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# Criminal Law--The Deadly Weapon Doctrine--The Hands as Deadly Weapons

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the physical structure thereof. This decision seems to let down the bars for the compensation of any disease when the time and place of its occurrence can be shown. The practical effect of the *Sexton* case is to write out of the Act the express *exclusion* of diseases as compensable. Occupational diseases would still be not compensable due to the interpretation of I *supra*, since they are not "by accident".<sup>28</sup> If such was the legislative intent, there would be no use for the exception, and it would have been omitted.

The writer examines the word "injury" when confronted with the facts of the *Sexton* case. An injury in the ordinary sense is not produced by the falling of a germ which weighs a small fraction of an ounce upon a man weighing many thousands of times more. However, the test of a traumatic injury is not to be found in a comparison of weights, nor is a practical legal problem to be solved by rarified philosophical reasoning. It is to be found in a reasonable meaning of injury as used by the average man, limited by the word "traumatic". The *Sexton* case, in its concern to find a trauma, loses sight of the fact it must find an injury. In other words there must be an injury before its cause is considered. The court errs in finding an injury which results in a disease in the *Sexton* case. Using injury in its ordinary sense makes each case rest on its own facts. If Sexton had cut his finger while he was dressing the rabbits, driving tularemia germs into his skin, there would be a traumatic *injury* causing the disease, though the injury would probably not cause him to cease working. If a blacksmith burns his fingers and blood poisoning results, that should be a compensable disease. The definition of "traumatic" in the *Sexton* case is fundamentally correct when "injury" is considered in its ordinary sense.

In conclusion it is submitted that the Act should be applied as suggested in the outline. The court errs in beginning an opinion with a discussion of trauma. The first part of an opinion should be concerned with the personal injury by accident factor; the traumatic injury factor should be treated at the end, and only when the personal injury by accident is a disease. It is submitted that the provision about recovery for disease has been held to include diseases which should not be compensable. It should include only those diseases resulting from a traumatic injury which can be called an injury in the usual, ordinary meaning of the word. This would make most disease cases rest on their own facts. The decision on existence or non-existence of a traumatic injury would be left to the Workmen's Compensation Board, and its decision would be as conclusive as if it were a finding of fact by a jury.

J. PAUL CURRY

#### CRIMINAL LAW—THE DEADLY WEAPON DOCTRINE—THE HANDS AS DEADLY WEAPONS

Defendant attacked his six-year-old nephew with his bare hands and strangled him to death after having committed the crime of

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<sup>28</sup> Moreland, *supra* note 5, at 200.

sodomy upon him. Murder conviction was sustained by the appellate court, upon the ground that the hands used for the purpose of strangulation upon a defenseless infant constituted a deadly weapon,<sup>1</sup> and therefore a presumption of premeditation and malice arose which was not rebutted. *State v. Heinz*, 223 Iowa 1241, 275 N.W. 10, A.L.R. 959 (1937).

The deadly weapon doctrine probably arose as a remedy for the difficulty of establishing the presence of express malice in homicide cases. The doctrine raises a presumption of the requisite premeditation and malice when an instrumentality recognized as capable of being dangerous to life is used in a manner which constitutes it a deadly weapon.<sup>2</sup>

The term "deadly weapon" has been defined by many courts, but the most generally accepted definition may be stated as follows: A deadly weapon is a weapon likely, from the manner of its use, to produce death or great bodily harm.<sup>3</sup> Another definition which seems to be more explicit and clear is: "A deadly weapon is a weapon with which death may be easily and readily produced; *anything*, (italics added) no matter what it is, . . . if it is a weapon, or if it is a thing with which death can be easily and readily produced, the law recognizes as a deadly weapon."<sup>4</sup> The courts in their interpretation of what constitutes a deadly weapon, have permitted the following to be placed in this class under the circumstances of the particular case: pistol; revolver;<sup>5</sup> razor;<sup>6</sup> axe;<sup>7</sup> hoe;<sup>8</sup> iron bar;<sup>9</sup> club;<sup>10</sup> brick;<sup>11</sup> and a pin.<sup>12</sup>

Whether a weapon is to be regarded as deadly often depends more upon the manner of its use than upon its intrinsic character.<sup>13</sup> No

<sup>1</sup> In the appellate report the court failed to state whether the question concerning the hands as deadly weapons was submitted to the jury. The court, however, inferentially stated that the hands used under these circumstances were deadly weapons as a matter of law.

<sup>2</sup> *Grey's Case*, Sayre, *Cases on Criminal Law* (1st ed. 1927) 772 [original report: *J. Kelyng*, 64, 84 Eng. Reprint 1084 (1666)]; *Kriel v. Com.*, 68 Ky. (5 Bush) 362, 373 (1869). See also Clark and Marshall, *The Law of Crimes* (3rd ed. 1927) 291.

<sup>3</sup> *Acers v. United States*, 164 U. S. 388, 17 S. Ct. 91, 41 L. Ed. 481 (1896); *People v. Lopez*, 35 Cal. 23, 66 Pac. 965 (1901); *Danforth v. State*, 44 Tex. Cr. App. 105, 69 S. W. 159 (1902).

<sup>4</sup> *Acers v. United States*, 164 U. S. 388, 17 S. Ct. 91, 41 L. Ed. 481, 484 (1896).

<sup>5</sup> *People v. Wells*, 145 Cal. 138, 78 Pac. 470 (1904).

<sup>6</sup> *State v. Iannucci*, 4 Pa. 193, 55 Atl. 336 (1903).

<sup>7</sup> *State v. Shields*, 110 N. C. 497, 14 S. E. 779 (1892).

<sup>8</sup> *Hamilton v. People*, 113 Ill. 34, 55 Am. Rep. 396 (1885).

<sup>9</sup> *Danforth v. State*, 44 Tex. Cr. App. 105, 69 S. W. 159 (1902).

<sup>10</sup> *People v. Fuqua*, 58 Cal. 245 (1881).

<sup>11</sup> *Acers v. United States*, 164 U. S. 388, 17 S. Ct. 91 (1896).

<sup>12</sup> *State v. Norwood*, 115 N. C. 789, 20 S. E. 712 (1894).

<sup>13</sup> "The question frequently arises in assault cases as to what constitutes a dangerous or deadly weapon, and it has been proven that almost any sort of instrument, depending upon the manner in which it is manipulated, may be construed as dangerous or deadly." *G. W. Keenan, Dangerous and Deadly*, 23 J. Crim. L. 1114 (1933). See also *Com. v. Duncan*, 91 Ky. 592, 16 S. W. 530 (1891).

weapon is a deadly weapon unless *used* in a deadly manner, and many instruments ordinarily not considered dangerous may become such by use under particular circumstances. For example: a pistol is considered intrinsically deadly; yet, one who strikes a healthy adult with the butt end of this characteristically deadly weapon is not using a weapon which is so deadly as an ordinary pin stuck into the throat of a new-born infant. Thus, in determining whether a weapon is deadly or not, reference must be made to the manner of use of the weapon as well as to the intrinsic nature of the weapon itself.

The courts make some distinction between characteristically dangerous weapons and weapons ordinarily considered non-dangerous. The mere fact that an instrument produces death is not, in itself, sufficient to establish its character as a deadly weapon.<sup>14</sup> It is only evidence thereof. Other evidentiary factors are necessary, and these factors frequently depend upon the nature of the weapon, whether characteristically dangerous or non-dangerous. Where the nature of the instrument indicates a high degree of deadliness, it is sufficient to raise the presumption of malice if it is shown that the weapon was used in the manner which constitutes it a dangerous instrumentality.<sup>15</sup> However, where the nature of the weapon is such as to be considered ordinarily non-dangerous (as the fist or hand), the manner of use of the weapon must indicate that death or great bodily harm will necessarily result.<sup>16</sup>

These distinctions, although probably well taken, are, however, mere rules of evidence. Thus, where the instrument is dangerous, less additional evidence will be required to determine that the weapon was deadly than under those circumstances where the instrument is non-dangerous; although, where sufficient additional evidence is available the ordinarily non-dangerous instrument may become equally as deadly as the intrinsically-dangerous weapon. In either of these cases, however, where the nature of the weapon or the manner in which it is used leaves doubt as to whether the weapon is deadly or not, the question should be left to the jury under appropriate instructions.<sup>17</sup>

Application of these rules to the instant case should determine whether the decision of the court was correct. The court concluded that the hands used for the purpose of strangling an infant are deadly weapons and that it was therefore unnecessary to have express malice and premeditation in order to subject defendant to a murder conviction. The hands and fists are generally considered non-dangerous

<sup>14</sup> *Scott v. State*, 46 Tex. Cr. R. 317, 81 S. W. 952 (1904). A shotgun at long range was held to be a non-dangerous weapon, though death resulted. See also *Medford v. State*, 86 Tex. Cr. App. 237, 216 S. W. 175 (1919).

<sup>15</sup> Hall and Glueck, *Cases on Criminal Law* (Temp. ed. 1939) 114. See also Clark and Marshall, *The Law of Crimes* (3rd ed. 1927) 292.

<sup>16</sup> Clark and Marshall, *The Law of Crimes* (3rd ed. 1927) 292; *Shaw v. State*, 34 Tex. Cr. App. 435, 31 S. W. 361 (1895).

<sup>17</sup> *Com. v. Duncan*, 91 Ky. 592, 16 S. W. 530 (1891); *Com. v. Yarnell*, 24 Ky. Law Rep. 144, 68 S. W. 136 (1902); *Carter v. Com.*, 131 Ky. 240, 114 S. W. 1186 (1909).

instruments.<sup>18</sup> Hence, the intrinsic characteristics of the instrument itself will be of little evidentiary consequence. However, the clear evidence of the manner of use indicates that these are weapons with which death may be easily and readily produced and that death or serious bodily harm must be the ultimate result of such use under the circumstances (use upon a defenseless infant). Therefore, there was not sufficient doubt as to the quality of deadliness of the instruments in order to justify submission of this question to the jury, and the court in the instant case was justified in concluding that the hands may be and were deadly weapons as a consequence of the manner of their use.

J. WIET TURNER, JR.

### PROSPECTIVE OVERRULING OF CONSTITUTIONAL CONSTRUCTION

The city of Covington over a period of years had levied a tax at a lower rate<sup>1</sup> than the maximum provided for local units by Kentucky Constitution 157. The revenue thereby procured had been insufficient to pay the city's total indebtedness for these fiscal years and a city ordinance authorized the issuance of bonds to fund the floating indebtedness. Ky. Const. 157 also provides that:

"No county, city, town, taxing district, or other municipality, shall be authorized or permitted to become indebted, in any manner, or for any purpose, to an amount exceeding, in any year, the income and revenue provided for such year . . . and any indebtedness contracted in violation of this section shall be void. Nor shall such contract be enforceable by the person with whom made."

In an action to secure judicial approval of the bond issue, as provided for by Ky. Stat. 186c, the city was given approval and the defendant taxpayer appealed, claiming that the floating debt was invalid as being an amount exceeding the income and revenue provided for the preceding years. The Court of Appeals affirmed the decision of the chancellor approving the bond issue, but stated in its decision that appellants' contentions were correct, that previous decisions approving similar bond issues had misconstrued the purpose and intent of the constitutional provision, that the instant issue was approved only because prior decisions of the court had misled the parties into the establishment of property rights, and that in the future the constitu-

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<sup>18</sup> Clark and Marshall, *The Law of Crimes* (3rd ed. 1927) 294. Cf. *State v. Sayles*, 175 Iowa 314, 155 N. W. 837 (1916).

<sup>1</sup> Kentucky Constitution 157 provides a maximum tax rate for cities of the class of Covington of \$1.50 per \$100.00, and that cities may become indebted in any one year to an amount in excess of that produced by the maximum tax rate providing such indebtedness was approved by a two-thirds vote of the citizens at an election called for that purpose. Section 153 provides a limit on gross indebtedness of local units regardless of the manner in which acquired. The city of Covington had levied a tax at an average rate of only \$1.29 for several years.