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## Individual Physical Characteristics as Affecting the Standard of Care in Criminal Negligence Cases

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objective standard used to measure such care in a tort case is that used by a reasonable man under like circumstances.<sup>2</sup> If the act of the defendant falls below this standard of care, he is charged with negligence, and is liable for any injury resulting from such act. Physical defects are circumstances to be considered in each case.<sup>3</sup> The fictitious reasonable man does not change, but the circumstances in each case change.<sup>4</sup> Therefore a person who has any infirmities must use more care with the faculties he does possess than a normal person in order to measure up to the standard set by the courts,<sup>5</sup> since he is more likely to cause injury than is a normal man. It is evident, then, that in tort cases, physical defects of the defendant are considered by the court and jury in determining whether or not the actor has been negligent.

The effect of physical defects in criminal negligence cases is not so readily discernible as in civil cases. Only two cases have been found in which this question is considered by the court. In *Rex v. Grout*<sup>6</sup> a pedestrian was walking along a highway when the defendant, who was near-sighted, ran over him with his cart and killed him. The judge instructed the jury that: ". . . the question for their consideration would be, whether the prisoner, having the care of the cart, and being a near-sighted man, conducted himself in such a way as not to put in jeopardy the limbs and lives of his Majesty's subjects. . . . If they thought he acted carelessly and negligently, they would pronounce him guilty of manslaughter." In a later case decided in this country, *Tift v. State*,<sup>7</sup> the defendant, who was subject to attacks of vertigo which rendered him unconscious, was driving his car along a public highway when one of these attacks hit

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<sup>2</sup>Harper *supra* note 1; *Restatement, Torts, supra* note 1, at sec. 283.

<sup>3</sup>Muse v. Page, 125 Conn. 219, 4 A. (2d) 329 (1939); Rosenthal v. Chicago & A. R. Co., 225 Ill. 552, 99 N.E. 672 (1912); Wilson v. Bittner, 129 Ore. 122, 276 Pac. 268 (1929).

<sup>4</sup>O'Connor v. Hickey, 260 Mass. 110, 156 N.E. 838 (1927), in which case, a runaway horse belonging to the defendant ran over the plaintiff's intestate killing him. The intestate had bad eyesight, and the defendant contended that the intestate was contributorily negligent. The lower court charged the jury that the intestate did not have to exercise the care of a reasonably prudent man, but only had to use due care with the faculties he possessed. Held: the instruction was incorrect. The intestate had to use more care with the faculties he possessed "in order to reach the standard established by the law for all persons alike, whether they be weak or strong, sound or deficient." Huddy, *Law of Automobiles* (8th ed. 1927), 369; Green, *The Negligence Issue* (1928), 37 Yale L. J. 1029.

<sup>5</sup>Blackack v. Blacksher, 11 Ala. App. 545, 66 So. 863 (1914); Armstrong v. Day, 103 Cal. App. 465, 284 Pac. 1083 (1930); Furtado v. Bird, 26 Cal. App. 152, 146 Pac. 58 (1914); Balcom v. City of Independence, 178 Iowa 685, 160 N.W. 305 (1916); O'Dell's Admr. v. Louisville & N. Ry., 200 Ky. 745, 255 S.W. 550 (1923); O'Connor v. Hickey, 260 Mass. 110, 156 N.E. 838 (1927), *op. cit. supra* note 4; Roberts v. Ring, 143 Minn. 151, 173 N.W. 437 (1919).

<sup>6</sup>Rex v. Grout, 6 Car. & P. 629, 172 Eng. Rep. 1394 (1834).

<sup>7</sup>Tift v. State, 17 Ga. App. 663, 88 S.E. 41 (1916).

him. As a result, he became unconscious, and the car ran into a buggy injuring persons therein. In affirming a conviction of assault and battery, the appellate court said, ". . . it would be for a jury to say whether the act of one who knew he was subject to occasional sudden attacks of vertigo or like malady . . . was such a disregard of probable consequences as amounted, *under the circumstances in proof*,<sup>8</sup> to criminal negligence . . ." In both of these cases, the court considered the physical defects of the defendant as circumstances to determine whether or not the defendant was negligent, but they failed to say what effect they would have on the degree of care which the defendant was required to exercise. Could a defendant in a negligent homicide case plead that due to defective eyesight, he would not have to use as much care as a person with normal eyesight? Lacking authoritative cases on such a proposition, it is necessary to draw an analogy from tort law to determine what effect physical defects would have on the degree of care required of a defendant in a criminal case.

To hold a man criminally liable for his negligence, a higher degree of negligence than that required to make him civilly liable is necessary, since the act must be committed in reckless disregard of the consequences and of the rights of others where the defendant is being tried for criminal assault and battery or for manslaughter.<sup>9</sup> For example, X may not use the care of a reasonable man, and would be subject to civil liability for any injury caused by his act. Increase the dangerousness of the act in the last situation to the degree that X acts in reckless disregard of the consequences of his act and of the rights of others, and he would be criminally liable. The distinction is in the degree of negligence, one act being more dangerous than the other. Theoretically, therefore, a person can be civilly liable without being criminally liable, but conversely, he cannot be criminally liable without also being civilly liable. In practice, however, this is not absolutely true, since in tort law, a defendant would be allowed defenses such as contributory negligence, despite his own negligence, which would be no defense in criminal law.<sup>10</sup> Disregarding these peculiarities of tort law, however, the proposition stated above is true. It then follows that criminal negligence is civil negligence plus.

It is submitted, therefore, that the standard by which the court

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<sup>8</sup> Italics added.

<sup>9</sup> French v. State, 235 Ala. App. 570, 180 So. 592 (1938); Cain v. State, 55 Ga. App. 376, 190 S.E. 371 (1937); State v. Hintz, — Idaho —, 102 P. (2d) 639 (1940); State v. Patterson, 60 Idaho 67, 88 P. (2d) 493 (1939); People v. Przybyl, 365 Ill. 515, 6 N.E. (2d) 848 (1937); State v. Satterfield, 198 N.C. 682, 153 S.E. 155 (1930); Potter v. State, 174 Tenn. 118, 124 S.W. (2d) 232 (1939); Bell v. Commonwealth, 170 Va. 597, 195 S.E. 675 (1938).

<sup>10</sup> People v. Fator, 14 Cal. (2d) 403, 58 P. (2d) 402 (1936); Cain v. State, 55 Ga. App. 376, 190 S.E. 371 (1937); State v. Brooks, 49 Idaho 404, 288 Pac. 894 (1930); State v. Thomlinson, 209 Iowa 555, 228 N.W. 80 (1929).

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.<sup>1</sup> Another line of decisions allows the cross-examiner to cover everything in issue,<sup>2</sup> and the third group takes a middle position allowing the cross-examiner to cover anything in the opponent's case.<sup>3</sup>

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

<sup>1</sup> 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.

<sup>2</sup> 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).

<sup>3</sup> Champo v. Dewey, 9 Mich. 381, 419 (1861); Wigmore, Evidence, (3rd. ed. 1940) sec. 1889