Allen, Larry. 1969. Criminal Law—Cruel and Unusual Punishment. Kentucky Law Journal, 58.

This brief article discusses a case in which two 14 year old youths were given life sentences without parole for raping a 71 year old woman. Allen redefines law to deny a fixed standard: "Since our concept of what constitutes cruel punishment changes as society progresses . . ." the Court set forth three standards for determining cruel and unusual punishment, (1) shocks the conscience and violates fundamental concepts of fairness, (2) penalty and offense are greatly disproportionate, and (3) penalty goes beyond what is necessary to effect legitimate penal goals. This new method, according to the author, "reflects much human and realistic thought."

KENTUCKY LAW JOURNAL

Volume 58
1969-70

COLLEGE OF LAW, UNIVERSITY OF KENTUCKY
LEXINGTON, KENTUCKY

plaintiff's income protection insurance, for example, just as there are sound reasons for ignoring the receipt of social insurance benefits in such a case. The point we are trying to make now, however, is that where an identifiable loss has been met by insurance, and there are not countervailing considerations, the plaintiff need not be compensated for that loss by the defendant. Since the insurance has operated to reduce the liability of the defendant, the defendant rather than the plaintiff should bear its cost.

Comments

CRIMINAL LAW—CRUEL AND UNUSUAL PUNISHMENT—COURT ADOPTS FEDERAL TESTS.—In 1958, two fourteen year old youths forcibly entered the residence of a seventy-one year old woman, gagged her, forced her onto a bed, and raped her several times in a particularly brutal manner. Shortly after the rape, the youths were arrested and brought before a juvenile court. At the juvenile court hearing[1] they were bound over to the grand jury to be treated as adults.[2] The grand jury returned an indictment for rape against both youths. At the trial their court-appointed attorney entered a plea of guilty on behalf of the defendants and the jury fixed punishment at life imprisonment without parole.[3]

The defendants, after being incarcerated in the Kentucky State Penitentiary at Eddyville, moved to set aside the judgment, and appeal was taken from an adverse ruling on the motion.[4] Held: Although the penalty of life imprisonment without parole may be imposed on adult offenders convicted of rape, life imprisonment without the benefit of parole is cruel and unusual punishment when applied to juvenile offenders. *Workman v. Commonwealth*, 429 S.W.2d 374 (Ky. 1968).

The Kentucky Court of Appeals has decided many cases[5] in which appellants have asserted that penalties received in a lower

---

[1] At the hearing neither juvenile was provided counsel. On appeal it was contended the court's failure to provide Workman with counsel was a violation of sections 11 and 14 of the Kentucky Constitution and the sixth amendment to the United States Constitution. The Court agreed that he right to counsel is essential to due process at a juvenile proceeding in which a waiver of jurisdiction is secured. But in *Smith v. Commonwealth*, 412 S.W.2d 256 (Ky. 1966) this requirement, first articulated in *Kent v. U.S.*, 383 U.S. 541 (1965), was not given retroactive effect. *See 1967-68 Court of Appeals Review*, 56 KY. L.J. 283, 360 (1968).

[2] KY. REV. STAT. [hereinafter cited as KRS] § 208.180 (1962) enumerates the instances in which juveniles may be tried as adults.

[3] Workman was sentenced pursuant to KRS § 435.090 (1944) which provides:

> Any person who unlawfully carnally knows a female of and above 12 years of age against her will or consent, or by force or while she is insensible, shall be punished by death, or by confinement in the penitentiary for life without privilege of parole, or by confinement in the penitentiary for not less than ten years nor more than twenty years.

[4] KY. R. CRIM. P. 11.42(1) states:

> A prisoner in custody under sentence who claims a right to be released on the ground that the sentence is subject to collateral attack may at any time proceed directly by motion in the court which imposed sentence to vacate, set aside or correct it.

[5] *See, e.g.*, Monson v. Commonwealth, 294 S.W.2d 78 (Ky. 1956); Weber v. Commonwealth, 303 Ky. 56, 196 S.W.2d 465 (1946); McElwain v. Commonwealth, 289 Ky. 446, 159 S.W.2d 11 (1942).

court proceeding contravened the protection afforded by the eighth amendment of the United States Constitution[6] or section 17 of the Kentucky Constitution.[7]

The Court has traditionally held that the prohibition against cruel punishment is directed at the legislature rather than the judiciary.[8] Consequently, no objection to judicial action is possible if the sentence is within the discretionary limits established by the applicable statute.[9] The defendant's only alternative has been to claim that the statutory punishment is so severe as to be cruel, regardless of the situation under which it is imposed.[10]

Since the Court has granted the legislature great discretion in establishing penalties, this argument has been impotent.[11] This is not to say, however, that the Court has not recognized its power to declare unconstitutional a statute imposing penalties in conflict with the prohibition against cruel punishment. The Court has, on the contrary, long asserted the existence of such a right,[12] but has decided it may be exercised only in cases where the penalty "clearly and manifestly... appears" to be cruel.[13]

This self-imposed judicial limitation produced a situation in which the Court never declared a statutory penalty in violation of section 17. Even in cases where the Court found the penalty too severe in relation to public injury or individual harm produced by the criminal act, there has been a consistent refusal to declare the penalty cruel and unusual.[14]

In *Workman*[15] the Court candidly conceded[16] it had never held an act of the legislature to be in conflict with the constitutional provisions[17] prohibiting cruel punishment, even though the penalties as applied were in some cases severe.[18] The Court did, however, reaffirm its power to declare a penalty unconstitutional if it "clearly and manifestly appears to be so."[19] Furthermore, the Court concluded that even though the prohibition against cruel punishment is generally directed to the *kind* of punishment, as distinguished from its *duration*, there can be penalties so disproportionate to the offense as to constitute a violation of the prohibition.[20]

Since our concept of what constitutes cruel punishment changes as society progresses, the Court set forth three tests designed to evaluate punishment in view of the constitutional prohibition against cruel and unusual punishment.[21] The first test asks if, in view of the circumstances, the penalty shocks the conscience and violates fundamental concepts of fairness.[22] The second approach asks whether

---

[6] U.S. CONST. amend. VIII reads:
Excessive bail shall not be required, nor excessive fines imposed, nor cruel and unusual punishments inflicted.
In Robinson v. California, 370 U.S. 661 (1962), the eighth amendment was held applicable against the states by virtue of the fourteenth amendment. Prior to *Robinson* the eighth amendment was not considered applicable as against the states. *See* Pervear v. Massachusetts, 72 U.S. 475 (1866); Weber v. Commonwealth, 303 Ky. 56, 196 S.W.2d 465 (1946).

[7] KY. CONST. § 17 requires that excessive bail or fines not be enacted, nor cruel punishment inflicted.

[8] Monson v. Commonwealth, 294 S.W.2d 78 (1956). There, the Court stated:
There is no merit in the contention that the punishment is cruel or that the fine is excessive under section 17 of the Constitution of Kentucky. This is a constitutional limitation on the legislatur ein the fixing of punishment by statute. It is not applicable to the punishment set by a jury so long as it does not exceed the statutory limits. *Id.* at 80.

[9] Bradley v. Commonwealth, 288 Ky. 416, 156 S.W.2d 469 (1941). This case held that where an objection is directed at a sentence and not to the statute under which it was imposed, there is no ground for reversal under section 17 of the Kentucky Constitution. *See e.g.*, McElwain v. Commonwealth, 289 Ky. 446, 159 S.W.2d 11 (1942); Golden v. Commonwealth, 275 Ky. 208, 121 S.W.2d 21 (1938).

[10] *See* Munson v. Commonwealth, 294 S.W.2d 78 (1956); Weber v. Commonwealth, 303 Ky. 56, 196 S.W.2d 465 (1946).

[11] In Crutchfield v. Commonwealth, 248 Ky. 704, 59 S.W.2d 983 (1933), the Court concluded that the legislature should determine the adequacy of penalties necessary to prevent crime, and unless the punishment is clearly cruel, it would not interfere.

[12] Harper v. Commonwealth, 93 Ky. 290, 19 S.W. 737 (1892).

[13] *Id.* at 291, 19 S.W. at 738.

[14] Golden v. Commonwealth, 275 Ky. 208, 121 S.W.2d 21 (1938). There the Court stated:
We conclude the defendant received a fair trial . . . and while it may be conceded, had we constituted the jury hearing this evidence establishing the defendant's guilt of shooting the deceased but also showing the grievous wrongs suffered by him, shadowing and disgracing him, that we would have been inclined to have found such evidence potent to ameliorate the severe sentence here meted out to the appellant. However, as the sentence imposed is within the terms of the state, Ky. St. § 1149, imposing a life imprisonment penalty for the perpetration of murder and the jury having found that such was the degree of the defendant's crime committed, the measure of the punishment having rested solely with the jury, we are constrained to not disturb its verdict. . . . *Id.* at 213, 121 S.W.2d at 27.

[15] 429 S.W.2d 374 (Ky. 1968).

[16] That the Court, prior to *Workman*, had not held a statute to be in conflict with section 17 of the Kentucky Constitution indicates the discretion which has been afforded the legislature in establishing criminal penalties.

[17] In *Workman* the Court, which decided the penalty violated section 17 of the Kentucky Constitution, did not indicate that the eighth amendment is now applicable to the states. It did, however, adopt three tests which have been promulgated in the federal court system and which will be discussed *infra* in the text.

[18] *See e.g.*, Golden v. Commonwealth, 275 Ky. 208, 121 S.W.2d 21 (1938), cited in note 14 *supra*.

[19] 429 S.W.2d at 377. The Court adopted the language used in Harper v. Commonwealth, 93 Ky. 290, 19 S.W. 737 (1892) as support for this power.

[20] *See, e.g.*, Weems v. United States, 217 U.S. 349 (1909); Weber v. Commonwealth, 303 Ky. 56, 196 S.W.2d 465 (1946).

[21] 429 S.W.2d at 378. The Court enumerated the three approaches citing several federal cases which are cited *infra* in notes 22, 23, 24.

[22] *See* Lee v. Tahash, 352 F.2d 970 (8th Cir. 1965); Jordon v. Fitzharris, 257 F. Supp. 674 (N.D. Cal. 1966).

the penalty and the offense are greatly disproportionate,[23] while the last test asks whether the penalty goes beyond what is necessary to effect legitimate penal goals.[24]

After making these tests applicable to *Workman*, the Court held that life imprisonment without parole for two fourteen year old youths shocks the conscience and is disproportionate to the offense committed.[25] Moreover, since the legitimate penal goal in providing a penalty of life imprisonment without parole is to protect society from incorrigibles, the punishment as applied to juveniles, who cannot be classified as incorrigible, was beyond its legitimate penal application.[26]

Basically, *Workman* embodies the realization that situations arise in which a statutory penalty, though reasonable in most circumstances,[27] is so severe in others[28] as to be cruel and unusual. In these instances, *Workman* holds that the statutory penalty as applied to the offender is unconstitutional.

The Court's decision to evaluate statutory penalties in terms of the circumstances surrounding their imposition, instead of simply reciting the rule that a criminal penalty is valid so long as it is within the discretionary limits established by the legislature, reflects much humane and realistic thought. Since it was possible under Kentucky law for two fourteen year old youths to be sentenced to life imprisonment without parole, the need for an analysis of surrounding circumstances is obviously necessary if the prohibition against cruel punishment is to be an effective limitation on the legislature.

Larry C. Allen

[23] Weems v. United States, 217 U.S. 349 (1909). There, the Court observed, "[I]t is a precept of justice that punishment for crime should be graduated and proportioned to the offense." *Id.* at 367.

[24] Robinson v. California, 370 U.S. 660 (1962).

[25] The Court observed:

> Rape is the only offense in this jurisdiction where punishment without benefit of parole may be inflicted. As a philosophical matter one is caused to wonder why this be so. It is difficult to believe that the legislature thought this offense worse than others, especially murder. 429 S.W.2d at 377.

[26] The Court stated, "We believe that incorrigibility is inconsistent with youth; that it is impossible to make a judgment that a fourteen-year old youth, no matter how bad, will remain incorrigible for the rest of his life." *Id.* at 278.

[27] The Court held that life imprisonment without parole is constitutional when imposed on an adult convicted of rape. *Id.* at 377.

[28] *E.g.*, in *Workman* the age of the appellants was the factor which rendered the penalty too severe.

TORTS—INADEQUATE VERDICTS—PARTIAL RETRIALS.—The case had been submitted to the jury. The plaintiff, having shown special damages from the automobile accident of almost $800 for hospital and medical expenses and approximately $2,600 for lost wages, as well as significant pain and suffering, was confident that her award would approach the nearly $26,000 asked. The defendant was equally confident that the jury would agree with his claim of contributory negligence and exonerate him entirely. When the jury returned, it rendered a verdict for plaintiff for "$2,000 total."

Plaintiff, unsatisfied with the verdict, appealed on the sole ground of inadequacy, and asked for a new trial limited solely to the issue of damages. Defendant, willing to accept the verdict and confident that the worst he could expect would be a complete new trial, did not cross-appeal but simply argued that the size of the award was supported by the evidence, and that, in any event, a partial new trial was not appropriate in the event of a reversal for inadequate damages since there was an inference of a compromise verdict. *Held:* Reversed for partial retrial. The mere fact that a verdict was reached by compromise is not recognized as an independent ground for reversal, and an award of damages concludes the issue of liability against a defendant who does not cross-appeal. Therefore, a plaintiff who has received an award which does not compensate him for special damages both pleaded and proved is entitled to a new trial on the basis of failure of the verdict to conform to the law and to the evidence; and this new trial may be limited to the issue of damages. *Nolan v. Spears*, 432 S.W.2d 425 (Ky. 1968).

The power of courts to set aside verdicts for excessiveness has long been recognized,[1] and the same is true of verdicts which award inadequate special damages.[2] Indeed, in Kentucky this was the only justification for a reversal for inadequacy until the repeal of section 341 and amendment of section 340(4) of the Civil Code of Practice in 1936.[3] The Civil Code of Practice was adopted in 1851[4] and the provisions dealing with new trials due to excessive or inadequate

[1] *See* Taylor v. Giger, 3 Ky. 595, 1 Hardin 586 (1808), in which the principle is first recognized in Kentucky, and Outten v. Barnes, 16 Ky. (1 Litt. Sel. Ca.) 136 (1812), in which it is first applied.

[2] Taylor v. Howser, 75 Ky. (12 Bush) 465 (1876).

[3] An Act to Repeal Section Three Hundred Forty-One (341) and to Amend and Re-enact Section Three Hundred Forty (340) of Article Five (5), Chapter Two (2), Title Nine (9) of the Kentucky Code of Practice in Civil Cases, Relating to New Trials, Ch. 27, [1963] Ky. Acts 67.

[4] An Act to Establish a Code of Practice in Civil Cases in the Courts of This Commonwealth, Ch. 616, [1850] Ky. Acts 106.