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INCREASED INTEREST in hunting for pleasure has led to an increased number of mishaps. Recent statistics show one injury for every 7,800 hunters, with one in every five or six fatal.[1]

From early to more recent cases it has generally been held that where one is not negligent in the handling of his weapon he is not liable.[2]

But "ordinary care" while hunting means a high degree of care, due to the inherent nature of the sport.[3] Thus, in *Adams v. Dunton*[4] two hunters sat in a boat, hunting ducks. Defendant hunter was found to be negligent when his rifle discharged, injuring the plaintiff. The bullet entered plaintiff's thigh from the rear and traveled downward parallel with the leg bone. The evidence showed that defendant's safety catch was "off." He was found liable for failing to use the care of a person of reasonable prudence in such circumstances.

Courts recognize that the standards of care to be observed are peculiar to each specific situation.[5] Precautions must be taken in accordance with the circumstances in order to avoid actionable fault.[6] Thus it is imperative for one to use a high degree of care when he is in doubt as to what he is shooting at. A well settled rule is that a hunter must exercise due care to identify his target, for if he is in doubt, he must not shoot.[7] On the other hand, a hunter is not liable if a person wanders carelessly or knowingly into a target area while wearing incon-

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1 Kelly, Civil Liability for Unintentionally Shooting a Person While Hunting, 15 Wyo. L. J. 88 (1960).

2 Siefker v. Paysee, 115 La. 953, 40 So. 366 (1905); Klop v. Vanden Bos, 263 Mich. 27, 248 N. W. 538 (1933); Moore v. Fletcher, 147 Colo. 407, 363 P. 2d 1056 (1961).

3 Normand v. Normand, 65 So. 2d 914 (La. App. 1953); McLaughlin v. Marlott, 296 Mo. 656, 246 S. W. 548 (1922).

4 284 Mass. 63, 187 N. E. 90 (1933).

5 Davidson v. Flowers, 123 Ohio St. 89, 174 N. E. 137 (1930); Winans v. Randolph, 169 Pa. 606, 32 A. 622 (1895).

6 53 A. L. R. 1205 (1928); Schouning v. Claus, 363 Mo. 119, 249 S. W. 2d 361 (1952).

7 Koontz v. Whitney, 109 W. Va. 114, 153 S. E. 797 (1930); State v. Green, 38 Wash. 2d 240, 229 P. 2d 318 (1951).

spicuous attire, and is injured by gunfire.[8] If plaintiff himself is able to avoid peril he is obligated to do so even though defendant may not have exercised due care.

Courts have established that use of firearms while hunting requires high care.

> Persons having control and possession of firearms must exercise the utmost caution that harm may not come to others from such weapons. The degree of care is commensurate with the dangerous character of the weapons. The care is such as ordinary cautious and prudent persons would exercise under similar circumstances.[9]

In one case, hunters were returning from a hunting trip. A loaded gun was placed by defendant in the front seat of a car, muzzle end toward the back seat. Decedent was shot and killed when the gun discharged as he attempted to leave the car. The defendant was found liable for failing to employ care commensurate with use of a dangerous instrumentality.[10] Whether a hunter was negligent in the handling of his weapon as a dangerous instrumentality is a question for the jury.[11]

The *res ipsa loquitur* doctrine often has been applied to negligent discharge of firearms while hunting. It is regularly employed in cases where injury occurs to the plaintiff while the defendant has sole or exclusive control of the firearm at the time when it is discharged.[12]

The res ipsa doctrine usually is invoked when evidence is slim but fault seems obvious. Growing use of this doctrine in hunting accidents shows a definite trend to strict liability in the field. A hunter will be liable under the res ipsa doctrine when a weapon he is properly holding or firing is negligently discharged.[13] For example, in one case a weapon held by the defendant in such a manner as was safe, discharged and caused permanent injury to the defendant's leg. The court found the

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[8] Webster v. Seavey, 83 N. H. 60, 138 A. 541 (1927).

[9] Gibson v. Payne, 79 Ore. 101, 154 P. 422 (1916).

[10] Nelson v. Lee, 249 Ala. 549, 32 So. 2d 22 (1947); Rudd v. Byrnes, 156 Cal. 636, 105 P. 957 (1909).

[11] Ertel v. DeWitt, 60 Ohio L. Abs. 273, 101 N. E. 2d 296 (1949); Bennett v. Marquis, 325 Mass. 375, 90 N. E. 2d 551 (1950).

[12] 46 A. L. R. 2d 1217 (1956).

[13] Norling v. Carr, 211 F. 2d 897 (7th Cir. 1954); Mobilia v. Blystone, 31 Erie Co. L. J. 307 (Pa. 1948); Annear v. Swartz, 46 Okla. 98, 148 P. 706 (1915).

defendant liable on the res ipsa principle.[14] Negligent manipulation while in complete control of the firearm constituted liability under res ipsa.[15]

By far the most popular and effective defense employed in hunting injury cases is contributory negligence. A classic example is found in *Wilfirt v. Nielson.*[16] Here two hunters were engaged in flushing a quail from the brush. Plaintiff allowed himself to get so close to the target that he found himself in defendant's line of fire, and was injured when a hail of pellet shot struck him in both legs. Defendant was found to be 10 per cent negligent, but the court found the plaintiff to be 90 per cent at fault. Even though the defendant had a duty to use care, the plaintiff hunter also had a duty to stay out of the defendant's line of fire.

Contributory negligence is used frequently as a defense in instances where the plaintiff becomes aware of the defendant hunter and fails to use due care while he is firing.[17] It has been held that a defendant will not be liable on the theory of contributory negligence where he has stationed the plaintiff hunter at a certain position and plaintiff strays from that spot knowing full well that defendant may fire.[18]

Contributory negligence has been successfully attempted in cases where both hunters had knowledge of the other's presence. A plaintiff shot in the back while standing directly in front of a loaded firearm that was being properly held by defendant has been found to be contributorily negligent.[19] In another case plaintiff was at a vantage point where he could see defendant and failed to notify him of his presence. His failure to use due care was found to be contributory negligence. Defendant hunter had no knowledge of plaintiff's presence while firing at a flying bird.[20] On the other hand, where plaintiff left a formation line of hunters and was injured by defendant's shot, he was not found to be contributorily negligent. In this instance the evidence showed

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[14] Huber v. Collins, 38 Ohio L. Abs. 551, 50 N. E. 2d 906 (1942); Zoeller v. Schmitz, 172 Ill. App. 167 (1912).

[15] Mobilia v. Blystone, *supra* note 13.

[16] 250 Wis. 646, 27 N. W. 2d 893 (1947); Harper v. Holcomb, 146 Wis. 183, 130 N. W. 1128 (1911).

[17] Summers v. Tice, 33 Cal. 2d 80, 199 P. 2d 1 (1948).

[18] Holmon v. Roess, 253 F. 2d 497 (5th Cir. 1958).

[19] Johnson v. Holzmer, 263 Minn. 227, 116 N. W. 2d 673 (1962).

[20] Blanchard v. Noteware, 263 App. Div. 186, 32 N. Y. S. 2d 188 (1942).

that defendant had failed to use due care in discharging his weapon.[21]

Hunting accidents have become so common in recent years that several states have adopted legislation making a person criminally liable when the circumstances show gross or reckless negligence. New York, a leader in this respect, passed a statute, in 1953, making a reckless person criminally liable if death resulted from such a hunting accident.[22] Punishment is imprisonment for up to five years, and/or $1000 fine.[23]

It has also been held, in criminal actions, that one using firearms in hunting must use the care commensurate with the danger involved, and that negligence in this instance may be criminal even though one thinks that he is shooting at an animal.[24]

Where criminal responsibility is imposed, the general rules relating to homicide have been applied to cases in which death resulted from a hunting accident while firing at game or supposed game.[25] Yet, a homicide has been found to be excusable in a hunting accident if the act is a lawful one done with ordinary caution and without unlawful intent.[26]

It has become almost a universal rule that gross or reckless negligence must be shown in order to make a hunter criminally liable. The case of *People v. Smaka*[27] points up strongly the culpable negligence rule. The defendant thought that the decedent was a bear, and without further caution fired into the bushes, killing him. An autopsy later performed gave as a cause of death, complications resulting from a gunshot wound. Defendant was found guilty of criminal negligence for failing to be more certain of his target before firing.

In a similar case the defendant was not liable criminally where he thought that the decedent was a deer, and shot and killed him.[28] Medical testimony showed that decedent met his

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[21] DiCostanzo v. Fiumano, 17 App. Div. 2d 787, 232 N. Y. S. 2d 728 (1962).

[22] N. Y. Penal Code, Sec. 1053-C (1953).

[23] *Ibid.*, Sec. 1053-D (1953).

[24] Anno. 63 A. L. R. 1232 (1929).

[25] Anno. 23 A. L. R. 2d 1402 (1952).

[26] People v. Joyce, 192 Misc. 107, 84 N. Y. S. 2d 238 (1948).

[27] 206 Misc. 295, 127 N. Y. S. 2d 556 (1954).

[28] People v. Dawson, 206 Misc. 297, 133 N. Y. S. 2d 423 (1954); State v. Jones, 152 Me. 188, 126 A. 2d 273 (1951); but see Fowler v. Monteleone, 153 S. 2d 490 (La. App. 1934).

death from a bullet wound which ruptured the aorta. The court held the evidence to be insufficient as a matter of law, in failing to establish gross negligence beyond a reasonable doubt. It could not be shown that defendant had completely disregarded the consequences that might ensue from his act.

Occasionally courts have indicted defendants on the charge of voluntary manslaughter. This was done where defendant, hunting birds along a river bank in a sparsely inhabited residential area, shot and killed a woman in her own driveway.[29] However, guilt was not established because of the prosecutor's failure to prove that the act was done in the heat of passion.

Defendants have been convicted of murder where sufficient evidence showed that the defendant hunter and the decedent had had words shortly before the alleged accident.[30] The decedent, in one such case, was found in an open clearing with a bullet hole in his back. Defendant's claim that he had thought that he was shooting at a rabbit did not hold up as a defense.

A conviction of involuntary manslaughter was obtained in *Vires v. Commonwealth.*[31] Here, evidence showed that defendant shot and killed decedent neighbor while both were hunting in a clear field in broad daylight, and defendant was only 15 or 20 feet away from decedent when the shooting occurred. Defendant maintained that he had mistakenly shot decedent while firing at a fox. In another case defendant was found guilty of manslaughter when he allegedly thought that a 15 year old boy wearing a red jacket and shirt was a bear.[32]

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[29] Mullins v. Commonwealth, 269 S. W. 2d 713 (Ky. App. 1954); Childers v. Commonwealth, 239 S. W. 2d 255 (Ky. App. 1951).

[30] Brown v. State, 203 Ga. 218, 46 S. E. 2d 160 (1948); Simmons v. State, 227 Ark. 1124, 305 S. W. 2d 119 (1957).

[31] 308 Ky. 707, 215 S. W. 2d 129 (1948).

[32] State v. Green, *supra* note 7; State v. Newberg, 129 Or. 564, 278 P. 568 (1929).