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The Scope of Cross-Examination

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measures the act of a person in criminal assault and battery and in manslaughter cases based on negligence contains the standard used in civil negligence cases and an added degree of dangerousness, which combined, equal the reckless disregard requisite for a conviction of criminal negligence.

In applying this test, it will be necessary to determine whether under all the circumstances the conduct of the defendant falls so far below the standard of care of the "reasonable man" as to amount to a reckless disregard of the consequences of the act and of the rights of others. Since civil and criminal negligence are the same in kind, only differing in degree, the circumstances surrounding a given case would be considered in exactly the same way in the determination of civil and criminal negligence, but, of course, in a criminal case the circumstances must be such as to make the act of the defendant more dangerous in order to secure a conviction.

This leads to the conclusion that physical defects are a part of the circumstances to be considered in the determination of criminal negligence, and one who has such defects must exercise more care with the faculties he does possess than the normal man.

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THE SCOPE OF CROSS-EXAMINATION

The American courts have adopted at least three different rules regarding the scope of cross-examination. The problem presented by these various rules is whether or not on cross-examination the opposing counsel should be confined to the matters brought out on the direct examination, or should he be permitted to cover everything in issue, both in the plaintiff's and defendant's case.

Of the three major lines of decisions dealing with this problem, one, adopted by the Federal courts and the most widely followed today, is to the effect that the cross-examination should be confined entirely to matters brought out on the direct examination.[1] Another line of decisions allows the cross-examiner to cover everything in issue,[2] and the third group takes a middle position allowing the cross-examiner to cover anything in the opponent's case.[3]

In England, the rule has always been that the cross-examiner has the privilege of examining the opponent's witness in every stage

[1] Philadelphia & Trenton R.R. v. Stimpson, 14 Pet. 448, 39 U.S. 448 (1840); Farley v. Norfolk & Western R.R., 14 F. (2d) 93 (1926); Tucker v. United States, 5 F. (2d) 818 (1925); Conley v. Mervis, 324 Pa. 577, 188 Atl. 350, 108 A.L.R. 160 (1936); Note (1920) 7 A.L.R. 1116.

[2] Ficken v. Atlanta, 114 Ga. 970, 41 S.E. 58 (1902); O'Connell v. Dow, 182 Mass. 541, 66 N.E. 788 (1903); Hemminger v. Western Assurance Co. 95 Mich. 355, 54 N.W. 949 (1893); Walter v. Hoeffner, 51 Mo. App. 46 (1892); Hawkesworth v. Scholer, 12 Mees & W. 45, 152 Eng. Rep. 1105 (1843); Gilbert v. Campbell, 13 N.B. 55 (Canada 1870).

[3] Champu v. Dewey, 9 Mich. 381, 419 (1861); Wigmore, Evidence, (3rd. ed. 1940) sec. 1889

of the cause and for every purpose.[4] This was likewise the rule in the United States through the first quarter of the nineteenth century,[5] being clearly stated by Mr. Justice Sutherland in the case of *Fulton Bank* v. *Stafford,*[6] in the following language:

> "When a witness has been sworn in chief, the opposite party may not only cross-examine him in relation to the point which he was called to prove, but he may examine him as to any matter embraced in the issue. He may establish his defense by him without calling any other witness."

The first American authority departing from this rule and intimating another was the case, *Ellmaker* v. *Buckley,*[7] in which Chief Justice Gibson said that a witness may not be cross-examined as to facts which are "wholly foreign to what he has already testified." The Justice cited no authority for this expression which appears to be obiter dictum in a decision that is itself very vague. In 1840 Justice Story, speaking for the court in the case of *Philadelphia & T. R. R.* v. *Stimpson,*[8] spoke of the "now well established rule" that "a party has no right to cross-examine a witness except to facts and circumstances connected with the matters stated in his direct examination." This rule referred to as well established was in fact a sudden innovation upon the general practice as it was known to the common law, both in England and the United States. Regardless, however, of the origin of the rule and the propriety of its establishment, it is now the well established rule in the Federal courts and in a great majority of the jurisdictions.[9]

Another rule adopted by some courts without explanation or apparent reason, is to the effect that the cross-examiner may question the opposing witness upon any matter which forms a part of the case of the opposite party.[10] This permits leading questions on cross-examination, but requires the cross-examiner to confine his ques-

[4] Fletcher v. Crosbie, 2 Moo. & Rob. 417 (1842); Dickenson v. Skee, 4 Espanasse 67, 170 Eng. Rep. 644 (1800); Rex v. Brook, 2 Stark 473, 171 Eng. Rep. 709 (1819); Morgan v. Bridges et al., 2 Stark 314, (3rd. ed. 1940) sec. 1889.

[5] Greenleaf, Evidence, (15th ed. 1892) sec. 445; Wigmore, Evidence, (3rd ed. 1940) sec. 1885–1893.

[6] Fulton Bank v. Stafford, 2 Wend. 483 (N.Y. 1827). The other view that cross-examination should be confined to matters brought out on the direct examination, is now firmly established in New York. Hall v. Allemannia Fire Ins. Co., 161 N.Y. Supp. 1091, (App. Div. 1916); Blumquist v. Snare & Triest Co., 119 N.Y. Supp. 225 (1898) Briggs v. Gardner, 15 N.Y. Supp. 335 (1891).

[7] Ellmaker v. Buckley, 16 S. & R. 72 (Pa. 1827).

[8] Philadelphia & T. R.R. v. Stimpson, 14 Pet. 448, 10 L.Ed. 535 (U.S. 1840).

[9] Philadelphia & T.RR. v. Stimpson, cited *supra* notes 1 & 7; Resurrection Gold Mining Co. v. Fortune Gold Mining Co., 129 Fed. 668 (1904); Hill v. Wabash R.R., 1 F. (2d) 626 (1924); Conley v. Mervis 324 Pa. 577, 188 Atl. 350, 108 A.L.R. 160 (1936); See collection of cases holding directly on this point in 70 Corpus Juris, Sec. 818, footnote 57.

[10] Wigmore, Evidence, *supra* note 3.

tioning to the opponent's case and refrain from presenting his own case by the opposing witnesses.

The Kentucky rule in this regard is somewhat different from the majority rule, confining the scope of cross-examination to matters brought out on the direct, but at the same time by implication permits the cross-examiner to question the witness on new matter, but not by leading questions.

The Kentucky Code,[11] section 594, Provides:

> "The examination of a witness by the party producing him is the direct examination; his examination, upon the *same* (italics ours) matter, by the adverse party is the cross-examination. The direct examination must be completed before the cross-examination begins, unless the court otherwise direct."

and section 595 provides:

> "A question which suggests to the witness the answer which the examining party desires is a leading question. On the direct examination, leading questions are not allowed, except under special circumstances making it appear that the interests of justice require it. On cross-examination, the adverse party may put leading questions, but, if he examine the witness on new matters, such examination is subject to the same rules as the direct examination."

Since the provision is that examination upon the same matter is cross-examination, and the requirement is that leading questions be used only on matter brought out on the direct examination, it would seem that the Kentucky rule would resemble in some respects the orthodox rule which was the early American view. The prevalent exception is that in examining upon the whole issue the examiner is not allowed to employ leading questions on new matter. This question has been considered by the Court of Appeals in one case.[12]

The decisions following the orthodox rule which is now the minority view in this country, are based on the reasoning that application of this rule tends to speed up the progress of the trial, to bring evidence before the court, and prevent the suppression of material evidence by the direct examination. They reason that there can be no scientific demarcation between the plaintiff's and defendant's case. Conceding that there is a difference, the Federal rule would require the trial judge to make innumerable rulings as to the propriety of questions put by the cross-examiner, giving rise to a large number of improper decisions.[13]

Some other reasons given in support of the minority view are: (1) that both parties should have equal opportunities to examine the witness, and that it is the purpose of legitimate cross-examination to extract from the opposing witness any knowledge which the witness may have on any part of the issue; (2) the cross-examining party

[11] Carroll's Kentucky Codes, Civil and Criminal, Baldwins Rev. (1936).

[12] Collins v. Flynn, 155 Ky. 717, 160 S.W. 496 (1913).

[13] Wigmore, Evidence, (3rd ed. 1940) sec. 1887, page 538.

should be allowed to impeach the opposing witness if the testimony is unfavorable to his case which he could not do if he had to make the witness his own.

The reasons advanced in support of the Federal rule, the majority rule in this country, are (1) a witness during his cross-examination is the witness of the party who calls him, and not the witness of the party who cross-examines him;[14] (2) confining the scope of cross-examination tends to promote order and method in the presentation of a case;[15] (3) the issues are clarified and confusion eliminated to the greatest possible extent by the separation of the litigants' respective contentions and the testimony produced in support thereof;[16] (4) there is no sound reason why the cross-examiner should be allowed, by leading questions, to introduce his own case.

In an attempt to determine which of these rules is the best, it would seem that the decisive factor should be, which rule, in its practical application, best serves the ends of justice in the form of speedy trials, and which rule tends to allow evidence to be placed before the jury in the clearest and least confusing form.

While it is sometimes difficult to determine what is within and what is without the scope of cross-examination, it can be safely said that only that which tends to limit, refute or explain the statements of the direct examination or to modify the inferences deductible therefrom, comes within the range of proper cross-examination.[17] The rule that cross-examination should be limited to the scope of the direct does not mean that cross-examination shall consist of a mere categorical review of the identical matters testified to by the witness, but merely that new subjects are not to be introduced.[18] Where the direct examination opens a general subject, the cross-examination may go into any phase of that subject.

The party who offers a witness stands sponsor for his credibility and is bound by his testimony both on direct and cross-examination. Being so bound, he has a right to call him to testify for a particular purpose, and his adversary should not be permitted to examine him generally, but should be confined to the testimony brought out on direct.[19] Adherence to the other rule deprives the calling party of cross-examination as to evidence called out by the other side, and the party against whom the witness was first called would obtain the advantage of introducing evidence under the pretense of cross-examination.[20]

To promote order and method in the presentation of a case, each party should have an opportunity to present his case without the

[14] Wilson v. Wagar, 26 Mich. 452 (1873); Champu v. Dewey, 9 Mich. 419 (1861).

[15] Conley v. Mervis, 324 Pa. 577, 188 Atl. 350, 108 A.L.R. 160 (1936)

[16] *Ibid*

[17] State v. Kelsie, 93 Vt. 450, 108 Atl. 391 (1919).

[18] Andrew v. State, 62 Fla. 10, 56 So. 681 (1911).

[19] Aeolian Co. v. Standard Music Roll Co., 176 Fed. 811 (1910).

[20] Stafford v. Fargo, 35 Ill. 481 (1864).

introduction of matters unrelated to his case in chief and not touched upon in his evidence. Such procedure clarifies the issues as much as possible by reducing to a minimum the possibility of the intermingling of matters purely defensive in character, with the facts of a plaintiffs' case.

It is certainly desirable not to mingle and thus confuse the testimony of the opposing parties. If the plaintiff first presents all his testimony, and then the defendant presents the evidence which properly pertains to his defense, the line of separation is well defined. No confusion is likely to follow, and the jury, if there be one, will be less likely to fall into mistakes, or to overlook material facts. The rule merely regulates the manner of examination. The party loses no rights, he merely postpones the time of introducing his testimony. This course can be productive of no prejudice to a party trying to prove by a witness other matters than such as are embraced in the direct examination, for it is well settled that he may afterwards introduce him as his own witness.

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OBJECTIVE FACTORS AS PART OF THE CIRCUMSTANCES IN CASES INVOLVING CIVIL NEGLIGENCE.

The standard of care usually required in cases of civil negligence is that degree of care which would be exercised by a reasonably prudent man under the circumstances. In each particular case, the circumstances vary. But those circumstances may, in themselves, be divided into two categories: (1) subjective circumstances, and, (2) objective circumstances. Extending this division still further, the second category, objective factors, may, in turn, be sub-divided into (1) instrumentalities, (2) environment or weather conditions, and (3) location. As is readily seen, all of these factors are things which are external in relation to the actor, things over which he has no control or at most, only a partial control. It is the purpose of this article to discuss what effect, if any, these objective factors play in determining whether or not the actor conducted himself as a reasonable man under the circumstances.

As a general rule, the standard of a reasonable man under the same or similar circumstances is unvarying, but the degree of care which the actor must exercise varies with a change in the circumstances. In other words, the law sets the standard and the jury measures the conduct of the party by it.[1]

Looking first at instrumentalities, the greater the risk of causing injury to a third person, the greater is the degree of care which he must exercise in order that his conduct will not be negligent. The care which the law exacts from any person, firm, or corporation, engaged in employing an instrumentality is always in proportion to the degree of danger reasonably to be foreseen from the use of

[1] Heimer v. Salisbury, 108 Conn. 180, 142 Atl. 749, 750 (1928).