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Criminal Law -- Deadly Weapons -- Classification in North Carolina

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Criminal Law—Deadly Weapons—Classification in North Carolina

The problem of the classification of instrumentalities used in the perpetration of assaults as deadly weapons and the added question of whether this classification should be made by judge or jury, provide an extensive and often intricate subject of research for the attorney seeking information concerning this branch of the criminal law. Fortunately for the North Carolina practitioner, the Supreme Court of this state has from the time of its original consideration of these questions laid down and adhered to sound fundamental rules and distinctions in determining the deadliness of a weapon. It is the purpose of the writer to enumerate these distinctions and to cite cases illustrative of each.[1]

The first general classification of deadly weapons is that into which fall those instruments which are deadly *per se*. In *State* v. *West*[2] the court enumerated as weapons deemed in law to be deadly a gun, a sword, a large knife or bar of iron, or any other heavy instrument by a blow from which a grievous hurt would probably be inflicted. In a later case[3] the court named a pistol and a dirk-knife as instruments which are of themselves deadly.

Where the indictment, under a count for assault with a deadly weapon, stated merely that the assault had been made with "a club," the court held that the term "club" *ex vi termini* imputed a deadly weapon.[4] So also, the mere description of the weapon as an axe,

[1] N. C. PUB. LAWS 1919, c. 101, expressly made assault with a deadly weapon punishable as a felony. The original legislation on this point was under chapters seven and eight of N. C. PUB. LAWS of 1869-70, wherein assault with a deadly weapon without intent to kill was made punishable by imprisonment in the State's prison not to exceed five years, and assault with a deadly weapon with intent to kill by imprisonment not exceeding ten years. These two sections were repealed by Chapter 43 of N. C. PUB. LAWS of 1870-71, and no further legislation on this point took place until that of 1919.

There seems to be some conflict as to the gravity of the offenses of assault with or without a deadly weapon under the 1868-69 provisions. In State v. Swann, 65 N. C. 330 (1871), the court held that the offense of assault with a deadly weapon with intent to kill, under the legislation of 1869-70, was not a felony. However, in State v. Bentley, 223 N. C. 563, 27 S. E. (2d) 738 (1943), Mr. Justice Seawell, in a review of this legislation, stated that the laws of 1870-71 reduced the offenses from felonies to misdemeanors, and he cited State v. Tyson, 223 N. C. 492, 27 S. E. (2d) 113 (1943) and State v. Smith, 174 N. C. 804, 93 S. E. 910 (1917) as supporting this position.

It would seem that much of this uncertainty arises from the fact that it was not until 1891 that the General Assembly classified as a felony any crime punishable by death or imprisonment in the State's prison, for the *Swann* case was decided before this classification was established. The *Bentley* case appears to be the latest authority on the point, and therefore determinative of the question as now presented.

For a general discussion of the classification of crimes see, Coates, *Punishment for Crime in North Carolina* (1938) 17 N. C. L. REV. 205.

[2] 51 N. C. 506 (1859).

[3] State v. Huntley, 91 N. C. 617 (1884); State v. Brewer, 98 N. C. 607, 3 S. E. 819 (1887).

[4] State v. Phillips, 104 N. C. 786, 10 S. E. 463 (1889).

without any further description in the indictment, has been held to be sufficient to charge assault with a deadly weapon.[5] The court has also likened a blackjack to a shotgun or pistol which *ex vi termini* import their deadly character.[6]

The number of weapons which from their very nature may be termed deadly, however, is comparatively few. More often the weapon attains the status of a deadly one through the circumstances of its use. Whether or not death results from the use of a weapon is not the determining factor as to its deadliness. It appears clear that weapons which are *per se* deadly may not always inflict fatal injuries, while an instrument which does not possess inherently deadly qualities may become deadly by the use which is made of it.

When the deadliness of the weapon must be deduced from the circumstances of use, proper consideration should be given to the size and nature of the weapon, the manner in which it is used, and the size and strength of the assailant and the assaulted.[7] When there is controversy as to these circumstances, the issue of the deadliness is generally one of law to be determined by the court.[8] In *State v. Smith*[9] the Supreme Court upheld the action of the court below in determining as a question of law that a baseball bat, if viciously used, was a deadly weapon. The opinion stated that where the alleged deadly weapon and its manner of use are of such character as to admit of but one conclusion, the question is one of law, and the court must take the responsibility of so declaring.

However, where the weapon may or may not produce death or bodily harm, according to the manner of its use, the part of the body at which the blow was aimed, and the relative size and condition of the parties, the question of the deadliness of the instrument is one of fact for the determination of the jury.[10] This rule was laid down in one of the earliest reported North Carolina cases involving the determination of the deadliness of a weapon.[11] There a piece of curled hickory about the size of a walking cane, used by a person much older and larger than the assailed, was held to be a deadly weapon, the court stating that it fell peculiarly within the province of the jury to ascertain whether such a weapon, in the hands of the particular assailant, and in the method in which it was used, was likely to produce fatal consequences.

[5] State v. Shields, 110 N. C. 497, 14 S. E. 779 (1892).
[6] State v. Hefner, 199 N. C. 778, 155 S. E. 879 (1930).
[7] State v. Sinclair, 120 N. C. 603, 27 S. E. 77 (1897).
[8] State v. Collins, 30 N. C. 407, 413 (1848) ("Whether the instrument used was such as is described by the witnesses, where it is not produced, or, if produced, whether it was the one used, are questions of fact; but, these ascertained, its character is pronounced by law."); State v. Speaks, 94 N. C. 865 (1886).
[9] 187 N. C. 469, 124 S. E. 737 (1924).
[10] State v. Watkins, 200 N. C. 692, 158 S. E. 593 (1931).
[11] State v. Jarrott, 23 N. C. 76 (1840).

To the same effect was the later case of *State* v. *Huntley*,[12] where a switch the thickness of a woman's little finger was found by a jury to be a deadly weapon because it was applied violently and repeatedly by the defendant upon the back of his frail wife. The Supreme Court, taking into consideration the violence of the attack and the physical advantage of the aggressor, upheld the finding of the jury.[13]

Perhaps the most striking example of how the manner of use of the instrument and the subject upon which it is used may determine its deadly nature is the case of *State* v. *Norwood*.[14] There the defendant was indicted for the murder of her infant child, the death being caused by pushing two pins down the child's throat. In finding no error on the part of the court below in submitting the question of deadliness to the jury, the Supreme Court followed the reasoning of the *Huntley* case, *supra*, in holding that the question of whether an instrument is a deadly weapon depends not infrequently more upon the manner of its use than upon the intrinsic character of the instrument itself. It appears clear that death might reasonably be expected to ensue from the pushing of a pin down the throat of an infant.

In the majority of the cases where the relative strength and size of the parties to the assault are considered in the determination of the question of the deadliness of the weapon used, the assailant's physical advantage is evident, and the obvious lack of inherent deadliness in the weapon is overcome by that factor. However, in the case of *State* v. *Sinclair*[15] was demonstrated the converse of that situation. There the assailant was a feeble, sickly boy of seventy-five or eighty pounds, while the victim of the assault was a full-grown man who was being held by two other men. The instrument used was a piece of pine weather boarding five to six inches wide, a quarter of an inch thick, and fourteen to eighteen inches long. It appears that the sole injury inflicted was a bruise on the assailed's leg. In holding the instrument not to be deadly, the court took into consideration the size and nature of the weapon, the manner in which it was used, the size and strength of the party using it, and the person upon whom it was used. The test seems particularly applicable and well applied here.

In the case of *State* v. *Watkins*[16] the Supreme Court held as error the instruction of the lower court that an assault when made with an instrument such as a pair of handcuffs would constitute in law an

[12] 91 N. C. 617 (1884).
[13] A two and a half foot piece of buggy trace has also been held to be a deadly weapon where the assailant was a strong, robust man and the victim was a frail, weak woman. State v. Archbell, 139 N. C. 537, 51 S. E. 801 (1905).
[14] 115 N. C. 789, 20 S. E. 712 (1894).
[15] 120 N. C. 603, 27 S. E. 77 (1897).
[16] 200 N. C. 692, 158 S. E. 593 (1931).

assault with a deadly weapon, the handcuffs not being presented in evidence and no evidence being introduced as to their size, weight, character or manner of use. Mr. Justice Clarkson dissented vigorously, basing his contention for the deadliness of the weapon largely upon the proven physical incapacity of the victim at the time of the assault, it appearing that he was then suffering acutely from heat prostration and that he died therefrom twelve hours after the assault.

The two most recent cases on the question of determination of the deadliness of a weapon are *State* v. *Davis*[17] and *State* v. *Harrison.*[18] In both of these cases, the former involving a hoe and the latter an ice pick, the trial judge charged the jury that the weapon was deadly *per se,* although there was no further particular description of either instrument in the indictments, and upon neither trial was the weapon presented for inspection by either judge or jury. In both cases the Supreme Court held the charge to be erroneous, and held that the question of the deadliness of the weapon should have been submitted to the jury under proper instructions. It would appear that the safest method of determining the question of deadliness, where the trial court is uncertain of whether the weapon is deadly *per se,* is to submit the question to the jury under instructions directing them to consider the matter of its use as well as other circumstances attending the assault and relevant to the question. For if the weapon is deadly *per se,* and the jury decides the question of deadliness in the affirmative, the failure to so instruct them will be cured by verdict.

Thus it can be seen that the court of last resort of North Carolina has provided clear and sensible guideposts for both the practicing lawyer and the trial judge, both of whom are faced so frequently with the question of the deadliness of a weapon in the prosecution of criminal offenses. It is an ever present possibility that some new and previously unclassified instrumentality may come before the court for classification. But when that event occurs, the likelihood of a proper determination of the question in the court below is greatly increased by its ability to resort to such a long and unwavering line of well-considered authority.

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Automobiles—Recording of Liens—Certificate of Title

Expanding production of new automobiles and its stimulation of trading in used cars renews interest in the legal problems of the sale and distribution of automobiles on credit. A timely reexamination of the

[17] 222 N. C. 178, 22 S. E. (2d) 274 (1942).
[18] 225 N. C. 234, 34 S. E. (2d) 1 (1945).