

1 **TITLE: DAN - VIC**  
2 **SUBJECT: CRIMINAL LAW**  
3 **FILE: CRIME07F.QUE**  
4

5 Dan has been in and out of mental institutions most of his life. While working in a grocery store  
6 stocking shelves, he got into an argument with Vic, a customer who complained that Dan was  
7 blocking the aisle. When Dan swore at Vic and threatened to ick him out of the store, Vic told  
8 Dan that he was crazy and should be locked up. Dan exploded in anger, shouted he would kill  
9 Vic, and struck Vic with his fist, knocking Vic down. As Vic fell, he hit his head on the tile floor,  
10 suffered a skull fracture, and died.

11  
12 Dan was charged with murder. He pleaded not guilty and not guilty by reason of insanity. At the  
13 ensuing jury trial, Dan took the stand and testified that he had been provoked to violence by  
14 Vic's crude remarks and could not stop himself from striking Vic. Several witnesses, including a  
15 psychiatrist, testified about Dan's history of mental illness and his continued erratic behavior  
16 despite treatment.

- 17  
18 1. Can the jury properly find Dan guilty of first degree murder? Discuss.  
19  
20 2. Can the jury properly find Dan guilty of second degree murder? Discuss.  
21  
22 3. Can the jury properly find Dan guilty of voluntary manslaughter? Discuss.  
23  
24 4. Can the jury properly find Dan not guilty by reason of insanity? Discuss.

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5

6 **I. FIRST DEGREE MURDER**  
7

8 First degree murder is common law murder, committed under aggravating circumstances. The  
9 jury can find Dan guilty of first degree murder only if each element of common law murder, plus  
10 one of the recognized aggravating circumstances, is proved beyond a reasonable doubt.  
11

12 **A. COMMON LAW MURDER:** Common law murder is homicide, committed with malice,  
13 without excuse, justification, or mitigation.  
14

15 **1. Homicide:** Homicide is the killing of one person by another. The conduct of the accused,  
16 Dan, must have been the actual and proximate cause of the death of Vic.  
17

18 **2. Actual and Proximate Cause:** Dan's conduct is the actual cause of Vic's death because  
19 but for Dan "*striking Vic with his fist*" Vic would not have died. Dan's conduct was also the  
20 proximate cause of Vic's death because death was not the result of an unforeseeable intervening  
21 event, nor a highly improbable sequence of events following the Dan's act. Thus, the homicide  
22 element is satisfied. Dan killed Vic.  
23

24 **3. Malice:** Malice can be shown in only four ways: (1) Intent to kill (2) Intent to inflict  
25 great bodily harm (3) Wanton conduct in utter disregard of a high likelihood of great bodily harm  
26 or death (4) Felony Murder Rule.  
27

28 a.. The first form of malice, ***intent to kill***, cannot be proven beyond a reasonable doubt  
29 with the facts given. In support of the prosecution's case, Dan did shout "*he would kill Vic,*" as  
30 he was striking him. Also Dan hit Vic hard enough to cause Vic to fall to the floor. On the other  
31 hand, Dan did not use a weapon, just his fist. He did not continue to attack Vic after he fell to  
32 the floor. On these facts, as a matter of law there is reasonable doubt as to whether or not Dan  
33 intended to kill Vic.  
34

35 b. The second form of malice, ***intent to inflict great bodily harm***, may or may not be  
36 satisfied by the facts. Intent to cause great bodily harm is intent to cause harm beyond that  
37 ordinarily caused by a simple fist fight. It is intent to puncture, break, cause damage to internal  
38 organs, cut skin, etc.  
39

40 Here, Dan intended to inflict some degree of bodily harm to Vic. He did say "*he would kill*  
41 *Vic.*". He also hit Vic hard enough to cause Vic to fall. On the other hand no weapons were used  
42 and Dan did not continue to attack Vic after he fell.  
43

44 A jury would most likely conclude that there was reasonable doubt as to whether or not Dan  
45 intended to inflict great bodily harm on Vic.

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c. The third form of malice, *wanton conduct in conscious disregard of a high likelihood of great bodily harm or death*, cannot be established beyond a reasonable doubt because there is not a high likelihood of great bodily harm or death from a simple strike with a fist.

d. The fourth form of malice, *Felony Murder Rule*, is not applicable because Dan was not committing an independent felony which resulted in Vic’s death. Assaulting Vic with Dan’s fist is neither an independent, nor inherently dangerous felony. It is not even a felony.

**Conclusion:** A jury could not properly find Dan guilty of common law murder because the malice element cannot be established beyond a reasonable doubt. Since common law murder is an element of first degree murder, Dan cannot be convicted of first degree murder.

**B. AGGRAVATING CIRCUMSTANCES:** Even if the prosecution could establish common law murder (second degree murder), notwithstanding the arguments against malice, the prosecution must also establish one of the recognized aggravating circumstances. The most common aggravating circumstances which elevate common law murder to first degree murder are premeditation, lying in wait, poison, bomb, torture, killing of police prison guards or politicians, felony murder, and the killing of a child involving a sex act.

Here, the only aggravating circumstance which the prosecutor could rationally assert would be premeditation. However, according to the facts, Dan “*exploded in anger*” when told he was crazy. A jury could not find premeditation, beyond a reasonable doubt, based on this evidence.

**Conclusion:** A jury cannot properly find Dan guilty of first degree murder because the prosecution cannot establish malice, and therefore cannot establish common law murder; and even if the state could prove common law murder, it cannot establish the aggravation required for first degree murder.

**II. SECOND DEGREE MURDER**

Second degree murder is the modern label for common law murder. Dan cannot be convicted of second degree murder because the prosecution cannot establish malice.

**III. VOLUNTARY MANSLAUGHTER**

Voluntary manslaughter requires malice. Assuming, for this part of the analysis, the prosecutor could establish malice, are there circumstances sufficient to mitigate the killing to voluntary manslaughter.

The three basis for mitigation are (1) imperfect privilege, (2) Diminished capacity and (3) Heat of passion.

1 **A. IMPERFECT PRIVILEGE:** Dan did not misjudge the existence of a privilege which he  
2 reasonably believed he had. His conduct is not almost self defense, or defense of others, or  
3 prevention of crime.

4

5 **B. DIMINISHED CAPACITY:** Diminished capacity is, by statute, in a minority of states, a  
6 mitigating factor. It usually only applies to homicide cases. When the defense is based on a  
7 statutory rule, it is an affirmative defense, which means the defendant must prove with the  
8 preponderance of evidence that he or she satisfies the terms of the statute.

9

10 In states which recognize this defense, it can be used to reduce second degree murder to  
11 voluntary manslaughter.

12

13 **1. Minority of States:** In a minority of states, the statutes allow this defense if Dan proves  
14 that he was *not capable of forming* the required intent because of his mental illness. In these  
15 states Dan will probably lose because his erratic behavior is not much evidence that Dan did not  
16 have the *capacity* to form malice.

17

18 **2. Model Penal Code:** The Model Penal Code has a diminished capacity provision. It  
19 applies if the defendant establishes that the killing was the result of an “extreme emotional  
20 disturbance.”

21

22 Dan will contend he was in a state of “extreme emotional disturbance” when he “exploded in  
23 anger.” He will offer as evidence his history of mental illness, continued erratic behavior,  
24 testimony of witnesses and psychiatrists about his mental illness, and the trigger words “*he was*  
25 *crazy and should be locked up.*” A jury would probably find this evidence does not meet the  
26 standard of preponderance of evidence.

27

28 **Conclusion:** Dan has the burden of proof. Dan cannot establish the statutory defense of  
29 diminished capacity with the preponderance of evidence.

30

31 **C. HEAT OF PASSION:** Dan must show, with the preponderance of the evidence, that (1) he  
32 was in fact provoked to such an extent that he lost self control, (2) that a reasonable person  
33 would have been provoked to this extent, (3) that he subjectively did not cool down in the short  
34 time, and (4) that a reasonable person would not have cooled in the time available.

35

36 **1. Actual Provocation:** There is significant evidence that Dan was actually provoked: (1)  
37 Dan testified that he was provoked to violence by Vic’s crude remarks and could not stop  
38 himself. (2) A psychiatrist and several other witnesses testified that Dan continued to exhibit  
39 erratic behavior, despite treatment. (3) Dan has been in and out of mental institutions most of his  
40 life. A jury could believe that, more likely than not, he was actually provoked to this extent by  
41 the crude remarks.

42

43 **2. Reasonableness of Provocation:** A jury would probably find that the second element,  
44 reasonableness, is not satisfied because. A reasonable person would not be provoked to this  
45 extent simply because he was accused of being crazy. Dan has mental problems. However, the

1 standard which is usually applied is “reasonable person” not “reasonable crazy person.”

2

3 **3 & 4. No Cooling Time:** A jury could properly find that the third and fourth requirements  
4 were satisfied because there was very little cooling time. According to the facts, Dan “exploded”  
5 and acted immediately.

6

7 Finally, the common law policy is that words alone will never be sufficient provocation for  
8 mitigation to voluntary manslaughter. Here, Dan was provoked by words alone. An exception to  
9 this rule is often applied if the words alone carry provocative information. That exception does  
10 not apply here.

11

12 **Conclusion:** Heat of passion mitigation probably fails because a reasonable person would not  
13 have lost self control merely because someone said he was “*crazy and should be locked up.*”  
14 Moreover, words alone are almost always insufficient to justify mitigating to voluntary  
15 manslaughter.

16

#### 17 **IV. NOT GUILTY BY REASON OF INSANITY**

18

19 There are four views as to what constitutes legal insanity. They are (1) the *M’Naughten* Rule, (2)  
20 Irresistible impulse (3) Model Penal Code (4) *Durham*. Additionally, the states are divided as to  
21 whether the prosecution must prove sanity beyond a reasonable doubt, or the accused must prove  
22 insanity with the preponderance of the evidence.

23

24 **A. M’NAUGHTEN:** *M’Naughten* provides a person is insane if because of a mental disease  
25 or defect, the person did not know what he was doing, or if he did, he did not know it was wrong.  
26 Dan testified he knew what he was doing but “*could he could not stop himself from striking*  
27 *Vic.*” Dan is not insane under this test.

28

29 **B. IRRESISTIBLE IMPULSE:** Irresistible impulse is a better theory for Dan. A person is  
30 insane under this test if because of a mental disease or defect she could not control her conduct.  
31 Here, Dan testified that he “*could not stop himself.*” A jury could find that Dan’s testimony,  
32 along with the testimony of several witnesses and a psychiatrist, was sufficient to meet the  
33 preponderance of the evidence standard.

34

35 **C. MODEL PENAL CODE:** Under the Model Penal Code, a person is insane if because of a  
36 mental disease or defect she lacks substantial capacity to appreciate the nature of her act, or to  
37 control it. Here, Dan has offered his own testimony, and that of several witnesses, and that of a  
38 psychiatrist, about his history of mental illness and continued erratic behavior. A jury might be  
39 persuaded that he lacked substantial capacity to control his behavior. Dan may be insane under  
40 the MPC standard.

41

42 **D. DURHAM:** *Durham* was adopted by only one state, Maine. Under the *Durham* standards,  
43 Dan must establish that his conduct was the product of a mental disease or defect. A jury could  
44 conclude that the evidence cited next was sufficient to establish insanity under this test.

45

1 **CONCLUSION:** Dan may or may not be found not guilty by reason of insanity, depending on  
2 the rule of insanity in the jurisdiction.

3

4 Word Count:1760