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Criminal Law—Murder—Negligent Medical Treatment Intervening Between Defendant's Act and Decedent's Death

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in inconsistency. It makes no great difference to the attorney whether the Washington court chooses to solidify its position in denying restitution on the *Schweiter* facts by declaring such agreements merely unenforceable, or continues to treat them as void. The court's decision will apparently be to deny restitution in keeping with Washington case law.[32] Non-compliance with the Statute of Frauds will prevent only the direct enforcement of the contract. Legal relations will continue to be indirectly enforced, with the unenforceable contract serving as a valid defense to the defaulting purchaser's action for restitution.

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CRIMINAL LAW

Murder — Negligent Medical Treatment Intervening Between Defendant's Act and Decedent's Death. In reviewing a murder conviction, the Washington court recently was confronted with the problem of negligent medical treatment intervening between the defendant's act and the ensuing death. In affirming, the court apparently took the extreme position that proximate causation is solely a jury question, the inquiry on appeal being limited to a cause-in-fact analysis.

In *State v. Little*[1], the defendant Little and the decedent, Ross Johnson, were both inmates of the state prison at Walla Walla. In settling a previous disagreement, Little punched and kicked Johnson about the head, sending him to the prison hospital in a dazed and semiconscious condition. In a cursory preliminary examination, his injuries were diagnosed as a concussion with possible skull fracture and brain damage. Johnson remained in a bed without side rails or other means of restraint for five days, during which time he was described as continually "thrashing around . . . throwing his arms about."[2] While at the prison hospital, he fell out of bed five times, striking his head against the wall, an iron radiator, and on the terrazzo floor. On the fifth day, X-rays and a thorough examination counseled his prompt removal via the prison doctor's station wagon to Western State Hospital, where he died before an operation could be performed.

The case presented a serious causation problem, for it was impossible to ascertain the source of the fatal injuries. Both the beating and the five falls had occurred before any X-rays were made. At the trial,

[32] See cases cited note 4 *supra*.

[1] 57 Wn.2d 516, 358 P.2d 120 (1961).
[2] *Id.* at 518, 358 P.2d 121.

expert medical witnesses stated that the death had resulted from head injuries, but specifically declined to express any opinion as to when those injuries were sustained.[3] Thus, there was a complete and absolute lack of evidence on this point, and nothing to support a jury finding of fact. It is hornbook law that the state has the burden of proof on every element of the crime of murder, and that causation is an essential element.[4] Absent any evidence as to the direct cause of the fatal injuries, the court was bound to assume they were caused by the falls.

The court, however, appears to have held that the beating itself could be found to be the direct cause of death:

> From the evidence in the instant case, the jury could have drawn either one of two plausible conclusions regarding the events which culminated in the death of Ross Johnson. The first possible conclusion as to the cause of death was that the skull fracture and the extensive brain hemorrhaging were sustained by Johnson *directly as the result of the violent encounter* with appellant.[5]... On the basis of all the evidence referred to above, the jury was warranted in concluding that Johnson *died as a direct result of the numerous punches and kicks* inflicted upon him by appellant.[6] (Emphasis added.)

It is arguable, however, that the quoted "holding" is made unnecessary to the result of the case by the court's further analysis, and thus is a dictum. The court goes on to point out:

> The second possible conclusion is that the fatal injuries were the result of one or more falls by Johnson from his bed while in the prison hospital.... The jury, if it found it necessary to consider the question, could have found that he fell because he was in a semiconscious condition and was in a bed without side rails or other means of restraint. There could be no doubt in the jury's mind that Johnson was in bed as a direct result of the beating administered by appellant.[7]

The difficulty with this approach is that it proves too little. The court suggests that the actual source of the injuries which proved fatal is irrelevant, pointing out that the deceased would not have been in the hospital bed but for the acts of the defendant. Cause in fact is not the measure of proximate, or legally recognizable, cause.[8] Had Johnson

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[3] Brief for Appellant p. 42. Dr. Charles Larson, expert medical witness for the state, testified that the fatal injuries could have been caused by the falls from bed.

[4] The case recognizes this; 57 Wn.2d 516, 522, 358 P.2d 120, 123 (1961).

[5] State v. Little, 57 Wn.2d 516, 522, 358 P.2d 120, 123 (1961).

[6] *Id.* at 523, 358 P.2d 124.

[7] *Id.* at 522, 358 P.2d 123.

[8] Little's acts were a *cause in fact* of the falls from bed, for without his acts the deceased would not have been in the bed. This does not show that the altercation is in any way a proximate cause. In Bush v. Commonwealth, 78 Ky. 268 (1880), a girl was

died of food poisoning while in the hospital, no one would contend that the defendant should be held criminally liable for the death, even though his acts were a cause in fact.

A causation problem is presented in every case where negligent medical treatment follows a criminal battery and the final result is the death of the victim. The assailant is not liable unless his acts were a proximate cause of the death. The original act must be a substantial contributing factor in the conditions which actually cause the death before proximate causation is established. Conversely, if the medical treatment itself is the *sole* cause of death, the defendant's act is excused.[9] This underlying concept has found expression in a variety of shorthand rules.[10] Generally, the result depends upon the extent of the original injuries. If such injuries are dangerous, or calculated to cause death, malpractice which contributes to the result will not constitute a defense.[11] However, if the original injuries are relatively minor, and the treatment inflicts additional injuries which are the predominent cause of death, most courts would recognize that the causal connection of the defendant's acts is too remote to bear legal responsibility.[12]

In the present case, the court suggested a slightly different shorthand rule based upon foreseeability:[13]

> The quality of medical care administered to the victim has no bearing upon the guilt or innocence of the accused in a criminal homicide case,

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hospitalized by a gunshot wound, and died from scarlet fever contracted from a physician just recovering from the disease. In reversing a conviction of murder, the court held that when death results from improper treatment or disease not superinduced by or resulting from the wound, the accused would not be guilty.

[9] State v. Baruth, 47 Wash. 283, 91 Pac. 977 (1907), gives the basis of this approach in Washington. In that case appellant assigned error to the refusal to admit testimony that gunshot wounds, located as they were, were not normally fatal if the best medical treatment was given. In holding that a showing of poor medical treatment would not be a defense, the court recognized that if unskillful treatment was the *sole* cause of death it would be a defense, but if it was only shown that the negligence was a contributing cause of death, it would not be a defense.

[10] Annot., 8 A.L.R. 506 (1920); Annot., 39 A.L.R. 1268 (1925); Annot., 126 A.L.R. 912 (1940). While the basic concept based on the sole and contributing cause distinction is logically clear, it is more of a final test than a working rule. It would solve no problems for a jury. Thus the necessity for rules based on normal results of the concept in common fact patterns.

[11] Sharp v. State, 51 Ark. 147, 10 S.W. 228 (1889); State v. Bantley, 44 Conn. 537, 26 Am. Rep. 486 (1877).

[12] Tibbs v. Commonwealth, 138 Ky. 558, 128 S.W. 871 (1910); Bush v. Commonwealth, 78 Ky. 268 (1880). The severity of the original injury test is probably based upon the near certainty that a very dangerous wound will be at least a contributory cause of death. Even so, a few cases seem to recognize that even a serious injury would be blameless if malpractice could be shown to be the *sole* cause of death. State v. Baruth, 47 Wash. 283, 91 Pac. 977 (1907).

[13] Where an intervening act causes the harm, whether it is a superceding cause is often determined by foreseeability. For a discussion of this approach, see PERKINS, CRIMINAL LAW 636 (1957).

> This is not to say, of course, that an unforeseeable intervening cause would not excuse the accused from legal responsibility. Malpractice with respect to the original injury or wound is no defense, whereas malpractice resulting in new and different injuries which prove fatal would be a defense.[14] (Court's citations omitted.)

This rule would also reach a correct result in terms of the basic causation concept in the great majority of cases. Malpractice with respect to the original injury would normally leave the original injury a contributing cause, while new and different injuries would more often constitute a sole cause of death. However, if the suggested rule were applied to the present case, an acquittal would seem to follow. The decedent died from his skull fractures, a new and different injury, not from an aggravation of the concussion which he received at the hands of the defendant. Thus the court carefully neglected any further treatment of its rule.

As has been suggested, the lack of evidence as to the actual source of the fatal injuries, coupled with traditional views concerning the burden of proof in criminal cases, seems to necessitate the assumption that the injuries were sustained in the falls from bed. Granting this, a conviction would be improper unless the defendant's acts were a proximate cause of the falls themselves. The application of causation rules or concepts requires focusing attention on these falls, rather than on the presence of the victim in the hospital.

What caused the falls? The prison hospital staff allowed Johnson to fall from his bed on five different occasions, even though his delirium made it obvious that some means of restraint was necessary. Such gross negligence would clearly seem to be an independent cause of the falls, and thus the fatal injuries. Had it been the sole cause, a logical and desirable result would be acquittal of the defendant. However, the delirious and violent condition of Johnson was as much a primary cause as the negligence, and this condition was induced by the beating received at the hands of Little. The pattern formed is one of contributing cause, rather than sole cause, the delirium completing the causal chain between the acts of the defendant and the death.

A similiar factual pattern was presented to the Vermont Supreme Court in *State v. Rounds*.[15] As here, the deceased had been hospitalized due to a beating by the defendant. While in the hospital, the deceased had fallen from his bed while in a delirious condition from head injuries.

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[14] State v. Little, 57 Wn.2d 516, 521, 358 P.2d 120, 123 (1961).
[15] 104 Vt. 442, 160 Atl. 249 (1932).

The evidence tended to show that the fall, rather than the beating, was responsible for the broken ribs, the immediate cause of death. The Vermont court recognized the causal connection to be established, as the delirium which was responsible for the fall was caused by the acts of the defendant, analysing it as a "cause of a cause" problem.[16] The conviction was reversed on the sole ground that some of the blows were justified in self-defense and some were not, and it could not be proved which caused the delirium. The Vermont court held that unless expert medical testimony was introduced tending to show that the unjustified blows caused the delirium, the jury was not warranted in so finding and convicting the accused.[17]

In *Little,* the court points out that the deceased fell because of his semiconscious condition,[18] but while it is a step in the analysis, the result is left to turn on other factors. It is submitted that without the concurrence of this delirium in producing the falls, the conviction cannot be supported. If Johnson had been conscious, and had fallen on a slippery floor, a murder conviction could not properly be sustained.

In conclusion, it appears that the cut-off point of criminal responsibility could have been extended to include the occurrence of the fatal injuries due to the continuing semiconscious condition of the victim. However, this circumstance does not lend validity to the action of the court in the present case. A causal connection supported only by the mental condition of the victim, stretching over a time period of five days, seems questionable enough to warrant the full consideration of the jury. It seems obvious from the reported decision that the jury received no adequate instruction or emphasis upon the sole factor that could form a basis for their verdict. The defendant seems entitled to a new trial with proper jury instructions.

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LABOR LAW

Labor Disputes—Federal Pre-emption of Jurisdiction. The doctrine of federal pre-emption of jurisdiction over labor disputes was given a significant application by the Washington Supreme Court in

[16] The "cause of a cause" reasoning refers to the intervention of dependent causes, as opposed to independent causes, leaving the chain of causation unbroken.

[17] Concerning the necessity of expert medical testimony as to cause of death to support a homicide conviction, see Annot., 31 A.L.R.2d 693, 703 (1953). See also State v. Bozovich, 145 Wash. 227, 259 Pac. 395 (1927). No Washington case has required expert medical testimony in support of a conviction, but the lack of authority is probably due to the practice of providing it where there is any doubt as to medical cause.

[18] State v. Little, 57 Wn.2d 516, 522, 358 P.2d 120, 123 (1961).