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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.

JOHN A. FULTON

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).

the means employed.² Thus, one who carries or handles loaded firearms in the immediate vicinity of others must exercise due care to prevent those firearms from discharging and injuring third persons. Some courts hold that a very high degree of care is required of the one carrying loaded weapons,³ but others require that the actor exercise only ordinary care not to endanger the lives of others. However, these courts admit that, owing to the dangers attendant upon the use of firearms, the ordinary care one is bound to exercise is really a very high degree of care.⁴ Naturally, the care which is exacted of such a person is greater than that required of one carrying an unloaded gun. Although the *standard* of care in both cases is exactly the same, the *degree* of care in the first instance is higher because the danger of injury from a loaded gun is greater than the danger from an unloaded firearm, the weapon making a difference in the circumstances.

The same rule applies to other instrumentalities which are by nature or use dangerous. One who keeps dynamite or employs it in his business must exercise a high degree of care to prevent injury to third persons from the negligent handling of it.⁵ So also in the case of other explosives of a dangerous nature such as nitroglycerine⁶ and gas.⁷ Where electricity is the instrumentality involved, the owner or operator of the electric plant is bound to exercise reasonable care in maintaining a system of inspection by which any change in the physical condition of any part of the plant, tending to increase the danger to persons in pursuit of their business or pleasure, may be reasonably discovered.⁸

In the case of each instrumentality, the operator's conduct is measured by the standard of a reasonable man under the circumstances. If a reasonable man would have exercised greater care

² Carroll v. Grande Ronde Electric Co., 47 Ore. 424, 84 Pac. 389, 391 (1906).

³ Rudd v. Byrnes, 156 Cal. 636, 105 Pac. 957, 959 (1909); Lindh v. Protective Motor Service Co., 310 Pa. 1, 164 Atl. 605, 606 (1933).

⁴ McLaughlin v. Marlott et al., 296 Mo. 656, 246 S.W. 548, 553 (1922).

⁵ Cincinnati, N.O. & T.P. Ry. v. Padgett, 158 Ky. 301, 164 S.W. 971, 972 (1914); Hamblin v. Gano, 76 So. 633 (Miss., 1918); Jagoe Const. Co. v. Harrison et al., 17 S.W. (2d) 861, 862 (Tex., 1929).

⁶ "In handling so dangerous an explosive as nitroglycerine, a very high degree of care, as compared with the caution required in performing a less dangerous work, is only reasonable care." Merrill v. Torpedo Co., 79 W.Va. 669, 92 S.E. 112, 116 (1917).

⁷ Koelsch et al. v. Philadelphia Co., 152 Pa. 355, 25 Atl. 522, 524 (1893).

⁸ Foley v. Northern California Power Co., 14 Cal. App. 401, 112 Pac. 467, 469 (1910); Bourke v. Butte Electric & Power Co., et al., 33 Mont. 267, 83 Pac. 470, 473 (1905). "A higher degree of care and vigilance is required in dealing with a dangerous agency (electricity) than is in the ordinary affairs of life and business, which involve little or no risk of injury to persons or property." MacDougall v. Pennsylvania Power & Light Co., 311 Pa. 387, 166 Atl. 589, 591 (1933), cited with approval in Vescio v. Pennsylvania Electric Co., 336 Pa. 502, 9 A. (2d) 546, 550 (1939).

while handling such instrumentality, the actor must also exercise a higher degree of care to escape being negligent. In other words, where the actor is operating or using an instrumentality, the care required of him is ordinary care under the circumstances; but the nature of the instrumentality may be such that ordinary care (reasonable care) under those circumstances is a high degree of care.⁹ With this in mind, we may conclude that where an instrumentality is involved in a negligence case, the jury will consider the potentially dangerous character of the instrumentality itself and whether or not a reasonable man employing it would have used the same or more care than that employed by the actor.

Another objective factor which must often be considered as part of the circumstances is that of environment or the forces of nature. In the case of *Pope v. Reading Co.*,¹⁰ the court said:

"A person is charged with ordinary knowledge of the workings of these forces, and his conduct, if it is to escape being stigmatized as wanting in care, must conform to the normal workings of the forces of nature. . . . For example, . . . when (one) leaves his automobile on a grade, with the brakes not effectively set and without turning the front wheels to the curb, he is chargeable with knowledge of the fact that gravity is likely to cause that vehicle to move down grade and injure persons in its path. . . . When a person dams a large body of water at a point in a valley above human habitations, he is chargeable with the knowledge that pressure of that body of water will be exerted against the dam, and if it overcomes it, the water will rush down into the valley. . . . Therefore, he must so build and maintain his dam as to withstand the water's pressure."

The individual must also have due regard (that of a reasonable man under the circumstances) for such incidental factors as smoke, rain, snow, sleet, or other atmospheric conditions.¹¹ For example, A is driving his automobile along a highway on a rainy night when he runs over B, injuring him. In determining whether or not A was negligent, the court will apply the standard of a reasonable man under the circumstances, and these circumstances will include the objective factors of rain and darkness. Thus, more care will be required of one who is driving through the rain at night than of one driving on a clear day since the adverse circumstances created by the objective factors demand that greater care be exercised.

Furthermore, even the *locus* of the act may be a factor in determining whether or not the accused acted as a reasonable man under the circumstances. That is, an act which would otherwise be considered due care may not be due care because of the locality

⁹ *Jackson v. Goldin*, 26 Ga. 283, 106 S.E. 12 (1921).

¹⁰ 304 Pa. 326, 156 Atl. 106, 109 (1931).

¹¹ *Peoples' Drug Stores Inc. v. Windham*, 12 A. (2d) 532, 538 (Md., 1940); *Johnson v. Reinhard Bros. Co.*, 285 N.W. 536, 537 (Minn., 1939) (snow); *Salera v. Schroeder*, 183 Minn. 478, 237 N.W. 180, 181 (1931) (fog); *Palmer v. Marceille*, 106 Vt. 500, 175 Atl. 31, 35 (1934) (smoke).

in which it is performed. One may employ dangerous explosives in rural or isolated districts without creating risks toward anyone. But the same use of explosives, even when carefully done, in a thickly populated city may create such risks that reasonable, cautious men would not employ them.¹² Likewise, "If a man fires a gun across a road where he may reasonably anticipate that persons will be passing and hits someone, he is guilty of negligence and liable for the injury he has caused; but if he fires in his own wood, where he cannot reasonably anticipate that anyone will be, he is not liable to anyone whom he shoots."¹³

It thus appears that in determining whether or not a person is negligent, the courts do take into consideration the objective factors of the case. In every instance, the actor must conduct himself as a reasonable man under the circumstances, but the care which he is required to use is dependent, for one thing, upon the *objective factors* of those circumstances: the instrumentality which he employed, the weather conditions, and the location of the act.

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¹² Harper, F. V., *The Law of Tort* (1933) Section 75.

¹³ See, *Smith v. London & South-Western R. R.*, L.R. 6 C.P. 14, 22 (1870).