1940

The Limits of Objectivity in Negligence

E. Preston Young
University of Kentucky

Follow this and additional works at: https://uknowledge.uky.edu/klj

Part of the Torts Commons

Right click to open a feedback form in a new tab to let us know how this document benefits you.

Recommended Citation
Available at: https://uknowledge.uky.edu/klj/vol28/iss2/11

This Note is brought to you for free and open access by the Law Journals at UKnowledge. It has been accepted for inclusion in Kentucky Law Journal by an authorized editor of UKnowledge. For more information, please contact UKnowledge@lsv.uky.edu.
The superiority of the objective theory of negligence comes from the greater protection which it affords society against harmful conduct resulting from deficiencies in knowledge, memory, observation, self-control, and the like. As Holmes expressed it, "when men live in society, a certain average of conduct, a sacrifice of individual peculiarities going beyond a certain point, is necessary to the general welfare." For the protection of the group, the individual must conform to acceptable modes of behavior. Since it can seldom be ascertained whether a particular act will or will not result in injury, the general types of behavior frequently causing injury (if their utility does not justify the risk) are to be discouraged. The failure of an individual to live among his fellows without subjecting them to undue risks is not to be condoned because he is anxious and solicitous for their well-being. What the law has regard for is the general security, and it imposes a standard to maintain that security. When the individual acts, he must measure up to that standard at his peril of answering for injurious consequences.

The idea that negligence is or involves a state of mind has been quite generally abandoned. By predicing liability solely upon undesirable consequences of dangerous conduct, the law discourages such conduct, and thereby protects the general security. By punishing for conduct causing harm because under like circumstances a reasonably prudent man would not have engaged in such conduct, the law will give protection to society against those individuals whose protestations of pure intentions always accompany their undesirable behavior.

Despite the lack of uniformity among the writers as to what may be considered by the jury "under the circumstances" of the particular case, it is probably safe to say that outstanding physical defects, the effects of which can be estimated in light of the experience of a jury, and not merely speculated upon, are valid considerations. Insofar as the effects of age, poor sense-perception, slowness of reaction, and the like, are matters of conjecture for jurors, they are better left to be "allowed for in the courts of Heaven" on the theory that a sacrifice of individual interests is justified in the interests of society. "Men must be able to assume that when their fellow men act affirmatively, their action will be reasonably safe, that is, will create no greater risk of harm than the ordinary understanding and moral sense of the community permits."

MARVIN M. TINCHER

THE LIMITS OF OBJECTIVITY IN NEGLIGENCE

It is the purpose of this note to discuss the methods and standards used by courts to determine whether an actor's conduct involved negligence toward a plaintiff injured thereby. The writer will show first, what factors are essential for negligence to exist; second, assuming every individual's conduct is measured by that degree of care which

27 Holmes, op. cit. supra note 22.
28 Edgerton, supra note 17, at 868.
a reasonably prudent man would exercise under the same or similar circumstances, to what extent the particular characteristics of the actor are considered a "circumstance", if at all; and third, will present a summary and conclusion.

A person is negligent when the risk of danger brought into being by his conduct outweighs the utility which the public or individual derives from such conduct. Negligence is conduct creating an unreasonable risk of harm to others, conduct which would not be engaged in by a reasonably prudent man under the circumstances.

In the determination of a standard by which to measure the particular actor's conduct, it follows that if his personal characteristics are regarded as circumstances to be considered under the formula, the court is refusing to place liability solely on the grounds that the "motions" of the defendant's conduct produce harmful results, but is adding that these results must be weighed by the jury in the light of a condition peculiar to this actor. Insofar as the court permits consideration of individual characteristics the standard is subjective. Such a standard is used where the actor has physical defects such as blindness, deafness or lameness, and therefore he is forced to make greater use of his other sound senses. The same standard is equally applicable to a negligent defendant as to a negligent plaintiff. However, where the actor's liability is due to a functional disturbance, the decisions seem uniformly to hold him to an objective standard because the reasonable man responds in the situation whether the actor is paralyzed with fright, or is easily rattled, or even if he is drunk. The standard man may have physical defects but not emotional ones, and he con-

1 Beatty v. Central Iowa R. Co., 58 Iowa 242, 12 N.W. 332 (1882); Restatement of the Law of Torts, sec. 291, comment a.
3 Restatement of the Law of Torts, sec. 289, comment a, states: "The rules which determine the contributory negligence of a plaintiff are ... the same as those which determine the negligence of the defendant". In other words, the same rules determining the reasonableness of the actor's risk toward his own interests govern the reasonableness of the risks he creates toward the interest of others.
4 See Holland v. Tenn. R.R. Co., 91 Ala. 444, 3 So. 524, 527 (1890), in which McAllan, J., said: "The fact, if it be one, that the intestate was panic stricken, and his energies paralyzed, by the awful nature of the impending catastrophe, might be proper to be considered by the jury, in determining what effort would amount to due diligence, or what omission of effort would be negligence under all the circumstances, but no such consideration can relieve from the duty of diligence on the one hand, or condone negligence on the other."
5 Bessemer Land & Improvement Co. v. Campbell, 121 Ala. 50, 25 So. 793 (1899).
6 Woods v. Board of Comm. of Tipton Co., 128 Ind. 289, 27 N.E. 611 (1891).
7 However, these cases are to be sharply distinguished from an emergency situation, where the reasonably prudent man does make a
forms to sober conduct. Likewise the actor's mental attributes such as memory, foresight, bad judgment, intelligence, stupidity, clumsiness, timidity, feelings, and will are considered immaterial in the formula, as well as his beliefs and moral qualities. Dean Pound has put as the "jural postulate" of society and the basis of our theory of negligence that "men must be able to assume that their fellow men when they act affirmatively, will do so with due care, that is, with the care which the ordinary understanding and moral sense of the community exacts, with respect to consequences that may reasonably be anticipated.

The actor's knowledge, as a circumstance, may be grouped into three classifications: First, where the wrongdoer has certain knowledge but fails to act in accordance with it, he is held to be negligent if a reasonable man having such knowledge would have acted differently. When a blind man voluntarily puts himself into a situation having knowledge of his physical defects, Professor Seavey points out, negligence is not predicated on the fact that he is blind, but because he knows he is blind and failed to do an act required of men knowing themselves blind. A person in this class is charged with notice of the situation and the law will hold him to an objective standard;—the mistake. Even though a wise course of action was open to the defendant, he may still incur no liability if he acted as the standard man would have acted in the emergency situation. Austin v. Eastern Mass. St. Ry., 269 Mass. 420, 169 N.E. 484 (1929); Terry, Negligence, (1915) 29 Har. L. Rev. 40, 49.

8 Edgerton, Negligence, Inadvertence and Indifference: The Relation of Mental States to Negligence, (1926) 39 Har. L. Rev. 349, 356-357; Holmes, The Common Law (1881) 103; Seavey, Negligence—Subjective or Objective? (1927) 41 Har. L. Rev. 1, 15; Restatement of Torts, sec. 291, comment c of subsection 1. But see Green, The Negligence Issue, (1928) 37 Yale L. J. 1029, 1045-1046, where the author says: "The law cannot deal with these factors in detail; therefore, it ignores them. They merely make up the 'circumstances' of the case."

9 Seavey, supra note 8, at 10: "That a purely objective standard applies to moral qualities is beyond question".

10 Pound, Introduction to the Philosophy of Law (1922) 170.

11 Seavey, supra note 8, at 23.

12 Seavey, supra note 8, at 28.

13 Reynolds v. Los Angeles Gas & Electric Co., 162 Cal. 327, 122 Pac. 962 (1912); Buckley v. Westchester Lighting Co., 93 App. Div. 436, 87 N.Y.S. 783 (1904); City of Charlottesville v. Jones, 123 Va. 832, 97 S.E. 316 (1918). Other conceivable illustrations of this first class may be where a danger signal is not heeded by the actor in a location with which he knows he is unfamiliar; here he is forced to use greater care than the residents. Ship captain leaves a strange port in the face of a storm, knowing of his unfamiliarity with the harbor, but thinking he can get back into port if the storm breaks, he assumes the risk. Instead the ship is badly injured, and he is held liable for the damage. The country doctor who sets himself up as a cancer specialist in a large city, and many other situations could be easily thought of. It is submitted that the doctor is negligent not because of his failure to have the knowledge he purports to have, but because he
fact that he forgot is not one of the circumstances for the jury. In the second class, the actor is charged with knowledge he in fact does not have but is presumed to have. One who is in fact ignorant of the dangerous propensities of nitro-glycerine, of wild animals and other facts of common knowledge to the community is held to accountability as if he had such knowledge because a reasonably prudent man would have known, or would have recognized the necessity of making a further investigation. The actor is being strictly penalized for the consequences of his unreasonably dangerous physical conduct “though his state of mind is not blameworthy”. This leads to the third classification, where the wrongdoer, for example, a physician, is possessed of special knowledge or skill. Being a member of that class, he must exercise that degree of care and skill which he holds himself out as possessing, and which is possessed by the ordinary reasonably cautious physician practicing in the same or a similar locality at the time of the treatment in question. And evidence as to what is customarily done in the locality in question does not establish the standard of care to which those who carry it on must conform. It will be noticed that in these cases the profession of the actor and the locality of his practice enter the formula as circumstances.

The standard for a child charged with negligence is commonly stated to be that degree of care which ordinary prudent children of his age, intelligence and experience (or other combination such as alertness, understanding, education, sex) ordinarily exercise under the same or similar circumstances. “An exception is made” says Mr. has entered upon an undertaking in which he knows he should not have entered. Knowing these facts it may be unreasonable for him to act at all.

14 Restatement of Torts, sec. 289, comments I and m.
15 Edgeront, supra note 8, at 855: “Though one need not actually use or have any particular mental characteristic in order to be free from negligence, one must act as if he had (as safely as if he had) a normal complement of all mental characteristics which would be useful in avoiding harm in the particular circumstances”. (Italics writer’s.)
16 Terry, supra note 7, at 41.
17 Ferrell v. Ellis, 129 Iowa 614, 105 N.W. 988 (1906); Nelson v. Sandell, 202 Iowa 109, 209 N.W. 440 (1927); Rann v. Twitchell, 82 Vt. 79, 71 Atl. 1045 (1909); Harper, Torts (1933) 168, sec. 71; Green, supra note 8, at 1040; Note (1909) 20 L.R.A. (N.S.) 1030.
18 Bohlen, Some Recent Decisions on Tort Liability, (1930) 4 Tulane L. R. 370, 379. Professor Bohlen explains: “This is subject to one limitation, that a certain minimum of general professional competence is always required no matter how isolated or poor the neighborhood. Except for this latter restriction, it is the standard of the profession which determines the skill and competence which the physician must exercise”. See also Pike v. Honsinger, 155 N.Y. 201, 49 N.E. 760 (1898); Ault v. Hall, 119 Ohio St. 422, 164 N.E. 518 (1928); Davis v. Kerr, 239 Pa. 351, 86 Atl. 100 (1913).
19 See Green, supra note 8, at 1039, footnote 25; Harper, supra note 17, at 161-62, sec. 71; Restatement, Torts (Tent. Draft No. 1), sec. 167. One of the leading cases upholding this view is Charbonneau v. MacRury, 94 N.H. 501, 153 Atl. 457 (1931); Noted in 17 Va. L.R. 698 (1931).
Justice Snow, "in favor of infants because their normal condition is one of capacity and the state of their progress toward maturity is reasonably capable of determination". If the child's age and capacity are disregarded as circumstances, the child would often be held to an absolute liability to do that which he is incapable of doing. The standard is the same whether the child be negligent or contributorily negligent.

In summary, the following conclusions may be drawn from the foregoing discussion: First, that "under the circumstances" is not a general catch-all phrase to serve as a basket to receive all the facts of the case. This phrase has boundaries to be observed as a definite guide to the jury. To determine in each case what is and what is not to be considered in it is the duty of the court. Second, that only where it would be obviously unfair, with reference to the actor's physical defects and very marked mental abnormality should the objective formula be deviated from, and not then unless such defect was the proximate cause of the actor's failure to act as a reasonable man. It is submitted, however, that this in no sense is creating a subjective standard, but is an objective standard for all members of the actor's class with the same attribute. With reference to all his other qualities he is treated as the "average man". Third, the writer recommends that as between the two theories for approaching the problem—one stating that negligence is conduct, the other saying that negligence is a state of mind—the former is the better criterion in the determination of the standard and the one actually used by the courts. In the situations where the objective standard is applied to the physically subnormal individual, a failure to recognize his subnormality would be unjust to him, while as concerns the person possessing skill, a failure to take into account his special knowledge would be unjust to the public. However, "for each individual to have a different valuation of interests would destroy the law and would be a disregard for the rights of others".

As to whether the same standard for the determination of negligence is applied in the law of crimes, there is lack of uniformity. Criminal negligence being fundamentally the same in kind as that giving rise to civil liability, the only difference is one of degree.

---

21 It was said in Charbonneau v. MacRury, 84 N.H. 501, 153 Atl. 457, 464 (1931), that "in neither case does the law make any distinction between the conduct of an actor when charged with actionable fault and when charged with contributory negligence". The court makes it clear that in an action for negligence, whether a minor is charged with primary or contributory negligence, he is subject to the same rule of reasonable conduct in view of all the circumstances. See also Briese v. Maechtle, 146 Wis. 89, 130 N.W. 893 (1911); Ames & Smith, Selection of Cases on the Law of Torts (3rd Ed. 1936), Vol. 1, 101, footnote 1; Harper, op. cit. supra note 17, at 297, sec. 133, and at 182, footnote 41; Terry, supra note 7, at 47.
22 Seavey, supra note 8, at 11.
23 This proposition is well expressed in Nail v. State, 33 Okla. Cr. 100, 242 Pac. 270 (1925), in which the court said: "When do the negligent acts of an individual cease to be mere negligence and become
fact that negligence to be criminal must be what is classed as reckless or gross is not sufficient reason to necessitate a different standard, which measures the actor's conduct, or even the addition of other subjective elements. Requiring negligence to be gross in order to be criminal is not requiring that the actor have a reckless, careless, or culpable state of mind. That negligence to be criminal must be gross means simply that the actor's negligent conduct must involve such a high and patent risk of harm to others that society imposes, as an additional restraining influence, criminal liability. But having made this analysis, the question that immediately presents itself is, how does gross negligence furnish the necessary mens rea required in crimes? Gross negligence which results in homicide is said to be sufficient to supply or to substitute for intent. Mr. Justice Holmes states, "The law requires men at their peril to know the teachings of common experience, just as it requires them to know the law". It is submitted that the objective standard for determining criminal liability is in harmony with the modern trend in criminal law to give less consideration to the criminal's intent and to look primarily to the sociological harm threatened by his behavior.

E. PRESTON YOUNG

CONFLICT OF LAWS—JURISDICTION FOR DIVORCE—EXTRATERRITORIAL VALIDITY OF EX PARTE DIVORCES

For the purpose of this discussion the following hypothetical case is proposed:

H and W were married in state X where they lived as husband and wife for several years. H left W in state X and went to state Y where he established a bona fide domicile. He then sued for a divorce on the ground of desertion, having service by publication upon his wife. H obtained a default decree in state Y and later married W number two. After living with W number two for several years he died, leaving real property in state X, state Y and state Z. W number...