Kentucky Law Journal

Volume 30 | Issue 4 Article 8

1942

The External Circumstances in Criminal Negligence Cases

Marcus Redwine Jr.
University of Kentucky

and the judge should have so recognized,[11] the decision is unmistakably sound.

DONALD MALONEY

THE EXTERNAL CIRCUMSTANCES IN CRIMINAL NEGLIGENCE CASES

Criminal liability does not arise from every negligent act, for the actor is criminally responsible only when his negligence is of a higher degree than that which is the basis of civil liability[1] His conduct must indicate, under all the circumstances, a reckless disregard for the lives and safety of others,[2] and if his conduct does evince such recklessness, he is guilty of criminal negligence. If his conduct indicates a wanton disregard for the lives and safety of others, he is guilty of such criminal negligence as constitutes the basis of a conviction for murder.[3]

Whether the conduct of the actor indicates a reckless or wanton disregard for the safety of others can be determined only by a consideration fo the circumstances of each case. The circumstances in any given case may be classified as either subjective or objective, but it is the purpose of this note to discuss only the influence of the objective, or external, circumstances upon the actor's conduct and the care exercised by the actor in view of those circumstances.

One who has in his possession or under his control an instrumentality, dangerous in character, must control it with care proportionate to the danger likely to result from its negligent use.[4] The greater the prospective danger to others, the greater is the degree of care required.[5] It follows that the degree of care required is variable and dependent upon the circumstances, e. g. the nature of the instrumentality, the time, place, proximity of other persons, and other external factors.[6] By reference to a few instrumentalities, the effect of these objective circumstances in criminal negligence cases may be seen.

It is not necessary here to discuss the character of firearms, for it is generally recognized that firearms are dangerous instrumen-

---

[11] These facts satisfy the test in note 7 *supra* that the court should have ruled so as a matter of law.

[1] Wells v. State, 162 Miss. 617, 139 So. 859 (1932); Hiller v. State, 164 Tenn. 388, 50 S. W. (2d) 225 (1932); Note (1937) 25 Ky. L. J. 183, 184.

[2] State v. Moore, 129 Iowa 514, 106 N. W. 16 (1916); People v. Przybyl, 365 Ill. 515, 6 N. E. (2d) 848 (1937); State v. Whatley, 210 Wis. 157, 245 N. W. 93 (1932).

[3] Reed v. State, 25 Ala. App. 18, 142 So. 441 (1932) (conviction for murder based on "highly reckless" and "greatly dangerous" conduct); State v. Shepard, 171 Minn. 414, 214 N. W. 280 (1927).

[4] Dahl v. Valley Dredging Co., 125 Minn. 90, 145 N. W. 796 (1914); 20 R. C. L. 51.

[5] Morrison v. Appalachian Power Co., 75 W. Va. 608, 84 S. E. 506 (1915).

[6] Koontz v. Whitney, 109 W. Va. 114, 153 S. E. 797 (1930); 20 R. C. L. 52, cited with approval in Annotation, 53 A. L. R. 1205.

talities. Moreover the care required of one using a firearm depends upon the environment and particular locality in which the firearm is used. In *People v. Fuller*,[7] defendant discharged his gun into the *public highway* about 9 o'clock at *night*, thereby killing a person a short distance down the highway. In affirming a judgment of manslaughter, the court characterized the defendant's conduct as an act of "gross carelessness." In *State v. Clark*,[8] defendant's companion was carrying the carcass of a deer. Defendant's view of him was obstructed by a *tree*, and defendant thought that the moving object was a deer. Without waiting to investigate, defendant fired and unintentionally killed his companion. The court held that the defendant would be guilty of manslaughter if he were "grossly negligent under the circumstances."

These cases illustrate that the dangerous nature of the firearm, its discharge at night, in a public place, or in a locality frequented by others,[9] and the impairment of vision by foliage or natural surroundings,[10] affect the care which must be exercised by one using the firearm.

Poisons are also dangerous in character, and persons who deal with them must necessarily be held to a high degree of care. One who causes death by negligently administering poison to another[11] or by negligently failing to affix the proper label to a bottle of poison[12] is guilty of manslaughter. The potent character of poison

[7] 2 Parker's Criminal Reports 16 (N. Y., 1823).

[8] 99 Ore. 629, 196 Pac. 360 (1921).

[9] State v. Hardie, 47 Iowa 647, 29 Am. Rep. 496 (1878) (defendant was held guilty of "criminal carelessness" in pointing an old revolver at his wife while attempting to scare her. The revolver accidentally discharged, and she was killed); Sparks v. Commonwealth, 3 Bush 111, 96 Am. Dec. 196 (Ky., 1867) (defendant, while walking down the street, fired his pistol over his shoulder and killed another); State v. Emery, 78 Mo. 77, 47 Am. Rep. 92 (1883) (defendant flourished a loaded revolver in a saloon. He accidentally discharged it, and a bystander was killed. Defendant was held guilty of "recklessness incompatible with a proper regard for human life and safety"); Banks v. State, 85 Tex. Crim. Rep. 165, 211 S. W. 217 (1919) (defendant was held guilty of recklessness in firing into a moving train); Reg. v. Salmon, L. R. 6 Q. B. Div. 79 (1880) (bullet fired from defendant's gun had to cross three highways to hit target. Deceased was killed while standing in his father's garden, and defendant was held guilty of manslaughter).

[10] Webster v. Seavey, 83 N. H. 60, 138 Atl. 541 (1927) (defendant heard rustling in the bushes. Thinking the object moving the bushes was a deer, he fired and injured plaintiff. Despite the fact that plaintiff was not wearing the usual hunter's outfit, the court said that the defendant did not take sufficient precautions to determine whether his target was man or beast); Harper v. Holcomb, 146 Wis. 183, 130 N. W. 1128 (1911) (defendant was held liable for his negligence in shooting at an object partly obscured by the underbrush without waiting to determine the nature of the object).

[11] Ann v. State, 11 Humph. 159 (Tenn., 1851) (gross heedlessness).

[12] Tessymond's Case, 1 Lew. C. C. 169, 168 Eng. Rep. 1000 (Lancaster Summer Assizes, 1828).

and the use made of it operate to increase the care required of persons possessing it.[13]

An automobile is not a dangerous instrumentality per se, but it may become a dangerous instrumentality if negligently used.[14] It is evident from principles already enumerated that to determine whether the driver's conduct amounts to criminal negligence, it is necessary to examine the external circumstances under which the act is committed. The amount of traffic on the highway or street, the adjacent terrain, the grade of the highway, the condition of the surface of the highway and shoulders,[15] the presence of rain, snow, glare of the sun, darkness, fog, and smoke[16] must all be considered in determining the care required to relieve the driver of liability for civil negligence. Each of these external factors, or any combination of them, affects the care which he must exercise. These factors likewise affect the care which the driver must exercise to relieve himself of liability for criminal negligence. The automobile itself as an instrumentality and the weather and other conditions under which it is used combine to determine the care required.

Therefore it is seen that all the instrumentalities mentioned may be used in a criminally negligent manner. A person using one of these instrumentalities must exercise the care required by the nature of that instrumentality and by the other external factors involved, for different combinations of external circumstances alter the care required. If one fails to exercise the care required by the particular instrumentality in relation to the circumstances, to such an extent

[13] This principle likewise applies to two other dangerous instrumentalities, dynamite and electricity. One employing either of these agencies is bound to exercise such care as is commensurate with the danger likely to be created by its negligent use. Mattson v. Minn. & N. W. R. R., 95 Minn. 477, 104 N. W. 443 (1905) (dynamite); Wood v. McCabe & Co., 151 N. C. 457, 66 S. E. 433 (1909) (defendant placed plaintiff in charge of moving some dynamite which had been left on the ground for two or three days. Held: defendant was negligent in not instructing plaintiff as to the increased danger of explosion when dynamite is exposed to atmospheric conditions); Morrison v. Appalachian Power Co., 75 W. Va. 608, 84 S. E. 506 (1915) (electric transmission wires). From these cases it would seem that the care required in the use of other instrumentalities, such as swords, daggers, "jack-knives," etc., also varies under changing circumstances.

[14] Parker v. Wilson, 179 Ala. 361, 60 So. 150 (1912); Tyler v. Stephan's Admrx., 163 Ky. 770, 174 S. W. 790 (1915); Steffen v. McNaughton, 142 Wis. 49, 124 N. W. 1016 (1910).

[15] Musante v. Guerrini, et al., 125 Cal. App. 416, 13 P. (2d) 965 (1932); Tente v. Jaglowicz, 241 Ky. 720, 44 S. W. (2d) 845 (1932); Schoepp v. Gerety, 203 Pa. 538, 107 Atl. 317 (1919).

[16] Gilbreath v. Blue & Gray Trans. Co., 269 Ky. 787, 108 S. W. (2d) 1002 (1937) (snow and ice); Barber v. El Dorado Lbr. Co., 139 So. 29 (La. App., 1932) (defendant was driving an automobile at night in foggy and rainy weather); Dominick v. Haynes Bros., —— La. ——, 127 So. 31 (1930) (smoke screen); Castille v. Richard, 157 La. 274, 102 So. 398 (1924) (cloud of dust); Ebling v. Nielsen, 109 Wash. 355, 186 Pac. 887 (1920) (darkness and rain); Franklin v. Bristol Tramways & Carriage Co., Ltd., (1941) 1 All Eng. Law Rep. 188 (wartime blackouts).

that he is guilty of recklessness or wantonness, he is criminally liable.

MARCUS REDWINE, JR.

THE ADMISSIBILITY OF EVIDENCE OF OTHER CRIMES IN A CRIMINAL PROSECUTION

In a prosecution for carnally knowing a female under sixteen, the commonwealth was allowed to introduce, over the defendant's objection, evidence that the defendant and prosecutrix had previously had illicit intercourse. The defendant contended on appeal that the introduction of evidence of other offenses prejudiced the jury against him. *Held:* In prosecutions for sexual crimes it is competent to introduce evidence of both prior and subsequent acts of a similar nature with the same person, for the purpose of showing the relation and mutual disposition of the parties, or the design and disposition of the accused to indulge his criminal desires in such fashion. *Tuttle v. Commonwealth,* 287 Ky. 371, 153 S. W. (2d) 931 (1941).

In another case James Hatfield, a deputy constable, attempted to arrest deceased and his wife who were momentarily parked on a roadside, on a charge of having intercourse on a public highway. In an ensuing altercation the deceased was shot and killed. At the trial of the defendant, the commonwealth introduced evidence to the effect that on previous occasions the defendant had similarly accosted other persons near the same place and attempted to extort money from them in consideration of not taking them before a magistrate. The defendant appealed from the ruling of the trial court on the ground that the introduction of this evidence was highly prejudicial and unwarranted. *Held:* The commonwealth may introduce such evidence when it tends to establish motive for the commission of the crime under trial or when the different offenses were committed by novel means in a peculiar manner, or a part of a plan or system or criminal action. *Hatfield v. Commonwealth,* 287 Ky. 467, 153 S.W. (2d) 892 (1941).

These two recent decisions of the Kentucky Court of Appeals present the much disputed question of when, if at all, evidence of past criminal acts may be introduced. Separately the cases present different aspects, or rather exceptions to the general rule involved, but they are so related as to present the same general problem and thus may be commented upon together and individually.

The general rule is that evidence of other crimes is not admissible in a prosecution for the crime with which the defendant is presently accused. There are, however, several well recognized exceptions to and limitations upon this general rule, of which the two principal cases are examples. Mr. Underhill in his valuable work on criminal evidence gives the rule above and states five exceptions to it.[1] These exceptions are well summarized in the case

[1] *Criminal Evidence,* (1st ed., 1901), sec. 87.