CRIMINAL LAW

Murder by Negligence

There is no space here to do more than notice the astounding decision of the House of Lords in *D.P.P. v. Smith*[1], which, if it is taken at its face value, is the greatest disaster to befall the criminal law in modern times.

D was driving a car in the back of which he was carrying some sacks of stolen property. V, a policeman, noticed these sacks when the car stopped in obedience to the signal of another policeman on point duty. Desiring to investigate further, V told D to pull in to the kerb. D panicked, and instead of pulling in, accelerated. V clung on to the car but eventually was thrown off, or knocked off by collisions with other cars, and killed.

D was convicted of capital murder.[2] The Court of Criminal Appeal allowed an appeal[3] against conviction and substituted a verdict of manslaughter. The ground of the appeal was that the trial judge misdirected the jury by telling them that if in their opinion a reasonable man in D's position would have "contemplated that grievous bodily harm was likely to result" to V, then that was murder. This was held to be a misdirection because, so far as responsibility for murder was concerned, the question was what D in fact contemplated, and not what a reasonable man in his position would have contemplated.

One might have thought that this conclusion was almost trite at the present day. The whole history of the law of murder shows a progress from the indiscriminate application of arbitrary outer standards to the individual, to a general rule that a man is not to be convicted of murder, as opposed to manslaughter, unless he actually intended at least to inflict grievous bodily harm, or was reckless thereto. This is a progress from injustice and reflects our growing understanding of the workings of the human mind.

These considerations did not prevent Viscount Kilmuir L.C. and Lords Goddard, Tucker, Denning, and Parker, from unanimously reversing the decision of the Court of Criminal Appeal and laying down the barbaric rule that, insanity apart, the test of intention in murder "is what the ordinary responsible man would, in all the circumstances of the case, have contemplated as the natural and probable result" of the accused's actions. In other words, in their Lordships' opinions, murder ought to be a crime of negligence.

1. [1960] 3 W.L.R. 546.
2. Homicide Act, 1957 (Eng.), s. 5 (1) (d): "any murder of a police officer acting in the execution of his duty". A capital murder in England is one for which the death penalty is retained.
3. [1960] 3 W.L.R. 92.

The proposition has only to be stated for its absurdity to leap to the eye. What is the function in future of the crime of manslaughter, if proof of a negligent killing is murder ? Is the new rule for murder to be applied generally to all offences which were previously thought to require intention or recklessness ? If so, intention and recklessness disappear from the criminal law and negligence becomes the sole relevant state of mind or action. One foresees a dismal proliferation of degrees of negligence according to the seriousness of the crime charged, each degree with its own distinguishing and entirely unhelpful adjective attached ("gross", "slight", "excessive", "undue", etc.).

For the common lawyer there is the hope that the courts will show themselves astute to distinguish *D.P.P. v. Smith* out of existence. It is hard to believe that the High Court of Australia for one will docilely accept it. Moreover, it is just possible that a differently constituted Privy Council may contradict *D.P.P. v. Smith,* as happened when the Privy Council in *Perera*[4] contradicted the House of Lords in *Holmes*[5] on provocation. Surely in one way or another a loophole will appear for escape from the strangulating toils of *stare decisis.*

Under the Codes of Queensland and Western Australia the outlook is brighter. No decision of the House of Lords can affect the simple wording of the definition of wilful murder, requiring an intent to kill a human being,[6] and of that form of murder which requires an intent to inflict grievous bodily harm.[7] There is plenty of scope for negligent murder under these codes,[8] but at least there are some areas which may be regarded as tolerably safe from retrogression. But even here a word of caution is necessary.

As an incidental of its general approach in *Smith,* the House of Lords accepted the so-called presumption that a man intends the "natural and probable" consequences of his actions. It is to be hoped that the courts of the code states will not undermine their codes by applying this vague and unsatisfactory concept to the word "intent", and will have regard to the cautionary words of the High Court in *Stapleton:* "The introduction of the maxim or statement that a man is presumed to intend the reasonable consequences of his act is seldom helpful and always dangerous. For it either does no more than state a self-evident proposition of fact,

4. [1953] A.C. 200, 205-206.
5. [1946] A.C. 588, 598.
6. Queensland Code s. 301: "a person who unlawfully kills another, intending to cause his death or that of some other person, is guilty of wilful murder". (W.A. Code s. 278.)
7. Queensland Code s. 302 (1): "a person who unlawfully kills another . . . If the offender intends to do to the person killed or to some other person some grievous bodily harm is guilty of murder". (W.A. Code s. 279 (1).)
8. Queensland Code s. 302; W.A. Code s. 279.

or produces an illegitimate transfer of the burden of proof of a real issue of intent to the person denying the allegation."[9]

Murder by Abortion

It is well known that the harshness of the common law felony-murder rule was mitigated in abortion cases through a merciful piece of judicial legislation whereby death caused by an illegal abortion was held, illogically but understandably, to be manslaughter only.[1] It seems from the decision in *Gould*[2] that no such amelioration is possible under the Queensland Criminal Code.

By s. 302 (2), an unlawful killing is murder if "death is caused by means of an act done in the prosecution of an unlawful purpose, which act is of such a nature as to be likely to endanger human life." It was decided by the High Court in *Hughes*[3] that the requirements of a dangerous act and an unlawful purpose are distinct, so that P cannot rely on the dangerous act as itself supplying also the unlawful purpose. In the usual abortion case, however, this is unlikely to help the accused much, for two reasons.

First, the illegal abortionist who causes death almost invariably does so by means of an act which on any view is likely to be dangerous. In *Gould* the accused had administered a solution concocted by boiling together a mixture of glycerine, the concentrated antiseptic known as "Dettol", and the household detergent known as "Surf". One might have thought that to introduce such a mixture into the uterus of a pregnant woman was beyond argument an act likely to endanger her life, yet one of the medical witnesses was prepared to say only that such a course was not "normal medical procedure" (!) and "would tend to endanger life". Because the trial judge omitted to draw the attention of the jury to this careful distinction between an act likely to endanger life (murder) and an act which would only *tend* to endanger life (manslaughter), the conviction for murder was reduced on appeal to manslaughter. But the illegal abortionist cannot normally count on such a combination of medical caution and judicial oversight.

The second reason why the *Hughes* doctrine will not normally avail the accused in cases of this kind is that in *Gould* the very limited application of the defence of mistake under s. 24 to murder under s. 302 (2) was made clear. By s. 24, a "person who does or omits to do an act under an honest and reasonable, but mistaken,

9. (1952) 86 C.L.R. 358, 365.
1. See the change of emphasis through *Whitmarsh* (1898) 62 J.P. 711; *Bottomley* (1903) 115 L.T.Jo. 88; *Lumley* (1911) 22 Cox. 635; *Brown* [1949] V.L.R. 177. *Cf.* Williams *The Sanctity of Life and the Criminal Law* (London, 1958) pp. 144-147.
2. [1960] Qd.R. 283.
3. (1951) 84 C.L.R. 170.

belief in the existence of any state of things is not criminally responsible for the act or omission to any greater extent than if the real state of things had been such as he believed to exist". The defendants in *Gould* argued that they genuinely and reasonably believed that the concoction they were administering was not dangerous to life. This argument was dismissed as irrelevant on the ground that the mistake alleged was as to the future consequence of a state of affairs, not as to the state of affairs itself, for the accused admitted that they knew perfectly well what they were administering, and even though this might be said to be a mistake as to the present properties of the mixture, it was nevertheless a mistake which could have significance only in relation to a future, not a present, state of affairs.

It is therefore not open to an illegal abortionist charged with murder under s. 302 (2) to put up any defence based on absence of knowledge of the dangerousness of the act. The test of dangerousness is an objective one,[4] as is made entirely clear by the use of the words "*likely* to endanger human life"; the section says nothing about the likelihood being to the knowledge of the accused. Once P has proved that the death followed from an act committed in the prosecution of the unlawful purpose of illegal abortion, conviction for murder is inevitable unless the act intended to abort the deceased woman was, in the opinion of the jury, not likely to be dangerous to life. Opinions may differ as to whether this is a desirable result in the middle of the twentieth century, but it is difficult to fault the reasoning of the Court of Criminal Appeal as a construction of the Code.

Automatism

Foy[1] and *Holmes*[2] are important as being the first reported cases in Australian Code jurisdictions in which the defence has sought a verdict of not guilty in reliance on the new so-called defence of automatism.

In *Foy* D was charged with the wilful murder of his wife, whom he had killed "by striking her about ten times on the head with a hatchet".[3] He had been an epileptic since the age of six, but there was no evidence that at the material time he was acting in a fit. In view of this, there was no basis for putting up a defence of insanity,[4] but counsel for D emphasised the line the defence was

4. [1960] Qd.R. 283,285 (*per* Stanley J.), 292 (*per* Philp J.), and 298 (*per* Townley J.).

1. [1960] Qd.R. 225.

2. [1960] W.A.R. 122.

3. At p. 234 *per* Philp J.

4. Insanity is defined in s. 27 of the Code, *inter alia*, as a "state of mental disease". It was not disputed that an epileptic not in the grip of a seizure was not at the material time suffering from a mental disease. By s. 26 everyone "is presumed to be of sound mind at any time which comes in question, until the contrary is proved".

going to take by expressly asking the trial judge *not* to direct the jury on insanity, a request which was granted. Counsel then requested further that the jury be directed that unless they were satisfied beyond reasonable doubt that D's act did not occur independently of the exercise of his will within the meaning of s. 23 of the Code,[5] they should return a verdict of not guilty.

The point of this second request, which was refused, was as follows. According to D the evidence might be thought to show that D, although not insane or in the grip of an epileptic seizure at the time, yet acted under the influence of a psychological condition which either rendered his act involuntary or prevented him from forming the specific intent necessary for wilful murder and murder.[6] Even if the evidence did not go that far, it might at least raise in the mind of the jury a reasonable doubt whether D acted voluntarily within the meaning of s. 23, or intentionally within the meanings of ss. 301 and 302 (1). If such a doubt were raised, a verdict of not guilty ought to be returned. The trial judge ought therefore to draw the attention of the jury to the proper course to take if they were to interpret the evidence in this fashion, although, of course without giving the impression that they ought so to interpret it.

The trial judge's refusal to make the direction requested was upheld by the Court of Criminal Appeal on the ground that there was no evidence that D had acted independently of the exercise of his will or without intention. This basic premiss being denied, it followed that the whole of D's ingenious argument fell to the ground. However, the court, recognising the importance of the issues raised, made some observations of general interest on the relationship of involuntary action with ss. 23 (volition) and 27 (insanity) of the Code, particularly as to burden of proof.

The advantage to D of putting his defence in the form adopted was that it made the most of the burden of proof which rested on P. If D had attempted to set up a case of insanity, then in addition to surmounting the obstacle that there was really no evidence of any such thing, he would also have been faced with the rule that it is for the defendant to prove insanity on the balance of probability.[7] Thus, any weakness in the evidence would have militated against him. But by disclaiming insanity, D sought not merely to leave

5. By the first paragraph of s. 23, which applies generally, "a person is not criminally responsible for an act or omission which occurs independently of the exercise of his will".
6. By s. 301 wilful murder requires a specific intent to "cause" the death of a human being, and by s. 301 (1) the only form of murder relevant to the present case requires a specific intent to do grievous bodily harm.
7. Sec. 26, quoted in fn. 3 above, does not say who is to prove insanity, but at least it is not inconsistent with the rule applied in Queensland, as at common law, that D must prove the defence on the balance of probability.

the usual burden of proof of guilt beyond reasonable doubt on P, but also to use such evidence as he had of involuntariness to induce in the mind of the jury a reasonable doubt. Any inadequacy in the evidence would have been less conspicuous in this context, for evidence which does not amount to proof on the balance of probability may well be enough to support a reasonable doubt.

The court would have none of this, regarding D's argument as an attempted evasion of the insanity section. It was not possible to make a good case under s. 23 out of a bad case under s. 27. If the defendant relied on evidence which proved insanity or nothing, then he had to prove insanity.

Holmes was a very different case. Because of the weakness of the evidence in D's favour, *Foy* inevitably left unanswered such questions as whether there are any psychological states which may be relevant under s. 23 but not under s. 27, and whether the court is entitled to direct the jury on insanity in the face of opposition by the defence. Although only a charge to a jury, *Holmes* goes some way towards answering these questions for the code states.

D was charged with "wilfully and unlawfully" causing an explosion likely to injure property.[8] The defence was squarely that D's action was not wilful because it was involuntary within the meaning of s. 23, but that D was not insane within s. 27. The trial judge, Jackson S.P.J., left three verdicts to the jury: guilty; not guilty; and not guilty on the ground of unsoundness of mind. He expressly dealt with the point that D did not rely on insanity and stated that, since in his own opinion there was evidence of insanity, it was nevertheless his duty to leave that verdict to the jury.

Dealing with automatism, his Honour took the view that s. 23 excluded responsibility for acts performed under the influence of hypnosis, or by sleepwalkers, or by epileptics during fits, and the like, and that the burden of proving that D was not in a state of automatism rested on P. However, he then reviewed the evidence in such a way as to make it clear that in his opinion a verdict on the guilty on the ground of unsoundness of mind would be proper, and this verdict was returned.

As compared with *Foy*, *Holmes* makes some important points: First, such states as hypnosis, sleepwalking, epilepsy, and post-traumatic automatism may be within s. 23 but not within s. 27, although in *Foy* the court regarded epilepsy as temporary insanity. Second, Jackson S.P.J. put the burden of disproving automatism on P, whereas the Queensland Court of Criminal Appeal seemed to say that the burden of proof of automatism ought to be assimilated

8. W.A. Code s. 454. There is no section exactly equivalent in the Queensland Code, but many sections employ the formula "wilfully and unlawfully", eg., ss. 461, 462 (2), 463, 465 (1) and (2), 468, 469.

to that of insanity. Third, *Holmes* lays down and *Foy* does not disagree, that it is for the court, not counsel, to say whether there is evidence of insanity.

The present position may be summarized by saying that in Queensland the tendency seems to be to cope with automatism by taking a broad view of the insanity rules, whereas in Western Australia automatism is seen as a category of involuntary action distinct from insanity.[9]

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LAND LAW

Restraints on Alienation.

In *Hall v. Busst* (34 A.L.J. 332) the High Court made a decision on the law concerning restraints on alienation that could be the beginning of a general restatement of the law on this subject. Hitherto the voidness of such restraints has been based on the concept of repugnancy to the grant; and there has been doubt and difference of opinion as to whether the repugnancy rule is an expression of a general principle of public policy in favour of free alienation. The High Court decision was based on this principle; and the result may be that the narrower repugnancy rule is thereby superseded.

Briefly the facts of the case were as follows. In 1949 the proprietor of an island off the coast of North Queensland sold the land together with fixed improvements and certain chattels on it for £3,157 4s. On the same day the vendor and the purchaser entered into an indenture by which the purchaser unterdook not to assign the land without the consent in writing of the purchaser and which also provided, in case the purchaser should desire to sell for a first option of purchase by the vendor at the original sale price plus the value of additions and improvements and minus the value of deficiencies of chattels and a reasonable sum to cover depreciation. In 1957 the original purchaser resold the property to other persons for £8,500, without obtaining the consent of the original vendor, who thereupon sued the original purchaser for damages for breach of contract.

The imperfect drafting of the indenture made it difficult to determine whether the prohibition of alienation without consent was absolute, or whether it ceased to operate if the original vendor

9. Since this note was written the report of the decision by the Full Court of Queensland in *Cooper v. McKenna* [1960] Qd.R. 406 has come to hand. A majority of the Court decided (1) that the effects of concussion from a blow on the head did not necessarily amount to insanity and (2) that no burden of proof falls on D in automatism. This decision may show that the approach which will be taken to insanity in relation to automatism in Queensland will not, after all, be significantly wider than elsewhere.