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Criminal Law - Homicide - Felony Murder - Causation - Degree of Proof

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CRIMINAL LAW—HOMICIDE—FELONY MURDER—CAUSATION—DEGREE OF PROOF—The Supreme Court of Pennsylvania has held that the medical causation needed in a homicide case must be established “beyond a reasonable doubt,” as opposed to “reasonable degree of medical certainty.”

Commonwealth v. Embry, 441 Pa. 183, 272 A.2d 178 (1971).

On the morning of December 20, 1967, around 10:45 A.M., Hattie Littlestone, seventy-one years of age, was set upon and robbed of her purse by the three defendants. In the ensuing struggle to prevent the purse-snatching, she fell to the ground and the defendants fled. Miss Littlestone was pronounced dead on arrival at the hospital.¹ The chief forensic pathologist for the Coroner's Office of Allegheny County, Cyril H. Wecht, M.D., who performed the autopsy, testified for the prosecution that the sole cause of death was a myocardial infarction, commonly termed a “heart attack.” Despite the existence of a past history of cardiac-related problems,² Dr. Wecht further opined, “with a reasonable degree of medical certainty,” that the myocardial infarction was caused by physical and emotional stress occasioned by the purse snatching and ensuing struggle. No other evidence was presented by the Commonwealth to “directly” link the purse snatching with Miss Littlestone's death. Dr. Wecht expressly admitted that, while he was positively certain that death occurred due to the infarction, he was not convinced beyond a reasonable doubt that the struggle produced the stress which, in turn, could have caused the myocardial infarction. Instead, he was only able to reconstruct the chain of “causation” with a “reasonable degree of medical certainty.”

The court charged the jury that they must make their findings from the facts and circumstances in the case and from the reasonable inferences which may be drawn from them. The opinion of a physician adds no fact or circumstance. The jury is never bound by the opinion of the coroner's physician. If his opinion is that the actions of the defendants caused the death of the victim, his degree of certainty is never controlling. If he should say he is positive as to the cause of death, the jury is not bound to find the cause of death to be as the

1. *Commonwealth v. Embry*, 441 Pa. 183, 272 A.2d 178 (1971).

2. Dr. Wecht testified that the autopsy also revealed the victim had “evidence of long-standing disease of the coronary arteries and evidence of old scarring in the heart from previous heart attacks, previous myocardial infarctions.”

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physician opines. If the coroner's physician states that in his opinion the actions of a defendant or defendants caused the death of a victim and that he gives this opinion with a "reasonable degree of medical certainty," he has given an opinion which the jury may consider. The physician's opinion is a guide to the jury which it may follow or not as it determines.³ The mere fact that the physician may say on cross examination that he has a reasonable doubt in his mind affects the weight of the opinion but does not destroy the physician's testimony. The test of sufficiency of the evidence is the same whether guilt is based upon direct or circumstantial evidence. The test is "whether accepting as true all the evidence upon which, if believed, the jury could properly have based its verdict, it is sufficient in law to prove beyond a reasonable doubt that the defendant is guilty of the crime charged."⁴ The appellants were found guilty of murder in the first degree by way of the felony-murder rule⁵ by verdict of the jury with punishment fixed at life imprisonment.

On appeal the conviction was reversed. Although a variety of contentions were raised, because of the court's disposition of the appeal they confined their discussion to one point—whether sufficient evidence was introduced to prove beyond a reasonable doubt that Hattie Littlestone's death was caused by a criminal agency.

Although it is hornbook law that a jury is never bound by an expert witness, when only one witness is presented by the Commonwealth to establish causation and that witness cannot do so beyond a reasonable doubt, a necessary element of the proof of that crime is missing. Hence the corpus delicti was not proven.

In *Commonwealth v. Radford*,⁶ the case that was primarily relied upon to support the decision in the present case, the court clearly indicated that the "[c]ommonwealth is charged with the responsibility of proving every essential element of a crime beyond a reasonable

3. *Commonwealth v. Heckathorn*, 429 Pa. 534, 537, 241 A.2d 97, 99 (1968). "For over 100 years it has been a well-established rule in this Commonwealth that the jury has the right and power to decide the guilt or innocence of an accused and what crime or crimes, if any, he has been guilty of." A similar view was held in all of the following cases: *Commonwealth v. Schmidt*, 423 Pa. 432, 224 A.2d 625 (1966); *Commonwealth v. Meas*, 415 Pa. 41, 202 A.2d 74 (1964); *Commonwealth v. Frazier*, 411 Pa. 195, 191 A.2d 369 (1963); *Commonwealth v. Steele*, 362 Pa. 427, 66 A.2d 825 (1949).

4. *Commonwealth v. Kravitz*, 400 Pa. 198, 201, 161 A.2d 861, 862 (1960); *Commonwealth v. Commander*, 436 Pa. 532, 538, 260 A.2d 773, 776 (1970).

5. In Pennsylvania, the felony-murder rule punishes as first degree all murders which shall be committed in the perpetration of, or in attempting to perpetrate, any arson, rape, robbery, burglary, or kidnapping. Act of June 24, 1939, P.L. 872, § 701, *PURDON'S PA. STAT. ANN.* tit. 18, § 4701 (1963).

6. 428 Pa. 279, 236 A.2d 802 (1968).

doubt.”⁷ In that case the crux of the problem presented on appeal was whether the beating administered by the defendants was the “legal cause” of the thrombosis which set off a chain reaction eventually resulting in death. After careful study and evaluation of the notes of testimony, the court was drawn to the conclusion that, at best, the expert’s medical testimony indicated that the defendant’s assault on the deceased probably caused the death. This was insufficient to present a prima facie case. However, the question of whether the causation could be proved beyond a reasonable doubt was never asked, since it was held that such a question would invade the province of the jury. *Commonwealth v. Embry*⁸ has now established that it is a proper question and that causation beyond a reasonable doubt is necessary to establish a prima facie case.

The significance of this decision lies in the language “beyond a reasonable doubt,” a medical standard for causation. This standard expressly overrules a long line of prior cases⁹ which relied on the rule that the corpus delicti is proven if the facts are consistent with death by criminal means, even though the possibility of accident or suicide cannot be eliminated. Hence, we see from this last phrase that causation had to be simply probable—a test used today in civil cases.

The only difficulty encountered in making the last statement, which expressly overrules a long line of prior Pennsylvania cases,¹⁰ lies in the somewhat unusual factual situation presented in *Commonwealth v. Embry*.¹¹ “Since physical and emotional stress cannot be demonstrated at an autopsy it can only be assumed with a reasonable degree of logic and medical certainty based upon experience and training as a physician,”¹² which we are told by the supreme court is not enough to prove the corpus delicti. However, that difficulty can be overcome by taking into account the testimony given by Bertha McKissock, a regi-

7. *Commonwealth v. Wucherer*, 351 Pa. 305, 311, 41 A.2d 574, 577 (1945). “Causation being an essential element to the crime of murder, the failure of the Commonwealth to prove more than probable causation justified the lower court’s grant of defendant’s motion in arrest of judgement.” *Tiffany v. Commonwealth*, 121 Pa. 165, 180, 15 A. 462, 464 (1888); *Commonwealth v. Flax*, 331 Pa. 14, 154, 200 A. 632, 637 (1938).

8. *Commonwealth v. Embry*, 441 Pa. 183, 272 A.2d 178 (1971).

9. *Commonwealth ex rel. Peters v. Maroney*, 415 Pa. 553, 204 A.2d 459 (1964); *Commonwealth v. Williams*, 304 Pa. 299, 156 A. 86 (1931); *Commonwealth v. Checks*, 423 Pa. 67, 223 A.2d 291 (1966); *Commonwealth v. Chester*, 410 Pa. 45, 188 A.2d 323 (1963); *Commonwealth v. Turza*, 340 Pa. 128, 16 A.2d 401 (1940); *Commonwealth v. Scovern*, 292 Pa. 26, 33, 140 A. 611, 614 (1928); *Commonwealth v. Eisenhower*, 181 Pa. 470, 37 A. 521 (1897).

10. *Id.*

11. *Commonwealth v. Embry*, 441 Pa. 183, 272 A.2d 178 (1971).

12. *Id.*

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stered nurse,¹³ "upon hearing someone calling or moaning I turned and went back to where Hattie Littlestone was lying on the sidewalk with a food cart lying across her" She heard Hattie say, "they took my purse." She noticed that Hattie had a thick tongue; she found Hattie had no pulse and saw her "die right there." It is submitted that one can reasonably assume that, if this medical testimony is not enough to sustain the burden of proof beyond a reasonable doubt, it never will be sustained in any type of case were a person dies from something other than an injury which is visible to the naked eye. In addition, if we compare the testimony in *Commonwealth ex rel. Peters v. Maroney*¹⁴ to the testimony in the present case, it will become more obvious that this case is not limited to its facts and has the potential to greatly change the law. In *Commonwealth v. Maroney*,¹⁵ where the defendant was convicted of murder, Dr. Theodore R. Helmbold, a qualified pathologist, testified that in his opinion there was a causal relationship between the injury and the pneumonia which resulted in death. Confinement to bed that results from a fall could easily be complicated by acute bronchial pneumonia. Of course, the confinement to bed itself is not the only cause of this illness. An individual who has suffered a traumatic experience has sustained a certain amount of shock, which might also contribute to this condition. Comparing this testimony to *Commonwealth v. Embry*,¹⁶ where Dr. Wecht testified that the physical and emotional trauma sustained by Hattie Littlestone as a result of the incidents was in his opinion, on the basis of reasonable medical certainty, the cause of death, one finds completely contrary result with almost identical testimony. This certainty supports the supposition that this case does expressly overrule prior cases stating that direct causation is properly a jury question in Pennsylvania.¹⁷ What makes this decision carry more weight is the fact that it was a unanimous decision.

Although this case has potentially far reaching effects, its decision should not come as a complete surprise in that the whole felony-murder doctrine is somewhat in disfavor at the present time,¹⁸ as evidenced by

13. *Id.*

14. 415 Pa. 553, 204 A.2d 459 (1964).

15. *Id.*

16. *Commonwealth v. Embry*, 441 Pa. 183, 272 A.2d 178 (1971).

17. *Commonwealth v. Smoker*, 204 Pa. Super. 265, 203 A.2d 358 (1964); *Commonwealth v. Harttle*, 200 Pa. Super. 318, 188 A.2d 795 (1963); *Commonwealth v. Williams*, 304 Pa. 299, 156 A. 86 (1931).

18. R. PERKINS, PERKINS ON CRIMINAL LAW 721 (2d ed. 1969).

the recent decision in *Commonwealth ex rel. Smith v. Myers*,¹⁹ which expressly overruled *Commonwealth v. Almeida*.²⁰ While precedent is to be found for application of the tort-law concept of "proximate cause" in fixing responsibility for criminal homicide, the want of any rational basis for its use in determining criminal liability can no longer be properly disregarded.²¹ Although the main issue was proximate as opposed to direct causation in criminal cases, it shows us how courts are discarding tort concepts, which had been applied in the criminal areas, for lack of sufficient basis to justify the results they then felt necessary. This is exactly what has happened in *Commonwealth v. Embry*.²² There, the court's realization that the test, "reasonable degree of medical certainty," is not consistent with the corpus delicti of crime; it is simply a different way of compelling a "high degree of probability," which is not probability "beyond a reasonable doubt" and, therefore, should logically be discarded as the test of causation needed in a criminal case.

The above indicates a new medical standard for causation and would seem to be a highly significant change in the law. However, its effect may be shackled by raising a problem of semantics. It is submitted that in Dr. Wecht's testimony his inability to state the relationship between the robbery and the death "beyond a reasonable doubt" rather than with "reasonable medical certainty" was in terms of medical exactitude and not in terms of legal causation. It is hornbook law that the empirical exactitude of science cannot be taken as the yardstick of legal decision making. Medical causation and legal causation are qualitatively different in their application. The scientist must strive to be more than "reasonable" in his judgment if his work is to have scientific validity; the jurist must be content to make rational judgments which more often than not serve the cause of justice. The potential impact of this case on the law in Pennsylvania is uncertain until the courts determine whether any steps will be taken to abridge, abolish, or alter the semantic problems which we are confronted with in comparing legal and medical causation. It can only be hoped that the wisdom of *Commonwealth v. Embry*²³ will be followed, instead of the inequities involved both in the use of the term "highly probable"

19. 438 Pa. 218, 261 A.2d 550 (1970); see 9 Duq. L. Rev. 122 (1970).

20. 362 Pa. 596, 68 A.2d 595 (1949).

21. 71 Dick. L. Rev. 523 (1966).

22. *Commonwealth v. Embry*, 441 Pa. 183, 272 A.2d 178 (1971).

23. *Id.*

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in criminal cases and the submission of this nebulous concept to the jury.²⁴

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INSURANCE CONTRACT—BURGLARY—The Supreme Court of Pennsylvania has upheld recovery on a Homeowner's Policy to indemnify the perpetrator of a crime for damages not intentionally caused in the course of a burglary.

Eisenman v. Hornberger, 438 Pa. 46, 264 A.2d 673 (1970).

On the night of February 4, 1960, Alton Raymond Hornberger, seventeen, and other youths, broke into the Eisenman house and stole a quantity of liquor. To avoid possible detection, the boys lit matches instead of turning on the lights. As the matches burned down, they were dropped or thrown on the floor. Though there was no sign of fire when the boys left, apparently one of the matches became lodged in a stuffed chair. A fire resulted which enveloped the house, destroying all the personal property. Eisenman initiated an action for damages against Hornberger and was awarded a verdict. A writ of execution against Hornberger was returned *nulla bona*, defendant without sufficient funds.

When Hornberger committed the burglary, he was included under his father's Homeowner's Policy issued by the Royal Insurance Co., Ltd. Under the terms of the policy, Royal agreed "to pay on behalf of the insured all sums which insured shall become legally obligated to pay as damages because of . . . property damages . . ." Property damage is defined in the policy as "injury to or destruction of property," and is in no way limited to property of the insured.² An exclusionary clause released the insurer from liability for any property damage caused "intentionally by or at the direction of the insured."³

24. Subsequent to *Embry* the United States Supreme Court and the Pennsylvania Supreme Court have pointedly referred to the possibility that due process might require that a criminal presumption be factually accurate beyond a reasonable doubt. *Leary v. United States*, 395 U.S. 6 (1970); *Turner v. United States*, 396 U.S. 398 (1970); *Commonwealth v. Owens*, — Pa. —, 271 A.2d 230 (1970).

1. *Eisenman v. Hornberger*, 438 Pa. 46, 48, 264 A.2d 673, 674 (1970).

2. *Id.*

3. *Id.* at 49, 264 A.2d at 674.