix that," and got his pistol. Immediately after he handed the gun to the wife, it discharged and killed her. The court affirmed a conviction of involuntary manslaughter based on the defendant's reckless conduct in allowing his wife, who was intoxicated and knew nothing of guns, to handle the weapon. Furthermore, the appellate court sustained the finding of the jury that the defendant's acts were the cause of death and that the wife's acts did not constitute an intervening cause.¹⁶

¹³Perkins, Criminal Law 608-09 (1957).

¹⁴Professor Perkins speaks of a sole or dominant cause and says, "A 'sole cause' which intervenes between defendant's act and the result in question is spoken of as a 'superseding cause.'" A superseding cause is an act of a third party or other force which by its intervention prevents the actor from being liable for resulting harm, even though his antecedent act is a factor in bringing it about. Perkins, Criminal Law 609 (1957). Perkins describes an intervening cause as "one which comes between an antecedent and a consequence." Perkins, Criminal Law 618 (1957). Further distinctions may be made between dependent and independent intervening causes. However, the courts have been inclined to use these primary terms of intervening and superseding cause interchangeably. Recognizing that there may be many causes leading to one result, the courts look to see if there was a factor, which came between the defendant's act and the resulting death, that was so important that it would relieve the defendant of liability. If so, it is frequently referred to as either an intervening or superseding cause.

¹⁵121 Cal. App. 2d 564, 263 P.2d 875 (Dist. Ct. App. 1953).

¹⁶Id., 263 P.2d at 885-87.

In a recent Massachusetts case, *Persampieri v. Commonwealth*,¹⁷ defendant and deceased were husband and wife. He told her he wanted a divorce, and after some conversation, she threatened suicide. He mocked her and told her where his rifle was. She brought it into the room; he loaded it and continued to taunt her. The gun, solely in the wife's possession, was between her legs with the barrel pointed toward her head. It discharged and killed her. The court held the husband's conduct to be criminally wanton. His wife was mentally disturbed, and instead of trying to bring her to her senses, he showed a complete disregard for her welfare.

Another situation where the courts have declined to find the deceased's conduct to be a sufficient intervening cause involves the so called "alternative-danger-in-an-emergency concept."¹⁸ In *Letner v. Tennessee*,¹⁹ three persons were crossing a river in a small boat. The defendant, hidden on the river bank, fired a gun into the water near the boat in order to frighten the rowers. One of the occupants in attempting to escape, jumped from the boat causing it to capsize. He and another passenger were drowned, and the defendant was convicted of involuntary manslaughter. He appealed claiming that the capsizing of the boat, caused by the decedent himself, amounted to a supervening cause. The court rejected this argument since a supervening cause cannot be one which resulted from the defendant's act. "[I]f defendant's negligence was a cause of death, it is immaterial that the negligence of the deceased himself... also contributed thereto.... Defendant's act or omission need not be the immediate cause of death; he is responsible if the direct cause results naturally from his conduct."²⁰

The foregoing cases, regardless of other points of law involved, are important in pointing to the fact that one may be charged with homicide even where the deceased has directly caused his own death. Liability may be established by the causal connection between the defendant's conduct and the resulting death.

¹⁷343 Mass. 19, 175 N.E.2d 387 (1961).

¹⁸*Morris, The Felon's Responsibility for the Lethal Acts of Others*, 105 U. Pa. L. Rev. 50, 63 (1957). In an old English case, Lord Coleridge stated, "If a man creates in another man's mind an immediate sense of danger which causes such person to try to escape, and in doing so he injures himself, the person who creates such a state of mind is responsible for the injuries which result." *Regina v. Halliday*, 61 L.T.R. (N. S.) 701, 702 (Crown Cas. Res. 1889); quoted in 105 U. Pa. L. Rev. 50 n.64.

¹⁹156 Tenn. 68, 299 S.W. 1049 (1927).

²⁰*Id.* at 1051. See also cases cited in 105 U. Pa. L. Rev. 50, 63 n.63.

The oft-cited Massachusetts case of *Commonwealth v. Campbell*,²¹ on the other hand, shows when the necessary element of causation may be lacking. The defendant was a participant in a riot which began as a demonstration against a compulsory draft law. Several soldiers were killed in trying to quell the uprising, but there was no evidence that the defendant, Campbell, was actually responsible. The prosecutor requested an instruction that if the defendant were merely engaged in the unlawful riotous transaction, he was guilty of at least manslaughter for a resulting homicide.²² The instruction was properly refused and the Supreme Judicial Court of Massachusetts said:

"No person can be held guilty of a homicide unless the act is either actually or constructively his, and it cannot be his act in either sense unless committed by his own hand or by someone acting in concert with him or in furtherance of a common object or purpose."²³

A further illustration of the proper strict application of the doctrine of causation is presented in the recent Pennsylvania case of *Commonwealth v. Root*.²⁴ Here, two persons were racing in automobiles and one was killed as a result of a collision with a third person. The Supreme Court of Pennsylvania reversed the other's conviction of manslaughter, holding that the defendant's participation was not a sufficiently direct cause of death.²⁵ The court did not discuss the problem in the *Root* case in terms of a superseding cause. However, stating that the defendant's conduct was not a sufficiently direct cause of death is merely another way of saying that the deceased's own actions amounted to a superseding cause. The Pennsylvania statement is phrased with reference to the defendant, whereas the language of superseding cause is phrased with reference to the decedent's own acts.

It appeared for a time that Pennsylvania would be extremely liberal in applying principles of causation in order to impose criminal liability. In *Commonwealth v. Almeida*,²⁶ the defendant and a co-felon committed an armed robbery. They shot at policemen who returned their fire. One policeman was shot and killed. The court stated there was sufficient causation to convict the defendant of murder based on the felony-murder rule, whether or not the fatal bullet was

²¹89 Mass. (7 Allen) 451 (1863).

²²Id. at 543. The court states that there is no authority for the position taken by the Commonwealth.

²³Id. at 544.

²⁴403 Pa. 571, 170 A.2d 310 (1961).

²⁵Id., 170 A.2d at 311.

²⁶362 Pa. 596, 68 A.2d 595 (1949).

fired by him or by a policeman. In *Commonwealth v. Thomas*,²⁷ two hold-up men tried to rob a store. The proprietor shot and killed one of the felons and the co-felon was held guilty of murder.

This line of authority came to an end in the Pennsylvania case of *Commonwealth v. Redline*.²⁸ Here, the defendant and another were engaged in a robbery and the co-felon was killed by a policeman. The defendant was found not guilty of murder. The court expressly overruled the *Thomas* case and cast doubt on *Almeida*. The authority of the view expressed in the *Redline* decision has been further strengthened by the *Root* case as the court states that, although the former is a murder case, "[t]he distinction between murder and involuntary manslaughter does not rest upon a differentiation in causation . . . the accused is not guilty unless his conduct was a cause of death sufficiently direct as to meet the requirements of the *criminal*, and not the *tort*, law."²⁹

In considering Beale's theory of causation and these cases, it is possible to see how an argument of sufficient causation might be made in the principal case. Atencio and Marshall actively participated in the game of "roulette." The final force was the deceased's participation in the game, but the defendants helped create the condition which brought this force into existence. It could be said that this was in furtherance of a common design and that the result was the probable consequence of defendants' participation.

However, it seems that in the principal case, it would be preferable to treat the decedent's act as a supervening cause which broke the chain of causation. Although the defendants participated in "Russian roulette" and possibly even instituted the game, the deceased by his own volition took part.³⁰ It is true that one may be held criminally

²⁷382 Pa. 639, 117 A.2d 204 (1955).

²⁸391 Pa. 486, 137 A.2d 472 (1958).

²⁹Note 24 *supra* at 311.

³⁰The decedent's mere contributory negligence does not relieve the defendants of criminal liability. *Indiana v. Plaspohl*, 239 Ind. 324, 157 N.E.2d 579 (1959); *State v. Custer*, 129 Kan. 381, 282 Pac. 1071 (1929); *Johnson v. State*, 66 Ohio St. 59, 63 N.E. 607 (1902); 26 Am. Jur. Homicide § 113 (1940); Perkins, Criminal Law 612-13 (1957).

But, it is recognized that the deceased's conduct may go so far as to constitute a superseding cause and relieve the defendant of liability. *Cain v. State*, 55 Ga. 376, 190 S.E. 371 (1937); *Carbo v. State*, 4 Ga. App. 583, 62 S.E. 140 (1908); *State v. Eldridge*, 197 N.C. 626, 150 S.E. 125 (1929); *Copeland v. State*, 154 Tenn. 7, 285 S.W. 565 (1926).

Professor Perkins, in his text on criminal law, states, "Even though the defendant was criminally negligent in his conduct it is possible for negligence of the deceased or another to intervene between this conduct and the fatal result in

liable when the defendant's participation involves compulsion³¹ on the decedent, even though death is due to the decedent's own immediate act. But, the defendants in no way forced the deceased to take his turn. Common sense dictates that where one assumes to participate in an activity so dangerous to his welfare as a game of "Russian roulette," the participant acts on his own initiative and only he is responsible for the consequences.³² By taking the pistol for such a dangerous purpose, the deceased's act looms so large a factor contributing to his death that the defendants' participation is hardly sufficient to form the basis for criminal liability.

In declining to compare this case to the *Root* decision and another similar holding,³³ the court said "there is a very real distinction between drag racing and 'Russian roulette.' In the former much is left to the skill, or lack of it, of the competitor. In 'Russian roulette' it is a matter of luck . . ."³⁴ Such reasoning is avoiding a very real distinction. When A and B engage in a drag race, and A kills a third party who is not participating in the race, B may be guilty of involuntary manslaughter.³⁵ He has helped create the condition contributing to the death of one who is removed from the cause. But where A, an active participant is killed, B cannot be held liable for his death. Where the deceased's own wilful, deliberate conduct contributes sub-

such a manner as to constitute a superseding cause, completely eliminating the defendant from the field of proximate causation. This is true only in situations in which the second act of negligence looms so large in comparison with the first, that the first is not to be regarded as a substantial factor in the final result." Perkins, Criminal Law 614 (1957).

³²26 Am. Jur. Homicide § 53 (1940).

³³In the *Freudenberg* case, deceased was intoxicated and knew nothing of the proper handling of weapons. In *Persampieri*, deceased was mentally disturbed. So, in both instances, defendants conduct in encouraging rather than preventing the acts of the deceased amounted to reckless disregard for their safety. In the principal case, defendant was not in a superior position so as to be required to exercise an unusual duty of care. In *State v. Benton*, 38 Del. 1, 187 Atl. 609, 615 (1936), the court stated, "In the determination of proximate cause common sense is not to be eliminated." Applying common sense, it is hard to see how one can be held responsible for another's act of pointing a gun to his head and pulling the trigger when no extraordinary duty of care was owed the deceased by the defendant.

³⁴*Thacker v. State*, 103 Ga. App. 36, 117 S.E.2d 913 (1961). Here, defendant and deceased were racing in autos when the latter lost control of his vehicle and was killed. The court said that the defendant could not be guilty of involuntary manslaughter as there was no showing that his acts caused the deceased to lose control of his car, other than the fact they were racing and this was held not to be sufficient causation.

³⁵Note 2 supra at 225.

³⁶*Indiana v. Plaspohl*, 239 Ind. 324, 157 N.E.2d 579 (1959); *Nelson v. Nason*, 343 Mass. 220, 177 N.E.2d 887 (1961); *Brown v. Thayer*, 212 Mass. 392, 99 N.E. 237 (1912).