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CRIMINAL LAW—DEADLY WEAPON DOCTRINE

The inference of intent to kill or to do serious bodily harm which is drawn from the use of a deadly weapon is one of the types of inferred malice which developed in the early common law. Such writers as Hale,¹ Blackstone,² and East³ give the classical examples of its application in the past.⁴ Many of the early decisions were cases of excessive punishment where the provocation was not sufficient to justify the use of a deadly weapon. For instance, a master corrected his servant with an iron bar; in one case, a mother, and in another, a schoolmaster, killed a child by stamping on his abdomen; and a park-keeper tied a boy who was found stealing wood, to a horse's tail and struck the horse so that the boy was dragged away by it.⁵

It should be pointed out that one does not have to intend to kill in order to be guilty of murder at common law; an intent to inflict grievous bodily harm is sufficient.⁶ Perkins suggests that this should be kept in mind in applying the deadly weapon rule because it permits convictions under an inference of intent to inflict serious bodily harm where an inference of intent to kill might not be possible.⁷

Why is such an inference of intent drawn from the use of a deadly weapon in a manner likely to cause death or serious bodily harm? The best rationalization would seem to be that every one knows that some weapons, such as loaded guns, and certain other instruments, such as stones, when used in a dangerous manner, are likely to produce death. Therefore when one directs such an instrument at another person, he may naturally expect that his conduct will produce death or serious bodily harm.⁸ In such cases it would seem that it is reasonable to infer that the killing was in fact intentional, and the actor should be guilty of murder in the absence of justification or excuse.

The fact that the doctrine is generally applied only in cases where there is an absence of direct proof of malice raises several difficult problems. The defendant may say, for example, that he used the weapon in self-defense, and his only chance is that the

¹ I HALE, HISTORY OF THE PLEAS OF THE CROWN (1778) 454, 457.

² IV BL. COMM. (11th ed. 1790) 199.

³ EAST, A TREATISE OF THE PLEAS OF THE CROWN (1806) 234, 235.

⁴ Grey's Case, J. Kelyng 64, 84 Eng. Rep. 1084 (1666).

⁵ IV BL. COMM. (11th ed. 1790) 199.

⁶ STEPHEN, A DIGEST OF THE CRIMINAL LAW (1877) 161.

⁷ Perkins, *A Re-Examination of Malice Aforethought* (1934) 43 YALE L. J. 537, 554.

⁸ For the rationalization offered by many courts see: *People v. Crenshaw*, 298 Ill. 412, 417, 131 N. E. 576, 578 (1921); *Commonwealth v. Webster*, 5 Cush. 295, 306 (Mass. 1850); *Commonwealth v. York*, 9 Metc. 93, 103 (Mass. 1845).

jury will believe his story.⁹ An innocent man, placed in this unfortunate situation by the inference of malice, might be convicted and receive the death penalty for a crime which in fact he did not commit. It is to be expected, of course, that many defendants will make false statements in an attempt to escape punishment. This group will probably constitute the great majority, but if there is a strong likelihood that a substantial number of innocent persons will be affected adversely to the point of injustice by the rule, it should be restricted in its application. Should it appear that such is the case, the adoption of the negligent murder doctrine in cases involving a deadly weapon is a possibility. The use of the deadly weapon would then be one of the circumstances to be considered and would raise no inference of malice. This would provide a greater safeguard for the rights of the defendant and might still allow the prosecution a conviction for murder where the man is actually guilty, although under a different rule and with a lesser degree of punishment under most modern statutes.

Having dealt with the reasoning behind the rule, we may inquire into the effect which the law gives to this inference. The best view seems to be that a rebuttable inference of the fact of malice is set up.¹⁰ It is considered that the rights of the defendant are not excessively endangered, for he may rebut the inference by any defenses or evidence which he is able to offer. And, on the other hand, the state is aided greatly from the procedural standpoint in that, having presented evidence to prove the killing with a deadly weapon, it may rest and allow the defendant to present his case. The net result of the application of the doctrine is that the state may show a killing with a deadly weapon; and that showing alone, without mitigating circumstances, will be sufficient to sustain an indictment and a conviction for murder.

Now it may be asked, what is a deadly weapon? In *Acres v. United States* it was defined as "a thing with which death can be easily and readily produced."¹¹ And, as we have seen, the requirement of deadliness is also met if great or serious bodily injury is likely to result. In applying these definitions, the following categories provide an adequate coverage for all situations. A deadly weapon may mean (1) a weapon or instrumentality deadly *per se*, or (2) one not inherently dangerous but which is used in a deadly manner. Under the first category will be included such weapons

⁹ This very thing occurred and the jury rejected the defendant's plea of self-defense and convicted him of murder. *Durr v. State*, 175 Miss. 797, 168 So. 65 (1936).

¹⁰ The term *inference* should be used instead of *presumption*, since the latter denotes a rule of evidence and goes further in its scope than the former. LX WIGMORE, EVIDENCE (3rd ed. 1940) sec. 2491; Perkins, *A Re-Examination of Malice Aforethought* (1934) 43 YALE L. J. 537, 550.

¹¹ 164 U. S. 388, 391, 41 L. Ed. 481, 484 (1896).

as loaded guns and pistols¹² and long knives.¹³ Instruments which have been classified as deadly because of the manner of their use under the circumstances include automobiles,¹⁴ bricks,¹⁵ hands and feet,¹⁶ pen knives,¹⁷ canes,¹⁸ pistols used as bludgeons,¹⁹ stones,²⁰ chisels,²¹ pins (used on a baby),²² chairs,²³ policemen's maces,²⁴ iron bars,²⁵ and axes.²⁶ The circumstances may include the strength of the actor and of the victim as well as the nature and size of the instrument itself.²⁷

The determination of what is a deadly weapon may be made by the court, the jury, or by both. A Kentucky case defines the province of court and jury by saying:

"The established rule on the subject is that, where the weapon is of such character as to admit of but one conclusion in that respect, the question whether or not it is deadly is one of law; but where the weapon employed is such that its deadly character depends upon the manner and circumstances of its use, the question is one of fact for the jury."²⁸

Many courts have ruled on the issue in cases in which it is conclusive that the weapon is deadly or in which it is practicable for them to do so.²⁹ It is significant to note that the question is generally decided as a matter of law where the weapon used is deadly *per se*, and that the jury decides whether the instrument was deadly under the circumstances. In addition to these distinctions, there is still a third aspect to the determination of what is a deadly weapon. The issue may be a mixed one, partly of law and partly of fact. In such cases, the jury will render a verdict after an instruction has been given by the court stating the elements of a deadly weapon

¹² Landreth v. State, 201 Ind. 691, 171 N. E. 192 (1930); Ewing v. Commonwealth, 129 Ky. 237, 111 S. W. 352 (1908); McBride v. State, 121 Tex. Crim. Rep. 288, 51 S. W. 2d 385 (1932).

¹³ Jones v. State, 74 Tex. Crim. Rep. 205, 167 S. W. 1110 (1914).

¹⁴ People v. Clink, 216 Ill. App. 357 (1920). *Contra*: People v. Cash, 326 Ill. 104, 157 N. E. 76 (1927).

¹⁵ State v. Lee, 6 W. W. Harr. 11, 171 Atl. 195 (Del. 1933); State v. Sims, 80 Miss. 381, 31 So. 907 (1902).

¹⁶ State v. Smith, 196 Wash. 534, 83 P. 2d 749 (1938).

¹⁷ State v. Roan, 122 Iowa 136, 97 N. W. 997 (1904).

¹⁸ Collins v. State, 22 Okla. Crim. Rep. 203, 210 Pac. 285 (1922).

¹⁹ Prior v. State, 41 Ga. 155 (1870); Shadle v. State, 34 Tex. 572 (1870-1871).

²⁰ Acres v. United States, 164 U. S. 388, 41 L. Ed. 481 (1896).

²¹ Commonwealth v. Branham, 69 Ky. (8 Bush) 387 (1871).

²² State v. Norwood, 115 N. C. 789, 20 S. E. 712 (1894).

²³ Kouns v. State, 3 Tex. Crim. App. 13 (1877).

²⁴ Doering v. State, 49 Ind. 56, 1 Am. Crim. Rep. 60 (1874).

²⁵ People v. Lee, 23 Cal. App. 2d 168, 72 P. 2d 572 (1937).

²⁶ Dollarhide v. United States, 1 Morris 233, 39 Am. Dec. 460 (Iowa 1843); State v. Walker, 193 N. C. 489, 137 S. E. 429 (1927).

²⁷ Cosby v. Commonwealth, 115 Ky. 221, 72 S. W. 1089 (1903).

²⁸ Owens v. Commonwealth, 187 Ky. 207, 210, 218 S. W. 719, 720 (1920).

²⁹ See State v. Davis, 14 Nev. 407, 413 (1879).

and leaving to the jury the task of finding whether the accused is guilty under the particular circumstances of the case.³⁰

In conclusion, it is submitted that the inference of malice from the use of a deadly weapon is desirable and that the application of the rule should be continued. Although it may work an injustice in a few cases, it is believed that these instances will be rare, and that, all things considered, its merits outweigh these possibilities of injustice.

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³⁰ An instruction which the Kentucky courts have used is found in STANLEY, INSTRUCTIONS TO JURIES IN KENTUCKY (1940) sec. 810.