Kentucky Law Journal

Volume 28 | Issue 4 Article 7

1940

Homicide--Is Knowledge of Danger Necessary in Murder by a Dangerous Act?

J. Wirt Turner Jr.
University of Kentucky

HOMICIDE—IS KNOWLEDGE OF DANGER NECESSARY IN MURDER BY A DANGEROUS ACT?

Stephen classified the English law of murder into four categories, the second of these involving the following:

> "Malice aforethought . . . may consist in . . . knowledge that the act which causes death will probably cause the death of, or grievous bodily harm to, some person, whether such person is the person actually killed or not, although such knowledge is accompanied by indifference whether death or grievous bodily harm is caused or not, or by a wish that it may not be caused."[1]

Homicides caused by an act involving probable death or grievous bodily harm were treated vaguely by the early writers in so far as they were treated at all. Stephen's classification has been accepted as the best statement of the law as it existed then.

It is a fair estimation of Stephen's position to say that he believed that the actor must have knowledge of the danger and not mere knowledge of the circumstances. It was not until Justice Holmes attacked the problem[2] that any doubt arose in regard to this interpretation. Holmes objected to the necessity for *actual knowledge of the danger* and concluded that it was sufficient if the actor had *knowledge of such circumstances* that according to common experience there was a plain and strong likelihood that death would follow the contemplated act.[3] In other words, Holmes suggested that an objective approach should be taken in lieu of the subjective approach of Stephen.

The purpose of this paper is to analyze the positions of these two prominent authorities, to determine wherein they differ, and to ascertain which has the better foundation in logic and practicality.

As a practical matter the distinction between the two views is not pronounced. Where the actor knows of all those circumstances which

---

[1] Stephen, *Digest of the Criminal Law*, (7th ed. 1926) art. 315(b). The other three categories involved express intent, homicide in the commission of a felony, and homicide while resisting arrest. Each of the four classes, according to Stephen, are conclusive indications of the presence of malice aforethought upon which the distinction between murder and manslaughter is based.

[2] The first case in which Holmes attacked the problem was that of Com. v. Chance, 174 Mass. 245, 54 N. E. 551 (1899). However, Holmes had previously discussed the problem in considerable detail. See Holmes, *The Common Law* (1881) pp. 51 *et seq.*

[3] In Com. v. Chance, 174 Mass. 245, 54 N. E. 551, 554 (1899), Holmes spoke of an act done with "knowledge of such circumstances that according to common experience there is a plain and strong likelihood that death will follow the contemplated act." Holmes seems to place the emphasis upon *circumstances*, rather than upon knowledge. The presence of knowledge, according to Holmes, may be ascertained generally from reference to the circumstances and is therefore not an important factor. It is highly probable that Holmes had no intention of inserting a subjective element in his theory when he used the term "knowledge of the circumstances." See Holmes, *The Common Law* (1881) pp. 55, 56.

would lead a man of common experience to conclude that there is a plain and strong likelihood that death will follow the contemplated act, then this actor will most frequently have actual knowledge of the danger involved as well as knowledge of the circumstances. The distinction will become material only in those cases where the actor is aware of the circumstances plainly indicating great danger and yet has no actual knowledge of that great danger. Such cases are seldom found except among those involving extreme absentmindedness and intoxication.[4]

Even in theory the distinction between these two views is not great. Knowledge of the actual danger is a subjective element the presence of which from necessity is usually ascertained by reference to objective circumstances. Inferences as to a particular actor's knowledge must usually proceed from propositions about the knowledge that men like the actor would generally have if they should act as he did under like circumstances.[5] Hence, the presence of knowledge of the danger can usually be ascertained wholly by reference to the extent of the actor's knowledge of the circumstances. Stephen's theory, therefore, generally cannot receive application without reference to the actor's knowledge of the circumstances. This, in effect, means that the two theories are so interwoven that usually the existence of one necessitates the existence and presence of the other.

However, *some* distinction between these two views does exist. Holmes view tends toward objectivity in contrast to the subjective view taken by Stephen.[6] Cases do not often arise which serve to distinguish the two views because of the difficulty of ascertaining subjective elements without basing this ascertainment upon objective circumstances. However, when they do arise one theory or the other must prevail.

It has been suggested that the Holmes-Stephen theories may be distinguished in cases of extreme absentmindedness.[7] Let us test the validity of this suggestion by means of the following hypothetical case: Defendant, a worker on top of a building, absentmindedly believed that he was working on an isolated building when in fact he was work-

[4] See Michael and Wechsler, *A Rationale of the Law of Homicide* (1937) 37 Col. L. Rev. 701, 711.

[5] Holmes is one of the advocates of this objective attitude toward subjective elements such as intent, foresight and knowledge. "The test of foresight is not what this very criminal foresaw, but what a man of reasonable prudence would have foreseen." And again, "The same principle applies to knowledge that applies to foresight. It is enough that such circumstances were actually known as would have led a man of common understanding to infer from them the rest of the group making up the present state of things." Holmes, *The Common Law* (1881) pp. 53–56.

[6] It cannot be said that Holmes' theory is purely objective because of his requirement that there be *knowledge* of the circumstances. This suggests the presence of a subjective factor. However, Holmes would probably determine the presence or absence of this knowledge by reference to objective circumstances. *Ibid.*

[7] *Supra*, n. 4, at 711.

ing on a building on a densely populated thoroughfare in a large city; he threw a heavy beam off the roof without giving warning and a passerby was killed. Throwing the beam down would not have been improper on an isolated building, but here it was extremely dangerous.

Is the defendant guilty of murder according to Stephen's theory? This question must necessarily be answered in the negative. The defendant was not conscious of danger at the time he committed the act, and therefore could have had no actual knowledge of the great danger involved therein.

Could the defendant be convicted of murder under application of Holmes' theory? At the moment of the commission of this extremely dangerous act, the defendant did not have present knowledge of such circumstances that according to common experience would lead him to believe there was a plain and strong likelihood that death would occur. Therefore, if Holmes' theory is construed as requiring a present and conscious knowledge of the circumstances, then, even under Holmes' theory, no conviction of murder could be sustained.

On the other hand, Holmes' theory could be construed so as to give an entirely different result. Although it must be admitted that at the time of the commission of the dangerous act the defendant had forgotten the circumstances, it could be reasoned that he did *know* these circumstances but failed to apply this knowledge. Since Holmes' theory requires mere knowledge, not consciousness, of the circumstances, then it could logically be said that the requirement is satisfied by the fact that the defendant *had knowledge of* these circumstances, regardless of the fact that he did not *apply* this knowledge so as to become conscious of these circumstances at the time he committed the dangerous act. This reasoning accords with the theory of objectivity,[8] and consequently Holmes would probably prefer this interpretation rather than the subjective construction requiring a present conscious knowledge of the circumstances. Therefore, we can say with reasonable assurance that under application of Holmes' theory the defendant in this hypothetical case is guilty of murder.

Since the more rational interpretation of Holmes' theory under the facts of this case would reach a different result than would an application of Stephen's theory, it seems that cases involving extreme absentmindedness may well serve to distinguish the two theories. However, in order to distinguish the positions with even more clarity, let us consider the two theories in connection with a case involving extreme intoxication. In *State* v. *Trott*,[9] defendant and another were riding in defendant's automobile and both were highly intoxicated; defendant relinquished the driver's position to the other, asking him to drive and telling him to get away quickly; the passenger took the wheel, drove

[8] Satisfying the knowledge factor without reference to the actual consciousness of the actor effectively reduces the importance of this subjective element to a minimum and thus gives more effect to objective factors.

[9] 190 N. C. 674, 130 S. E. 627 (1925).

down the street at a high rate of speed and crashed into another automobile, killing one of the occupants.[10]

Let us assume that the defendant's drugged mental faculties permitted him to gather that he was placing his companion at the wheel of the automobile, and yet that the intoxicants rendered him incapable of reasoning from these circumstances to the ultimate probable consequence, i. e., that great danger would be created. Accepting this assumption, we may conclude that the defendant had knowledge of circumstances (that he was placing his drunken companion in control of the automobile) which would lead a man of common understanding to realize that there was a plain and strong likelihood that death would result.[11] Thus, under application of Holmes' theory the defendant could be convicted of murder.

We have assumed that the defendant, although able to understand the circumstances, was nevertheless unable to reason from these circumstances to the logical and probable result. That is, the defendant did not have knowledge of the great danger involved in the creation of such circumstances because his bedrugged mind prevented proper operation of his powers of reason. Assuming that the defendant did not have such knowledge, a murder conviction could not be sustained under an application of Stephen's theory.[12] Thus the application of the two theories might again reach a different result.

These two illustrations tend to indicate that a distinction between Holmes' view and Stephen's view exists where the actor has knowledge of the circumstances plainly indicating great danger and yet has no actual knowledge of the great danger involved. Although absentmindedness and intoxication may not be the only instances in which a distinction between the two theories can be drawn, these instances are probably better adapted to that purpose than any others because of the remoteness of the possibility that both presence of knowledge of the

[10] The defendant was convicted of second degree murder, and on appeal this conviction was sustained. *Ibid.*

[11] Assuming that the defendant did not consciously commit the dangerous act, it could still be reasoned that he had knowledge of the circumstances from the fact that by becoming intoxicated he placed himself in a position where he might commit such act.

[12] This interpretation of Stephen's theory would not permit any drunken defendant to be convicted of murder *regardless of the wantonness of the act committed.* Did Stephen intend this broad exception? Assuming that Stephen would not convict the defendant of murder in the *Trott* case, would he also refuse to convict one of murder who became voluntarily intoxicated beyond reason and drove his automobile at top speed down a densely populated thoroughfare thereby killing a dozen innocent people? The theory of voluntary intoxication would serve as a means of convicting the defendant of murder in the latter hypothetical case as well as in the *Trott* case. Is it possible that Stephen recognized the merit of this theory of voluntary intoxication at the time he formulated his theory requiring actual knowledge of the danger? Or did Stephen intend to exclude from murder *all* acts committed without actual knowledge of the danger?

circumstances and absence of knowledge of the danger will obtain in any other instances.

Having set out wherein the two theories differ, there remains yet to determine which has the better foundation in logic and practicality.

It is generally accepted that the primary purpose of criminal punishment is prevention and deterrence.[13] Confinement of the actor will serve to prevent and deter the commission of the dangerous act. Naturally the length of the confinement should be correlative with the degree of the desirability of prevention and deterrance in the particular instances. And again, the degree of the desirability of prevention and deterrence should depend upon, or be correlative with, the extent of the probability that this or other similar dangerous acts would be committed again by the particular actor. Thus, it follows that the actor should be convicted of a greater or lesser crime depending upon the duration of the probability that the actor will commit other dangerous acts again.

Now, returning to the two illustrations discussed above, under Holmes' theory the defendants would be convicted of murder, regardless of the fact that they did not know that their acts were creating great danger. That is, Holmes suggests that the length of confinement should be the same whether the actor knows of the danger or does not know of the danger at the time he commits the act. On the other hand, Stephen suggests that the length of confinement should be greater where the actor knows of the danger and less where he has no such knowledge. Since the length of confinement depends upon the extent of the probability that the actors will commit other dangerous acts again, the solution to the query of which of the two theories is correct should depend upon whether there is a greater probability that the actors having knowledge of the danger will commit other similar dangerous acts.

Proceeding further, the greater the blameworthy quality of the actor's mind, the greater will be the tendency of the actor to commit dangerous acts. However, the actors of the two illustrations did not possess such a blameworthy quality of mind as they would have possessed had they committed the acts with knowledge of the danger. Therefore, these actors would not have so great a tendency to commit acts as they would have if they had acted with knowledge of the danger. There is not as great a probability that dangerous acts will be committed again by these particular actors as if they had possessed knowledge of the danger at the time of the commission of the acts. We are therefore led to the conclusion that there is a greater probability that actors having knowledge of the danger will commit other similar acts than there is probability that the actors not having knowledge of the

[13] Other purposes of criminal punishment includes the retributive theory and the reformatory-educational theory. Retribution as a purpose of punishment has become antiquated and the reformatory-educational theory has not received a sufficiently strong foothold in our criminal institutions to warrant serious consideration as a purpose of criminal punishment.

danger will commit other similar acts. Accordingly, since the extent of confinement should be greater where the actor knows of the danger and lesser where he has no such knowledge, we must conclude that Stephen's theory has a better foundation in logic and practicality.

In conclusion, it is submitted that although Holmes' and Stephen's theories do not differ extensively, the fact remains that some distinction does exist where the actor has knowledge of the circumstances plainly indicating great danger and yet has no actual knowledge of the great danger. And, finally, it is submitted that Stephen's theory, resting upon subjectivity, has the better foundation in logic and practicality.

J. WIRT TURNER, JR.

MAY THE DEED OF AN INSANE GRANTOR BE AVOIDED AT LAW AS WELL AS IN EQUITY?

The majority view is that the deed of an insane grantor, not yet officially declared to be insane, can be avoided in an action at law as well as in equity, though the question has not been passed upon by many states.[1] In many other decisions it is taken for granted that the matter can be decided in a law action.[2] Though early federal cases said that in ejectment the strict legal title prevails,[3] a power of attorney to convey the property of an insane owner was held void in an action at law.[4] Therefore, the deed executed in accordance with it was held void. There was a dictum in the case to the effect that if the insane owner had been the grantor of the land, the action that would result in the avoidance of his deed could be brought at law as well as in equity.[5]

Ordinarily the law actions in which the deed of an insane grantor is avoided are ejectment[6] and writ of entry.[7] The question usually arises where the person intending, eventually, to impeach the title of the grantee from the insane grantor, brings a law action, claiming title in himself. To combat this, the defendant must give evidence of a deed which the plaintiff will then claim is void, because of the grantor's

[1] Doherty v. Courtney, 150 Cal. 606, 89 Pac. 434 (1907); Elder v. Schumacher, 18 Colo. 433, 33 Pac. 175 (1893); Webster v. Woodford, 3 Day 90 (Conn. 1808); Guest v. Beeson, 2 Houst. 246 (Del. 1859); Brown v. Freed, 43 Ind. 253 (1873); Wall v. Hill's Heirs, 40 Ky. (1 B. Mon.) 290, 36 Am. Dec. 578 (1841); Valpey v. Rea, 130 Mass. 384 (1881); Eaton v. Eaton, 37 N. J. L. 108, 18 Am. Rep. 716 (1874); Smith v. Ryan, 191 N. Y. 452, 84 N. E. 402 (1908); Fitzgerald v. Shelton, 95 N. C. 412 (1886); Farley v. Parker, 6 Ore. 105, 25 Am. Rep. 504 (1876); Crawford v. Scovell, 94 Pa. 48, 39 Am. Rep. 766 (1880).

[2] Daugherty v. Powe, 127 Ala. 577, 30 So. 524 (1900); Burnham v. Kidwell, 113, Ill. 425 (1885); Eaton v. Eaton, 37 N. J. L. 108, 18 Am. Rep. 716 (1874).

[3] Foster v. Mora, 98 U. S. 425 (1878).

[4] Dexter v. Hall, 82 U. S. 9, 21 L. ed. 73 (1872).

[5] *Id.* at 21, 21 L. ed. 73, 77.

[6] Crawford v. Scovell, 94 Pa. 48, 39 Am. Rep. 766 (1880).

[7] Valpey v. Rea, 130 Mass. 384 (1881).