**Criminal Law—A Defendant Who Intentionally Commits a Felony During Which a Bystander is Killed by Another Bystander Reasonably Attempting to Stop that Felony Commits an Intentional Killing within the Meaning of Section 19.02(a)(1) of the Texas Penal Code.** *Blansett v. State*, 556 S.W.2d 322 (Tex. Crim. App. 1977).

Clifford Blansett, armed with a shotgun, accompanied Billy Wayne Dowden to the Orange City jail to forcibly free Dowden's brother, who had been imprisoned earlier that evening. After announcing an intent to free his brother, Dowden became involved in a scuffle with Police Captain Gray. Subsequently, a gunbattle erupted between Dowden and Police Officer Windham. During the gunbattle Captain Gray was killed by a shot from Officer Windham's gun.[1] Although no evidence was introduced in the trial court to show that Blansett had fired his gun,[2] he was found guilty of the capital murder of Officer Gray.[3] The Texas Court of Criminal Appeals affirmed the conviction, holding that because the killing would not have occurred but for the intentional conduct of Blansett, he had committed an intentional killing within the meaning of section 19.02(a)(1) of the Texas Penal Code.[4]

A familiarity with the 1974 Penal Code's definitions of capital and non-capital murder is necessary to understand how the issue of an "intentional killing" arose in *Blansett v. State.*[5] Under section 19.02(a) a person commits non-capital murder if he does one of the following:

> (1) intentionally or knowingly causes the death of an individual;
> (2) intends to cause serious bodily injury and commits an act clearly dangerous to human life that causes the death of an individual; or
> (3) commits or attempts to commit a felony, other than vol-

1. Blansett v. State, 556 S.W.2d 322, 324 (Tex. Crim. App. 1977).
2. *Id.*
3. *Id.*
4. *Id.* at 325. The court determined that the evidence would support a theory of guilt solely because of Blansett's acts. The charge, however, only submitted a theory of guilt based upon Blansett's responsibility for the acts of Dowden. Relying on Livingston v. State, 542 S.W.2d 655 (Tex. Crim. App. 1976), the court held that the vicarious liability provision articulated in section 7.02 of the Penal Code does apply to capital murder cases. Blansett v. State, 556 S.W.2d 322, 326-27(Tex. Crim. App. 1977).
5. 556 S.W.2d 322 (Tex. Crim. App. 1977).

> untary or involuntary manslaughter, and in the course of and in furtherance of the commission or attempt, or in immediate flight from the commission or attempt, he commits or attempts to commit an act clearly dangerous to human life that causes the death of an individual.[6]

Capital murder is limited, however, to intentional or knowing killings, as defined in section 19.02(a)(1), that are accompanied by any one of five aggravating circumstances.[7] One such aggravating circumstance occurs if "a person murders a peace officer or fireman who is acting in the lawful discharge of an official duty and who the person knows is a peace officer."[8]

The specific issue in *Blansett v. State*[9] was whether a defendant commits an intentional killing as defined in section 19.02(a)(1) if the victim is accidentally killed by a bystander attempting to resist the commission of a felony by the defendant. The appellant contended that traditional felony-murder reasoning could not be used to supply the "intentional or knowing" requirement under such circumstances.[10] The court, however, avoided the issue of the application of the felony-murder doctrine because it concluded that Blansett intentionally caused the death of Gray within the literal meaning of section 19.02(a)(1).[11]

The application of section 19.02(a)(1) to the facts of *Blansett* necessitated the construction of two crucial elements embraced in that section, intent and causation. Under section 6.03(a) of the Penal Code a person acts "intentionally, or with intent, with respect to the nature of his conduct or to a result of his conduct when it is his conscious objective or desire to engage in the conduct or cause the result."[12] Causation, in turn, is defined in terms of criminal responsibility; section 6.04(a) provides that one is criminally responsible "if the result would not have occurred but for his conduct, operating either alone or concurrently with another cause, unless the concurrent cause was clearly sufficient to produce the result and the conduct of the actor clearly insufficient."[13] Applying these terms to the facts of *Blansett*, the court concluded that the mens rea, or

6. TEX. PENAL CODE ANN. § 19.02(a) (1974).
7. TEX. PENAL CODE ANN. § 19.03(a) (1974).
8. TEX. PENAL CODE ANN. § 19.03(a)(1) (1974).
9. 556 S.W.2d 322 (Tex. Crim. App. 1977).
10. *Id.* at 325.
11. *Id.*
12. TEX. PENAL CODE ANN. § 6.03(a) (1974).
13. TEX. PENAL CODE ANN. § 6.04(a) (1974).

intent, element of section 19.02(a)(1) was no obstacle to a determination of guilt; Blansett acted with intent because he intentionally went to the Orange City jail to use firearms with a conscious disregard for life.[14] The court viewed the causation element as more difficult. Although the court easily concluded that the death of Gray would not have occurred but for the conduct of Blansett and Dowden, it perceived the "concurrent cause" limitation of section 6.04(a) as the major obstacle to the imposition of liability under section 19.02(a)(1). The court determined, however, that the shooting of Gray by Windham was not a concurrent cause of death because Officer Windham's reaction was a reasonable response to the acts of the defendant.[15] Thus, in a step-by-step application of the intent and causation elements of section 19.02(a), the court concluded that Blansett was guilty of capital murder because he had "intentionally . . . caused the death of an individual"[16] who was a police officer in the discharge of his official duty and known by Blansett to be a police officer.

Cases involving prosecution for the murder of a victim who dies as a result of a bystander's attempt to thwart a felony are not novel to Texas jurisprudence. The Court of Criminal Appeals has confronted this situation at least three times.[17] Unlike most jurisdictions, which have wrestled with the applicability of the felony-murder doctrine under such circumstances,[18] the Texas court has not expressly addressed the felony-murder issue; instead it has approached the problem as one of causal connection. Discussion of the felony-murder doctrine was probably avoided because prior penal codes treated felony-murder under a general provision penalizing the accidental commission of one felony by the same person who was attempting another felony.[19] Logically, therefore, felony-murder was

14. Blansett v. State, 556 S.W.2d 322, 325 (Tex. Crim. App. 1977).

15. *Id.*, *citing* People v. Gilbert, 63 Cal. 2d at 690, 408 P.2d 365, 373-74, 47 Cal. Rptr. 909, 917-18 (1965), *rev'd on other grounds*, 388 U.S. 263 (1967).

16. TEX. PENAL CODE ANN. § 19.02(a)(1) (1974).

17. Miers v. State, 157 Tex. Crim. 572, 251 S.W.2d 404 (1952); Keaton v. State, 41 Tex. Crim. 621, 57 S.W. 1125 (1900); Taylor v. State, 41 Tex. Crim. 564, 55 S.W. 961 (1900). *Taylor* and *Keaton* arose under the Penal Code of 1895, whereas *Miers* was decided under the 1925 Penal Code.

18. See Annot., 56 A.L.R.3d 239 (1974) for collection of cases.

19. "If one intending to commit felony, and in the act of preparing for or executing the same, shall, through mistake or accident do another act which, if voluntarily done, would be a felony, he shall receive the punishment affixed by law to the offense actually committed." Tex. Penal Code art. 48 (1895). To the same effect is article 42 of the 1925 code. Tex. Penal Code art. 42 (1925).

only applicable if the defendant or his accomplice, rather than a bystander, killed a person.[20]

The Court of Criminal Appeals first confronted the issue of a defendant's liability for the death of another resulting from the actions of a bystander in the 1900 case of *Taylor v. State.*[21] In an attempted train robbery Taylor and three accomplices boarded the engine and removed the fireman and engineer. The fireman was killed when a gunfight erupted between the robbers and a passenger. Evidence was conflicting as to whether the passengers or the robbers fired the fatal shots.[22] In reviewing Taylor's conviction of first degree murder, the court characterized the question as one of causal connection.[23] Noting that a person need not do the act of killing directly to be guilty of homicide,[24] the court held that if the defendant set in motion the cause that occasioned the death of the victim, he should be as culpable as if he had done the deed with his own hands.[25] The court expressly adopted the tort concept of "proximate cause" as a basis for the imposition of criminal liability under such circumstances.[26] The *Taylor* panel did not, however, address the issue of the defendant's mental culpability; the 1895 Penal Code's requirement of "malice aforethought"[27] appears to have been totally obscured in the court's search for causal connection.

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20. Under several provisions of the prior codes a defendant could be held vicariously liable for the acts of the co-felon. Tex. Penal Code art. 74-79 (1895). Tex. Penal Code art. 65-70 (1925). Vicarious liability is now treated in TEX. PENAL CODE ANN. § 7.02 (1974).

21. 41 Tex. Crim. 564, 55 S.W. 961 (1900).

22. 55 S.W. at 961-62.

23. *Id.* at 964.

24. *Id.* at 964-65. The court pointed out that under several provisions of the penal code, if a person produced death indirectly he could be held criminally liable. Of particular significance was Article 77, which provided:

> If any one, by employing a child or other person, who can not be punished, to commit an offense, or by any means, such as laying poison where it may be taken, and with intent that it shall be taken, or by preparing any other means by which a person may injure himself, and with intent that such person shall thereby be injured, or by any other indirect means cause another to receive an injury to his person or property, the offender by the use of such indirect means becomes a principal.

Tex. Penal Code art. 77 (1895).

25. Taylor v. State, 41 Tex. Crim. 564, 55 S.W. 961, 964 (1900).

26. *Id.* at 965.

27. The 1895 Penal Code, in pertinent part, provided that "[e]very person with a sound memory and discretion who shall unlawfully kill any reasonable creature in being within this state, with malice aforethought, either express or implied, shall be deemed guilty of murder." Tex. Penal Code art. 710 (1895). The code further provided that any murder committed in an attempted robbery was first degree murder, the punishment for which was death or life imprisonment. Tex. Penal Code art. 711, 714 (1895).

In *Keaton v. State*[28] the court reviewed the conviction of one of Taylor's accomplices. In affirming Keaton's conviction of first degree murder, the court concluded that Article 77 of the 1895 Penal Code was specifically applicable to the facts.[29] In essence, Article 77 provided that if one person caused another person to be injured by any indirect means, the offender became liable as a principal.[30] Article 77 concerned only the question of one's complicity, however, and not the issue of mental culpability. Thus, in *Keaton* the court again avoided any consideration of the malice requirement of murder.

In *Miers v. State*,[31] a case arising under the 1925 Penal Code, the defendant was found guilty of murder and sentenced to death for a killing that occurred during his commission of a robbery. According to the defendant, the deceased accidentally shot himself in an attempt to overtake the defendant.Without reference to the mens rea requirement of the murder statute,[32] the court relied on *Taylor v. State*[33] to hold that because Miers had set in motion the cause that occasioned the death, he was guilty of murder.[34]

Implicit in *Taylor, Keaton,* and *Miers* is the principle that once causal connection has been established in instances in which the victim is killed by a third person, mens rea is of nominal significance. Each decision would have imposed criminal liability even if the defendant's lack of intent was accepted as a fact. In this regard the courts' analysis appears to parallel the traditional felony-

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28. 41 Tex. Crim. 621, 57 S.W. 1125 (1900).

29. 57 S.W. at 1129. See note 24 *supra.* Whereas in *Taylor* the court relied upon Article 77 merely to support its conclusion that one need not do the killing himself to be criminally responsible, the *Keaton* court determined that Article 77 specifically applied to the facts.

30. Tex. Penal Code art. 77 (1895). See note 24 *supra.*

31. 157 Tex. Crim. 572, 251 S.W.2d 404 (1952).

32. The 1925 Penal Code provided in pertinent part that "[w]hoever shall voluntarily kill any person within this State shall be guilty of murder. Murder shall be distinguished from every other species of homicide by the absence of circumstances which reduce the offense to negligent homicide or which excuse or justify the killing." Tex. Penal Code art. 1256 (1925), *as amended by* Tex. Laws 1927, ch. 274, § 3-a, at 412. The 1925 act amending the murder provision provided:

> In all cases tried under the provisions of this Act, it shall be the duty of the court to define "malice aforethought" and shall apply that term by appropriate charge to the facts in the case and shall instruct the Jury that unless from all the facts and circumstances in evidence the Jury believes the Defendant was prompted and acted with his malice aforethought, they cannot assess the punishment at a period longer than five years.

Tex. Laws 1927, ch. 274, § 3-a, at 412, 413.

33. 41 Tex. Crim. 564, 55 S.W. 961 (1900).

34. 157 Tex. Crim. 572, 251 S.W.2d 404, 408 (1952).

murder reasoning that the commission of a felony supplies the mens rea element for murder.[35] Although no statutory basis existed for the application of the felony-murder rule, similar reasoning would be essential to a finding of guilt because criminal liability could not be imposed in the absence of malice.[36]

Although these prior cases are indicative of the Court of Criminal Appeals' approach to the facts of *Blansett,* determination of guilt under these unusual circumstances must now be made under the 1974 Penal Code. Under the new code murder is no longer defined as one crime with two different types of punishment, but as two separate crimes.[37] Capital murder is distinguishable from non-capital murder not only in terms of the consequences of conviction,[38] but also in that capital murder is limited to intentional killings accompanied by at least one of five aggravating circumstances.[39] Non-capital murder encompasses intentional killings as well those resulting from acts that are clearly dangerous to human life.[40]

In contrast to prior codes, the present penal code now specifi-

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35. Morris, *The Felon's Responsibility for the Lethal Acts of Others,* 105 U. PA. L. REV. 50, 58 (1956). When the felony-murder rule has been invoked in Texas, reference has usually been made to Article 42 of the 1925 code. See note 19 *supra.* For example, in Walker v. State, 138 Tex. Crim. 343, 135 S.W.2d 992 (1939), the defendant's gun accidentally went off while robbing the victim. The court, citing Article 42, held that "[i]f, while voluntarily committing one felony, the accused accidentally commits another felony, he is guilty of the felony he accidentally commits as though he had willingly and intentionally perpetrated the same." 135 S.W.2d at 994.

36. *See* Tex. Penal Code art. 710 (1895); Tex. Penal Code art. 1256 (1925), *as amended by* Tex. Laws 1927, ch. 274, § 3-a, at 412.

37. Time, *Murder by any name ain't the same,* 34 TEX. B.J. 1005 (1971).

38. Capital murder is punishable by death or life imprisonment, whereas non-capital murder is punishable by confinement for not less than five years, nor more than 99 years. TEX. PENAL CODE ANN. §§ 12.31-.32 (1974).

39. TEX. PENAL CODE ANN. § 19.03(a) (1974). Under this section a person commits capital murder if he commits murder as defined in section 19.02(a)(1) and there is present one of the following aggravating circumstances:

> (1) the person murders a peace officer or fireman who is acting in the lawful discharge of an official duty and who the person knows is a peace officer;
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> (2) the person intentionally commits the murder in the course of commiting or attempting to commit kidnapping, burglary, robbery, aggravated rape, or arson;
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> (3) the person commits the murder for remuneration or the promise of remuneration or employs another person to commit the murder for remuneration or the promise of remuneration;
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> (4) the person commits the murder while escaping or attempting to escape from a penal institution; or
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> (5) the person, while incarcerated in a penal institution, murders another who is employed in the operation of the penal institution.

TEX. PENAL CODE ANN. § 19.03(a) (1974).

40. TEX. PENAL CODE ANN. § 19.02(a) (1974).

cally addresses felony-murder under the non-capital provision.[41] One commits murder if during an attempted felony he commits an act clearly dangerous to human life that causes the death of an individual.[42] Under this formulation the implication of an intent to kill by the mere attempt or commission of a felony is no longer necessary.[43] Instead, the statute deems the mental state inherent in the commission of an act clearly dangerous to human life to be sufficient mens rea for murder. Theoretically, this provision could cover the situation in which a third person kills in response to the acts of a felon.

The "intentional or knowing" standard of section 19.02(a)(1) evinces a legislative intent to supplant the nebulous concept of malice with more definitive terms to describe mental culpability.[44] The legislators carefully drafted section 6.03 to distinguish between two types of offense elements, one relating to the nature of one's conduct and the other relating to the result of that conduct.[45] Thus, one may act intentionally either with respect to the nature of his conduct or with respect to a result of that conduct.[46] The distinction may be illustrated as the difference between intentionally possessing a prohibited drug, which relates to the nature of one's conduct, and intentionally killing another person, which relates to the result of one's conduct.[47]

The Penal Code approaches the problem of causal connection

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41. TEX. PENAL CODE ANN. § 19.02(a)(3) (1974).

42. *Id.*

43. Searcy & Patterson, *Practice Commentary*, TEX. PENAL CODE ANN. § 19.02 (1974).

44. STATE BAR COMMITTEE ON REVISION OF THE PENAL CODE, TEXAS PENAL CODE: A PROPOSED REVISION, 148 (Final Draft, Oct. 1970) (Committee Comment to § 19.02) [hereinafter cited as Proposed Draft]. The drafters of the code consolidated 67 different terms that described culpable mental states under the prior law into four mental states: intent, knowledge, recklessness, and criminal negligence. *Id.* at 42.

45. *See* Proposed Draft, *supra* note 44, at 42 (Committee Comment to § 6.05). The Penal Code actually distinguishes between three types of offense elements, the third referring to the circumstances surrounding the conduct. Only the first two types of offense elements are germane to this discussion.

46. TEX. PENAL CODE ANN. § 6.03(a) (1974).

47. Searcy & Patterson, *Practice Commentary*, TEX. PENAL CODE ANN. § 6.03 (1974). Searcy and Patterson illustrate the distinction between the types of "intentional" offense elements as follows:

> *Intentional* as defined in Subsection (a) is synonomous with purposeful: one purposefully engages in conduct—shoots a pistol, throws a punch or a bomb, offers a bribe, denies a permit, takes a pill—or one desires a particular result—death, serious bodily injury, an explosion, to permanently deprive, compulsion.

*Id.*

under the traditional "but for" test.[48] One is responsible for a result if the result would not occur but for the actor's conduct, unless a concurrent cause is clearly sufficient to produce the result and the conduct of the actor clearly insufficient.[49] The objectives of this section were "to free the [penal] law from the encrusted precedents on 'proximate causation'"[50] and to afford some guidance in conceptually difficult situations in which direct cause is absent.[51] Particularly aware of the difficulty of imputing criminal responsibility in fact situations such as *Taylor v. State*,[52] the drafters indicated that whereas section 6.04(a) may be helpful in the determination of criminal liability in such situations, ultimate recourse for settlement of the issue should be made to the felony-murder rule in section 19.02.[53]

Although the Penal Code demands careful attention to each element of an offense, *Blansett v. State*[54] illustrates the danger of disregarding the plain import of the statute in favor of a meticulous analysis of the individual elements of an offense. To reach the conclusion that Blansett committed capital murder, the court had to find that he intentionally or knowingly caused the death of Gray within the meaning of section 19.02(a)(1). By segregating the causation and intent elements of this provision and analyzing the facts under a strict construction of these terms, the court determined that Gray's killing was intentional.[55] This analytical approach led the court to the conclusion, reminiscent of prior Texas cases, that cause, and not intent, was the critical issue.

The court's focus on the causation issue was misplaced. The "but for" test of causation renders this issue one of only minimal significance in most situations.[56] A finding of causation is almost certain if the test is that the result would not have occurred "but for" the conduct of the actor. Further, although the "concurrent

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48. *See* Proposed Draft, *supra* note 44, at 46 (Committee Comment to § 6.07) *citing* R. PERKINS, CRIMINAL LAW 687-90 (2d ed. 1969).

49. TEX. PENAL CODE ANN. § 6.04(a) (1974).

50. *See* Proposed Draft, *supra* note 44, at 46 (Committee Comment to § 6.07).

51. Searcy & Patterson, *Practice Commentary*, TEX. PENAL CODE ANN. § 6.04 (1974).

52. 41 Tex. Crim. 564, 55 S.W. 961 (1900).

53. The Proposed Draft explains that section 19.02 "deals explicitly" with this type of causation problem. *See* Proposed Draft, *supra* note 44, at 47 (Committee Comment to § 6.07). Searcy and Patterson indicate that section 19.02 "deals partially" with this problem. Searcy & Patterson, *Practice Commentary*, TEX. PENAL CODE ANN. § 6.04 (1974).

54. 556 S.W.2d 322 (Tex. Crim. App. 1977).

55. *Id.* at 325.

56. Bubany, *The Texas Penal Code of 1974*, 28 Sw. L.J. 292, 307 (1974).

cause" limitation of section 6.04(a) may make the fact finder's determination of guilt more difficult, in light of the precedents of *Taylor, Keaton,* and *Miers*, it poses no problem as a legal issue.

The *Blansett* court's crucial mistake was its failure to recognize the distinction drawn in section 6.03(a) between intentionally engaging in conduct and intentionally causing a result.[57] Section 6.03(a) was drafted as a general provision applicable to various crimes. Because of this universal application, the intent definition necessarily incorporated two types of offense elements, one relating to the nature of one's conduct and the other relating to the result of one's conduct.[58] Specifically, under this section one acts "intentionally, or with intent, with respect to the nature of his conduct or to a result of his conduct when it is his conscious objective or desire to engage in the conduct or cause the result."[59] Under this provision, therefore, a person may act intentionally (1) with respect to the nature of his conduct if it is his conscious objective or desire to engage in that conduct, or (2) with respect to a result of his conduct if it is his conscious objective or desire to cause the result. On its face, however, section 6.03(a) does not clearly delineate that the phrase "conscious desire to engage in conduct" refers only to a conduct-type offense element or that the phrase "conscious desire to cause the result" refers only to a result-type offense element. The statute's failure expressly to make this delineation apparently led the *Blansett* court to conclude that a person may act intentionally (1) with respect to the nature of his conduct if it is his conscious desire to engage in the conduct *or* cause the result, or (2) with respect to the result of his conduct if it is his conscious desire to engage in the conduct *or* cause the result.

Applying this latter interpretation of section 6.03(a) to the facts of *Blansett* the court concluded that Blansett intentionally caused the death of Gray because he intentionally raided the jail and because Gray would not have died but for this conduct.[60] The court's failure to draw the "conduct-result" distinction is critical because section 19.02(a)(1), which provides that one commits an offense if

57. "The court's analysis ignores the distinction between the state-of-mind requirement as it relates to conduct and that requirement as it relates to the result of the conduct . . . ." Dix, *Administration of the Texas Death Penalty Statutes: Constitutional Infirmities Related to the Prediction of Dangerousness,* 55 TEXAS L. REV. 1343, 1348 n.15 (1977).

58. Searcy & Patterson, *Practice Commentary,* TEX. PENAL CODE ANN. § 6.03 (1974). See note 45 *supra.*

59. TEX. PENAL CODE ANN. § 6.03(a) (1974).

60. Blansett v. State, 556 S.W.2d 322, 325 (Tex. Crim. App. 1977).

he intentionally causes the death of another, obviously refers to a "result-type" culpable mental state and not to a "nature of conduct" mental state.[61] Although Blansett intentionally engaged in the conduct, raiding the jail, he clearly did not intend to cause the result, the death of Gray.

Only by segregating each of the elements of intentional murder and then applying the appropriate definition to separate facts could the court reach a result so incongruous with the plain import of the statute. Section 1.05(a) of the Penal Code suggests that such a strict construction of the elements of an offense is neither wise nor warranted.[62] Section 1.05(a) expressly abolishes the rule that a penal statute be strictly construed. Instead, it provides that provisions of the code "shall be construed according to the fair import of their terms, to promote justice and effect the objectives of the code."[63] Certainly, the fair import of section 19.02(a)(1) is that one should be held liable under this section only if he "intentionally" causes the death of another person within the common sense meaning of this term.

Although the deterrence of life-endangering crimes, such as the jail raid in *Blansett,* is concededly a valid objective of the code, this objective can be reasonably fulfilled by the application of the felony-murder rule in section 19.02(a)(3) to the *Blansett* facts.[64] Indeed, the legislative history of section 6.04(a) suggests that the felony-murder rule should be controlling. Cognizant of the problems historically encountered in finding causation under these facts the drafters indicated felony-murder is the appropriate sanction.[65] The

61. The Practice Commentary to the Texas Penal Code explicitly refers to death as a result-type offense element. Searcy & Patterson, *Practice Commentary,* TEX. PENAL CODE ANN. § 6.03 (1974).

62. TEX. PENAL CODE ANN. § 1.05(a) (1974).

63. *Id.*

64. TEX. PENAL CODE ANN. § 19.02(a)(3) (1974). A reasonable analysis of Blansett's liability under the felony-murder statute would probably require the application of the doctrine of vicarious liability as articulated in section 7.02(a) of the Penal Code. Although the attempted jail break might be considered an "act clearly dangerous to human life," Dowden's initiation of a gun battle in the jail house seems more clearly in point. Because Blansett could be held responsible for the acts of Dowden, as in fact was held, it would not be difficult to find Blansett guilty of murder.

One writer suggests the killing might have been considered involuntary manslaughter. Dix, *Administration of the Texas Death Penalty Statutes: Constitutional Infirmities Related to the Prediction of Dangerousness,* 55 TEXAS L. REV. 1343, 1349 n.15 (1977). Under TEX. PENAL CODE ANN. § 19.05(a)(1) (1974), a person commits involuntary manslaughter if he "recklessly causes the death of an individual."

65. Searcy & Patterson, *Practice Commentary,* TEX. PENAL CODE ANN. § 6.04 (1974). *See* Proposed Draft, *supra* note 44, at 47 (Committee Comment to § 6.07).

legislators' intimation that the felony-murder rule covers the situation in which a victim is killed by a third person should be considered not only an endorsement of the policy that felons should be held responsible for the natural consequences of their acts, but also a rejection of the imposition of capital liability for such crimes.

The implications of the *Blansett* decision are broad. In essence, the court has incorporated a culpable mental state into the mere commission of a volitional act.[66] Once this culpable mental state has been established, criminal liability is sure to follow because of the liberal test of causation under section 6.04(a). Thus, under the *Blansett* holding courts can theoretically impose capital liability even in instances in which the felony-murder provision would not apply. Indeed, the felony-murder rule is more limited in its application because under it the actor must at least commit an act clearly dangerous to human life.[67] Under *Blansett's* strict construction approach, a defendant need only intentionally engage in the conduct but for which death would not have occurred to commit intentional murder under section 19.02(a)(1). Further, if one of the five aggravating circumstances is present, the defendant commits capital murder. Thus, the net effect of the *Blansett* decision is to extend capital murder to wholly unintentional killings,[68] a result clearly

66. "Care should be taken not to confuse the 'voluntariness' requirement with the mental state described in sections 6.02 and 6.03 . . . ." Bubany, *The Texas Penal Code of 1974*, 28 Sw. L.J. 292, 301 (1974).

67. TEX. PENAL CODE ANN. § 19.02(a)(3) (1974).

68. As Professor Dix notes:

> By judicial sleight of hand, the court in *Blansett* dispensed with any requirement of mens rea in capital murder regarding the result of death except perhaps for a requirement that defendant have harbored a conscious disregard for the risk to life he created. This does gross violence to the statutory homicide scheme, which attempts to grade homicide offenses by the reprehensibility of defendants' mens rea with respect to the death of the victim.

Dix, *Administration of the Texas Death Penalty Statute: Constitutional Infirmities Related to the Prediction of Dangerousness*, 55 TEXAS L. REV. 1343, 1349 n.15 (1977).

inconsistent with legislative history and common meaning of the statute.[69]

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69. The court's finding of an intentional killing in *Blansett* appears even more tenuous in light of the jury's response to special issues to determine if the defendant should be subject to capital punishment. In answers to special issues required by TEX. CODE CRIM. PROC. ANN. art. 37.071(b)(1) (Supp. 1978), the jury found that Blansett had not deliberately killed the deceased. The *Blansett* court perceived this finding as inconsistent with the jury's determination of guilt. Blansett v. State, 556 S.W.2d 322, 327 n.6 (Tex. Crim. App. 1977). The court conceded that section 19.03(a) and article 37.071 are inconsistent; "a jury having found that a defendant intentionally committed capital murder to be consistent would have to find that the act was deliberately done." *Id., citing* Searcy & Patterson, *Practice Commentary,* TEX. PENAL CODE ANN. § 19.03 (1974). The court explained this inconsistency simply by concluding that "the jury did not want the death penalty assessed." 556 S.W.2d at 327 n.6. One writer suggets, however, that these findings are not inconsistent at all. He notes that a jury may consistently find that a killing was "knowingly" and yet not "deliberately" committed. Crump, *Capital Murder: The Issues in Texas,* 14 HOUS. L. REV. 531, 551 (1977).