

Life After Commonwealth v. Brown:
the Abolition of the Felony-Murder Rule

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Introduction

The holding in Commonwealth v. Brown: Prospectively, a defendant may not be convicted of murder without proof of one of the three prongs of malice.

- henceforth, felony murder is limited to its statutory role under G.L. Ch. 265 §1 --> as an aggravating element of murder. A jury may find a defendant guilty of 1st degree murder instead of 2nd degree murder if the murder was committed in the course of a felony punishable by life imprisonment even if NO (1) deliberate premeditation or (2) EAC.

That might seem like a significant change. In this talk, I will explore whether the abolition of felony-murder is, in fact, significant and if so, how things will change.

One way to approach this question:

Q: How would Brown himself be prosecuted if he were retried today?

Facts of the case:

- Brown loaned a gun and a disguise to friends he knew intended to use these items to break into a drug dealer's home and rob him.
- the friends did so and in the process killed one of the drug dealers

A: Gaziano's dissent - "under this narrower version of felony murder, the defendant in this case likely would be convicted of murder in the first degree on the basis of joint participation in an act of **third prong malice.**"

Refresher on Three Prongs of Malice:

1st prong: Intent to kill

2nd prong: Intent to cause grievous bodily harm

3rd prong: intent to do an act which, in the circumstances known to the defendant, a reasonable person would have known created a plain and strong likelihood that death would result.

Theory under which Brown was guilty of murder by 3rd prong malice

Justice Gaziano cites Commonwealth v. Selby, 426 Mass. 168, 172 (1997), in which the SJC concluded that a jury **could** infer third prong malice from evidence that an individual entered an occupied house, carrying a loaded firearm with the intent to commit a robbery.

Here, of course, Brown did not actually go to the victim's house. Rather, he merely loaned a gun and a disguise to the robbers

Justice Gaziano concluded that based on these facts a jury could reasonably conclude that he "shared the intent to carry out the crime of armed home invasion or armed robbery"

What are the remote outer fringes of third prong malice?

Q: Will knowing participation in armed robbery always satisfy 3rd prong malice if someone dies in the robbery?

Hypotheticals that Gants and Gaziano seem to agree do NOT warrant a finding of malice:

- (1) - armed robber vaults over counter, **accidentally** drops gun, gun discharges, killing clerk
 - (2) - Comm. v. Hanright
 - 19 year old lookout and getaway driver was waiting for much older co-D to rob a department store
 - sees co-D chased out by responding cop
 - walks away from scene
 - co-D then shoots responding cop
- Not clear to me whether, and if so, why Gaziano thinks these fact patterns would not satisfy 3rd prong malice given his citation to Commonwealth v. Selby as dispositive in Brown's case (3rd prong malice warranted where individual entered an occupied house, carrying a loaded firearm with the intent to commit robbery)
- But the lack of citation to precedent tells me that there is no clear precedent on the outer edges of 3rd prong malice as applied to a death in the course of an armed robbery.
- That makes sense because under the felony murder doctrine, it was much simpler to prosecute for felony murder. If the armed robbery was the but for cause of the death, then a jury was required to find 1st degree murder. So there was no need to rely on 3rd prong malice in those cases.

Potential Sufficiency Challenges to 3rd prong malice

Possible bases to attack liability for 3rd prong malice in cases on “remote outer fringes” of felony murder

- tenuousness of the causality between underlying felony and killing (accidental shooting during robbery)
- tenuousness of involvement in underlying felony (Brown giving gun, disguise to robbers but never going to scene of crime; abandonment of crime)

Conclusion:

First, I think the scope of 3rd prong malice is not clear. We are really just guessing as to the scope of 3rd prong malice in the context of death during armed robbery.

Second, I think that it will be hard to develop per se rules here because every case is different.

Third, I think that one good development is that the prosecutor will at least have to work harder. Previously, they merely had to prove that an inherently dangerous life felony was the but for cause of a death. If so, the jury was required to find 1st degree murder; now, the prosecutor has to prove to the jury that (1) an inherently dangerous life felony was the but for cause of death AND (2) the robber and any accomplices had at least 3rd prong malice.

- This will allow juries to mitigate culpability, especially in cases where the defendant's involvement was limited to the "remote outer fringes."

** I think post-conviction lawyers can expect to face an increasing variety of challenges to 3rd prong malice murder convictions in cases that previously would have been prosecuted as felony-murder cases.

Postscript

- Even if the Commonwealth fails to prove 3rd prong malice,
 - it will likely be able to satisfy the jury that the defendant is guilty of at least armed robbery on a joint venture theory
 - the judge will be able to take the death into account in deciding the sentence
 - the sentence can be anything up to life in prison.

** But again, this introduces discretion and room for advocacy where previously, there was none.

Second Postscript: Will Abolition of Felony Murder Survive?

Q: Will Gants' concurrence stand now that Kafker has replaced Hines?