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Crim. L.R. 2000, JAN, 41-44
(Cite as: Crim. L.R. 2000, JAN, 41-44)

Criminal Law Review

2000

Case Comment

A COMMENT ON MOOR'S CASE

J.C. Smith.

Case: R. v Moor (David) (Unreported, May 11, 1999) (Crown Ct)

Subject: CRIMINAL LAW

Keywords: Causation; Defences; Doctors; Euthanasia; Mens rea; Murder

Abstract: Whether special rule of causation applies where doctor gives pain killing drugs which accelerate death, availability of special defence and whether doctor intends death when he acts for reasons which jury deem to be benevolent.

***41** Summary: This note considers whether there is a special rule of causation applicable in the case of a doctor who administers pain-killing drugs which accelerate death; whether a doctor who has caused death has a special defence based on his belief that his action was proper treatment to relieve pain and suffering; and whether a person who knows that his act is virtually certain to cause death must be taken to have intended death when he acted for reasons which a jury consider benevolent.

In order to convict any person (D) of murder the prosecution must prove (i) that he caused the death of the victim (V), (ii) that he did so with intent to kill or to cause grievous bodily harm and (iii) that any defence (other than diminished responsibility or insanity) which has been raised is not made out. The same general principles apply to a doctor who kills in the course of treating a terminally ill patient as to anyone else who kills.

Causation

Courts have frequently ruled that causation is simply a question of common sense. So Devlin J. in Adams told the jury: "Cause means nothing philosophical or technical or scientific. It means that you twelve men and women sitting as a jury would regard in a commonsense way as the cause." But the mass of case law on causation suggests that this is an oversimplification and, in an entirely different context (causing the pollution of a river [FN1]), the House of Lords has recently agreed that more guidance may be needed. "The first point to emphasise is that commonsense answers to questions of causation will differ according to the purpose for which the question is being asked." If that is the first point, the second point must be to determine the purpose. Is it in relation to the law of murder generally, or to the special case of the administration of drugs by a doctor to a dying patient? If the former, it is well established that any

acceleration of death is a cause of it. But Hart and Honore [FN2] show, at least, some sympathy for what they describe as "the vague common sense distinction between accelerating and causing death" in--

> ***42** "the special case where the victim is dying from a wound or illness and his death is only slightly accelerated by an act of accused which would not be sufficient to kill a person in a normal state of health. Quite apart from the law on the subject, such an act would be described as 'accelerating' rather than 'causing' death for causal language has to be modified to fit such cases of additional causation."

It is noteworthy that the learned authors are discussing only the case where the drug is a contributory cause of death. They would not apparently extend their sympathy to the doctor who administers a dose sufficient to kill even a healthy patient. And their sympathy would not, in the end, extend to accepting a modification of the rule that the slightest acceleration of death is homicide. They conclude that, because a doctor has a duty to relieve a patient's suffering "it is permissible for him, when the patient is doomed to die shortly, to administer pain-killing drugs with his consent even if they shorten life." We seem now to have abandoned the lack-of-causation defence and to have embraced a special doctors' defence instead: "It does not follow that it would be permissible, as opposed to understandable, for someone without such a duty to do the same." We cannot distinguish between a doctor and a layman doing the same act on grounds of causation, but only on the ground that what is permissible for the one is not permissible for the other.

In Moor Hooper J. told the jury only that D causes death "if his act, in this case the intra-muscular injection, contributed significantly to the death. It does not have to be the sole or principal cause." So far as appears, the judge did not elaborate on what is "significant." If he had taken the generally accepted view of causation in homicide, he might have said "Are you sure that V would not have died when he did, but for the injection? If you are sure of that, then you are sure he caused the death, even though V would have died soon after anyway." But a jury might think that five minutes, an hour, perhaps a day or even more was not "significant." In Adams Devlin J. specifically advised the jury that "no people of common sense" would say that the doctor caused death if it occurred at eleven instead of twelve o'clock or even on Monday instead of Tuesday. "Significant" thus left it open to a conscientious jury to conclude that they were not sure that D caused V's death and so to acquit.

Mens rea

The judge's question 3 implies that a doctor who has caused death is not guilty of murder if his purpose was to give treatment which he believed, in the circumstances, as he understood them to be, to be proper treatment to relieve V's pain and suffering. Even if the jury were sure, then, that D knew that the injection would significantly shorten life, i.e. he intended to cause death -- he would have a defence, if he had, or may have had, this benevolent purpose in doing so. Notwithstanding the insistence of the courts that the law is the same for doctors as for everyone else, the effect must be to give the doctor a special defence. "Proper treatment" must refer to accepted medical practice.

The judge's Question 4 assumes that the jury are satisfied that D caused V's death and that his purpose was not to give proper treatment to relieve V's pain and suffering. He was then guilty of murder if, but only if, he intended to cause death. The judge's instruction on intention to kill is generous to D. The direction was that (a) he had an intention to kill, only if he acted with the purpose of killing; (b) it was ***43** not enough that he thought it was highly probable that he would kill. There are some difficulties here.

(i) D must have had some purpose. If it was not his purpose to give what he believed to be proper treatment to relieve pain (as the jury at this point is assumed to have decided) and it was not his purpose to kill (a possibility which the jury is now asked to consider), what was his purpose? The only candidate seems to be that of relieving V's pain by treatment going beyond what is "proper." "Accepted medical practice would not approve of this, but I am going to do it anyway, to save my patient from pain." Whether that is what the judge had in mind is not clear and whether the jury would work it out for themselves less so; but that seems to be the effect.

(ii) It is now entirely clear, following Woollin, [FN3] that proposition (b), above, is correct but that proposition (a) is not. Even if it was not D's purpose to kill, the jury was still "entitled" (if not bound) to find that he intended to do so if death was a virtually certain consequence of his act and he knew that it was a virtually certain consequence. At one point in his speech in Woollin, Lord Steyn said that "a result foreseen as virtually certain is an intended result;" but the speech is not free from ambiguity in that it approves, with some modifications, the direction proposed in Nedrick [FN4] ("a tried and tested formula" which trial judges ought to continue to use) which is in terms of "the jury is not entitled to [find] the necessary intention unless ..." As Peter Mirfield has pointed out, [FN5] "if I am entitled to find A only when B and C are present, I am also entitled not to find it where both are present." What is lacking is any indication by the courts as to the criterion by which the jury should or should not act on their "entitlement" to find intention proved. On this, Professor Norrie's article, "After Woollin" [FN6] is very interesting. He suggests that foresight of virtual certainty is over-inclusive and does not reflect the degree of "moral malevolence" in the accused's act. It therefore needs to be narrowed. What the argument (which deserves closer attention than it can receive here) seems to amount to is that the jury, having determined that D did foresee some prohibited consequence as certain, should go on to consider whether, in all the circumstances, he was so wicked that an intention to cause that evil should be attributed to him. In gross negligence manslaughter we already have a law that requires the jury to decide whether D's conduct is bad enough to be condemned as that offence. [FN7] This would suggest a similar rule for murder--except where D had the purpose of killing or of causing serious bodily harm. This is where there appears to be some difficulty in accepting Professor Norrie's argument. If the "moral threshold" test is to be applied to "oblique" intention so as to save hard cases from conviction, why should it not also apply to direct intention, i.e. purpose? The typical mercy killer acts with the purpose of killing--and his may be the hardest case of all.

But this is a digression. The fact is that under the present law the jury, in the circumstances envisaged, are directed that they are merely "entitled" to find an

intention to kill. I have long hoped for a jury to ask some unfortunate judge for further and better instructions, but no such case has been reported. So what do ***44** juries do? No one knows, or is allowed to try to find out. But it seems likely that the intelligent foreman will say: "It is up to us then: are we all sure that he deserves to be convicted of murder? Or not?" Norrie's moral threshold may well be at work in "oblique intention" cases but, if so, it remains concealed.

The judge's decision not to give a Woollin direction may have saved D from a possible, but by no means certain, conviction. The jury, though sure that they were entitled to convict him if they thought fit, might well have been unwilling to do so, as was their right.

The Doctor's Defence

The question whether the doctor has a special defence has already been answered; according to Moor, at least, he has: although he knows his act will accelerate death significantly, the jury is not entitled to convict him of murder if his purpose is to give treatment which he believes, in the circumstances as he understands them, to be proper treatment to relieve pain. It is in substance an application of the old doctrine of double effect and has been much criticised on that ground. It has been said that it leaves doctors vulnerable and confused. Dr Nigel Cox's case fell on the wrong side of the line. He was convicted of attempted murder (it was no longer possible to prove the actual cause of death) when he administered potassium chloride to a patient, B, a 70-year old woman, to terminate the great pain from which she was suffering. In this case pain-killing drugs were no longer effective to relieve B's suffering and he gave the injection which had the effect of stopping her heart. It seems that he decided to kill B. He considered he was choosing the least evil of the options with which he was faced. An expert medical witness at a subsequent General Medical Council hearing said that Dr Cox's mistake was to give potassium chloride; a large dose of sedative causing B to lapse into a coma would have fallen on the right side of the law: The Times, November 18, 1992. Dr Cox could then truthfully have said that his purpose was not to kill but to prevent pain, even if the effect on the patient would not have been materially different.

This is not the place to consider the arguments in favour of, and against, a statutory defence of euthanasia; but an interesting article on Moor by Jeremy Laurance (The Independent, May 13, 1999) concludes:

> "The intention to relieve suffering is clearly distinct from the intention to kill. The doctrine of double effect has the virtue of allowing doctors to bring life to a peaceful and dignified end without jeopardising patients' trust. It may not be the ideal option--no law can accommodate every eventuality--but it is the least worst. No other country has shown conclusively that there is a better way."

Sybille Bedford called her account of the trial of Dr Bodkin Adams "The Best We Can Do." Perhaps this is still the best we can do. [FN8]

FN1. Environment Agency v. Empress Car Co [1999] 2 A.C. 22, sub. nom. Empress Car Co v. National Rivers Authority [1998] 1 All E.R. 481.

FN2. Causation in the Law (2nd ed. 1985) 344. Glanville Williams, Textbook of Criminal Law (2nd ed. 1983) at p.385, "The defence of minimal causation," considers, that Devlin J.'s judgment in Adams seems to imply the view that what the doctor does by way of approved medical practice is not a cause in law; but the passage quoted is at least equally consistent with a special doctor's defence.

FN3. [1999] A.C. 82, [1998] Crim.L.R. 890.

FN4. [1986] 3 All E.R. 1, CA.

FN5. [1999] Crim.L.R. 246.

FN6. [1999] Crim.L.R. 532.

FN7. Adomako [1995] 1 A.C. 171 -- at least as interpreted in Smith & Hogan, Criminal Law (9th ed.) pp. 375-377.

FN8. Even that stickler for exactitude in the law, Glanville Williams said of Devlin J.'s direction in Adams, "we may applaud his attitude without enquiring too closely into its legal basis"--the least bad solution in the absence of a statutory defence of euthanasia which he supported.

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