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Criminal Law -- Determination of Proximate Cause by Court and Jury

an appreciable number of qualified Negroes in the community.[5] Since the Court did not evolve a precise test in that decision, state courts, therefore, could distinguish subsequent cases [6] before them, as in the instant case, on the ground that a smaller percentage of Negroes resided in the community than in the *Neal* case, or the United States decisions following.[7]

Recently in *Patton v. Mississippi*,[8] the Supreme Court approached the exclusion problem anew. This case held that the defendant's prima facie case was established by merely proving that no Negro had been called to jury duty from the Negroes in the community over an extended period of time. Thus, it was unnecessary to show that there was an appreciable number of qualified Negroes in the county *in proportion to the white population*.[9] The mathematical proportion test as a test of racial discrimination in the selection of jurors was discarded *sub silentio* as unsound.

The lower court, in the instant case, held that defendant did not establish a prima facie case, although he showed no Negroes were summoned to the grand jury for ten years, because there were so few Negroes in the community that their absence could as easily have been laid to chance as to intentional exclusion. Pending the appeal in the principal case, the opinion in the *Patton* case was handed down. But the New York Court of Appeals failed to apply the more liberal view established in the *Patton* case [10] and adopted the narrower view of the lower court based on the mathematical proportion reasoning as developed in the cases following *Neal v. Delaware*.[11] It would appear that the decision in the instant case is not in keeping with the trend towards greater recognition of civil rights manifested by *Patton v. Mississippi*.

CRIMINAL LAW—DETERMINATION OF PROXIMATE CAUSE BY COURT AND JURY

Defendant was convicted of murder in the first degree under the Pennsylvania felony murder statute.[1] An off-duty policeman had attempted

5. *Accord*, Hill v. Texas, 316 U.S. 400 (1942); Hale v. Kentucky, 303 U.S. 613 (1938); Montgomery v. State, 55 Fla. 97, 45 So. 879 (1908).

6. People v. Dessaure, 193 Misc. 381, 68 N.Y.S.2d 108 (Sup. Ct. 1946); Bruster v. States, 40 Okla. Cr. R. 25, 266 Pac. 486 (1928); Swain v. State, 215 Ind. 259, 18 N.E.2d 921 (1913).

7. Hill v. Texas, *supra;* Smith v. Texas, 311 U.S. 128 (1940); Pierre v. Louisiana, 306 U.S. 354 (1939).

8. 332 U.S. 463 (1947).

9. "But whatever the precise number of qualified colored electors in the county, there were some; and if it can possibly be conceived that all of them were disqualified for jury service by reason of the commission of crime, habitual drunkenness, gambling, inability to read and write, or to meet any other or all of the statutory tests, we do not doubt that the state could have proved it." Patton v. Mississippi, 332 U.S. 463, 468 (1947).

10. Compare the time interval in the instant case of ten years with a thirty year period in the *Patton* case.

11. Hill v. Texas, *supra;* Pierre v. Louisiana, *supra;* Hale v. Kentucky, *supra*.

1. "All murder . . . which shall be committed in the perpetration of . . . robbery . . . shall be murder in the first degree." PA. PENAL CODE § 4701 (1939).

to apprehend defendant and his accomplices who were escaping after having committed a robbery. In the subsequent gunfire between defendant and other policemen, the off-duty policeman was killed. The trial court held that the defendant would be guilty whether he or the policemen had fired the fatal shot. The only question presented to the jury for their determination was whether defendant had been engaged in a robbery. On appeal, *held*, that he whose felonious act is the proximate cause of another's death is criminally responsible for that death, and that the act of robbery was, as a matter of law, the proximate cause of the death of the policeman. Judgment affirmed. *Commonwealth v. Almeida*, 68 A.2d 595 (1949).

Although a person's act may not be the direct cause of death, he will be held responsible for all consequences of which his conduct was the proximate cause.[2] Difficulty is encountered in deciding the proper functions of judge and jury in determining proximate cause because of the varying interpretations which have been given to the term. Proximate cause[3] is composed of two elements: (1) the element of causation connecting the actor's conduct with the consequences, and, (2) the element of a determination of the limits of responsibility to be placed upon the actor for the consequences of his act. The element of causation is a question of fact to be determined by the jury. It is most suitably determined by answering the question of whether the actor's conduct was a substantial factor[4] in producing the consequences. The determination of the limits of responsibility is a question of law to be determined by the court upon a consideration of many factors—past decisions, public policy,[5] and the justice of the decision.[6] Therefore, proximate cause, whether in tort or criminal law,[7] should be determined by having the court conclude, assuming causation, whether or not the consequences come within the limits of responsibility under the rule violated, and then having the jury determine if causation did in fact exist.

However, this procedure has not been followed in cases with fact situations similar to that of the principal case. Instead of the judge and jury each determining their respective question of law and fact, the solution of the problem has been attempted by three general methods. First, the entire problem of proximate cause has been presented to the jury as a fact question

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2. MILLER, CRIMINAL LAW 83 (1934).

3. For discussions of proximate cause see GREEN, RATIONALE OF PROXIMATE CAUSE (1927); Beale, *The Proximate Consequences of an Act*, 33 HARV. L. REV. 633, (1920); Levitt, *Cause, Legal Cause, and Proximate Cause*, 21 MICH. L. REV. 34 (1922); Edgerton, *Legal Cause*, 72 U. PA. L. REV. 211 (1924); McLaughlin, *Proximate Cause*, 39 HARV. L. REV. 149 (1925).

4. *See* Smith, *Legal Cause in Action of Tort*, 25 HARV. L. REV. 103, 309 (1911).

5. As to public policy in regard to felony murder cases see MILLER, CRIMINAL LAW 92 (1934).

6. See Edgerton, *Legal Cause*, 72 U. of PA. L. REV. 211, 343 (1924).

7. For the view that the question of proximate cause presents the same problem in both tort and criminal law, see McLaughlin, *Proximate Cause*, 39 HARV. L. REV. 149.

of causation.[8] Second, the jury has been asked to determine both the limits of responsibility and causation.[9] Third, the court has determined both the limits of responsibility and causation.[10]

The court in the principal case has followed the third method above in determining proximate cause by deciding both the limits of responsibility and causation. The only question presented to the jury was the question of whether defendant had been engaged in a robbery at the time of the death. But proof of robbery alone doesn't establish causal connection between the robbery and the death.[11] Nor should the fact of causal connection be assumed by the court.[12] This court cites *Commonwealth v. Moyer*[13] as authority for determining proximate cause as a matter of law, however, although that case did establish that the limits of responsibility under the felony murder statute in Pennsylvania do extend to cover the fact situation of the principal case, it cannot be said to have eliminated the necessity of a fact determination of causation by the jury.[14]

It is submitted that the court in the principal case properly performed its function as the determiner of policy by stating the limits of responsibility under the felony murder statute, but that the court invaded the province of the jury in deciding the fact question of causation. Though the result cannot be said to have been unjust in this case, deviations from the principle that the jury is the determiner of fact should be avoided since such deviations are likely to be accepted as authority in future cases involving the question of proximate cause.

DOMESTIC RELATIONS—RIGHT OF INFANT TO BRING AN ACTION FOR THE ENTICING AWAY OF A PARENT

Infants brought suit by their father and next friend against the defendant for wrongfully enticing and inducing their mother to leave them and their family home. A motion was filed by the defendant to dismiss the suit on the grounds that the alleged cause was not recognized in the state of Michigan since "heart balm" actions had been abolished.[1] *Held,* that a child has a legally

8. Butler v. State, 125 Ill. 641, 18 N.E. 338 (1888); Taylor v. State, 41 Tex. Cr. R. 564, 55 S.W. 961 (1900).
9. Keaton v. State, 41 Tex. Cr. R. 621, 57 S.W. 1125 (1900).
10. Letner v. Tenn., 156 Tenn. 68, 299 S.W. 1049 (1927).
11. Commonwealth v. Kelly, 333 P. 280, 4 A.2d 805 (1939); State v. Golden, 67 Idaho 497, 186 P.2d 485 (1947).
12. State v. Lanto, 98 N.J.L. 401, 121 A. 139 (1923); People v. Marendi, 213 N.Y. 600, 107 N.E. 1058 (1915).
13. 357 Pa. 181, 53 A.2d 736 (1947).
14. Though the court in *Commonwealth v. Moyer* did, in effect, determine causation, it was due to an inadequate presentation of the question to the jury rather than due to a decision that such question was for the court to determine.

1. MICH. COMP. LAWS, § 551.302 (1948).