

CRIMINAL LAW



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Chapter 1 - Introduction to Criminal Law

Criminal law protects society's interpretation of right and wrong and deems these acts/ crimes as unlawful which are created to protect the society as whole, individual interests and certain property rights. Any crime is regarded as a 'public wrong' and the State is charged with the responsibility of protecting the moral foundation of the society.

Criminal law is constantly evolving. The changing mind-set of the society results in a corresponding change in law. Most recently there has been a complete change in the sexual offences law, also old offences have been replaced by completely new offences. Amendments are being made every day.

GENERAL PRINCIPLES OF CRIMINAL LAW

There must be a balance between the need to protect the society against unlawful behaviour and the human rights of the accused. Hence, whenever there is an alleged breach of law, the accused will be considered innocent until proven guilty. He must be given a fair trial and the burden of proof lies on the prosecution.

THE BURDEN AND STANDARD OF PROOF

The case of **Woolmington v DPP** [1935] AC 462 laid down the foundation of criminal law. The prosecution has to prove every element of the crime beyond a reasonable doubt. Moreover, Article 6(2) of the ECHR supports this, it provides that 'a person charged with a criminal offence shall be presumed innocent until proven guilty according to the law'.

In exceptional circumstances, the defendant bears the burden to prove a fact on a balance of probabilities test, instead of just adducing evidence of it. Moreover, more exceptional categories are made by the Parliament, but these statutory restrictions must be handled cautiously, as all of them must comply with Article 6(2).

CLASSIFICATION OF OFFENCES

The tribunal that will hear the offence is decided by the classification of the offence. Some offences are more serious than the others.

SUMMARY OFFENCES

These offences are the least serious of all crimes. These offences if committed by an adult are only tried summarily. The Criminal Justice Act, 1988 has made summary only a few offences: common assault, battery and taking vehicles without consent. They are tried only in the Magistrates' Court. The maximum punishment that can be imposed is currently 12 months' imprisonment and a £5,000 fine.

INDICTABLE ONLY OFFENCES

An 'indictable' offence means an offence, which when committed by an adult, is only triable on 'indictment', even though it is exclusively so triable or triable either way. Offences are made indictable only due to the gravity of the crime or some other reason like complexity of the issues involved which makes them unsuitable to be tried as summary offences. These offences include any crime punishable by imprisonment for life on conviction, death caused by dangerous driving and other serious offences under the Theft Act 1968.

An indictable offence is tried by jury and a judge in the Crown Court and the maximum punishment is imposed by the regulating statute. Examples: robbery, rape, murder, manslaughter, causing grievous bodily harm with intent and blackmail.

EITHER- WAY OFFENCES

There are certain offences where the seriousness of the crime depends on the facts of the case. These are classified as 'either way' offences and can either be tried in the Magistrates' Court or in the Crown Court. This decision is initially made by the Magistrates, in whose court the criminal case proceedings commence. If the Magistrate is of the opinion that his powers are sufficient to deal with the case then the case will be tried summarily, although the defendant has the right to choose trial by jury. Contrastingly, if the Magistrate is of the opinion that the case

attracts a penalty beyond the Magistrate's power then the case goes to the Crown Court and the defendant loses the right to choose a trial by jury. Example: burglary, theft and unlawful wounding.

THE OBJECTIVES OF CRIMINAL LAW

A useful explanation of the purpose of criminal law was provided by the American Law Institute when they attempted to define the objectives of the criminal law in Article 1 of their Draft Model Penal Code:

- (a) to forbid and prevent conduct that unjustifiably and inexcusably inflicts or threatens substantial harm to individual or public interests;
- (b) to subject to public control persons whose conduct indicates that they are disposed to commit crimes;
- (c) to safeguard conduct that is without fault from condemnation as criminal;
- (d) to give fair warning of the nature of the conduct declared to be an offense;
- (e) to differentiate on reasonable grounds between serious and minor offenses.

THE BASIC ELEMENTS OF A CRIME

Once the offence has been identified, we need to identify the requirements to establish the offence. The Latin maxim *actus non facit reum nisi mens sit rea* clearly explains the basic elements of criminal liability. A person is not criminally liable for his conduct unless the required state of mind coincides with the prohibited *actus reus*.

ACTUS REUS

This phrase is usually used to describe the act of the accused which is prohibited by law. The concept may also cover omissions or state of affairs. This is an essential element of any offence. Offences may be categorized in several different ways:

- **CONDUCT OFFENCES**

Some offences only require certain acts to be committed by the accused to satisfy the *actus reus*. For instance, fraud by false

misrepresentation simply requires the defendant to make a misleading or untrue representation. Even damaging consequences from this action are not important.

- **RESULT OFFENCES**

In such offences, the action of the defendant must result in a specific consequence to satisfy the *actus reus* element. For instance, in the case of murder where the actions of the accused lead to the death of the victim what needs to be proved is that the action caused the result.

- **SURROUNDING CIRCUMSTANCES**

In certain offences, in addition to an action (and a specific result in some cases) surrounding circumstances also form a part of the *actus reus*. For instance, under the Theft Act 1968, appropriation of property under Section 1(1) involves property 'belonging to another'. What needs to be proved here is that the action of the Defendant of allegedly appropriating property was done in circumstances that it 'belongs to another', someone other than the thief.

- **OMISSIONS**

In certain situations, the *actus reus* can be fulfilled when the Defendant has taken no action whatsoever. Criminal law, in certain situations, imposes criminal liability when there is a failure or omission to act. This will be discussed in the subsequent chapters.

MENS REA

This is the second important element of criminal liability. Most offences require that the accused not only commit an act but that action must be accompanied by a 'guilty mind'. The term '*mens rea*' covers a variety of mind states that need to be proved in relation to the *actus reus* of the crime in question. In some offences, a particular *actus reus* may require more than one type of *mens rea* in order to establish that offence.

Some offences use other words when defining *mens rea*, for instance they can use the term 'maliciously'. This denotes that the

actus reus must be committed intentionally or recklessly (for example Section 20 of the Offences Against the Person Act 1861).

General Principle: Contrastingly, some offences do not require *mens rea* in every element of the offence.

Cundy v LeCoq (1884) LR 13 QBD 207

Facts: The Defendant was convicted for selling liquor to a drunken person that was against Section 13 of the Licensing Act 1872. The Defendant had no means of knowing that his customer was drunk. Moreover, the section did not have any requirements that referred to the Defendant's knowledge, or that the Defendant should ascertain that the customer was drunk or not. **Ratio: The issue for the court was whether awareness of the customer's condition had to be taken into consideration according to the wording of the Statute. Whether the answer was no, the element of *mens rea* should have not needed to be proven.** **Application:** By looking at the wording of the Statute the prohibition was held to be absolute and the Defendant convicted. His knowledge of the condition of the customer was not necessary to constitute the offence. The court allowed the application of the so-called 'strict liability' even though the Defendant alleged to have committed a bona fide mistake. The court took into consideration the absence of the required *mens rea* as a matter of mitigation of the penalties but not as an element that allowed avoidance of liability.

CO-INCIDENCE OF ACTUS REUS AND MENS REA

The prosecution needs to establish that the *actus reus* and *mens rea* occurred at the same time. This will be studied in more detail in chapter 3.

SUMMARY

- Criminal law protects individuals and their property from harm, preserves order in society, punishes those that commit offences.
- The accused will be considered innocent until proven guilty.
- The burden of proof lies with the prosecution.

- There are different potential offences.
- Offences may be described as summary (the least serious), indictable (whether they require a jury in front of the Crown Court) or either-way offences.
- Criminal law aims to forbid and prevent unlawful actions, protect the general public and give guidance on what is lawful and what is not.
- The basic elements of a crime are the *actus reus* and the *mens rea*.
- The *actus reus* element may constitute in a conduct, result, omission.
- The *mens rea* element is represented by the status of the Defendant's mind.

Chapter 2 - Homicide

Actus Reus & Causation: Murder

INTRODUCTION

Under English law, homicide is used as a generic term which covers causing the death of another human being. Murder is the most serious kind of homicide and the distinguishing factor is that the defendant must act with a specific intent. Following the Murder (Abolition of Death Penalty) Act 1965, it is punished by a mandatory life sentence. The judge does not have any discretion in sentencing other than to consider a minimum term before a prisoner can be released on license.

DEFINITION OF MURDER

There is no statutory definition of murder. The definition laid down by Sir Edward Coke is still applicable today:

“Murder is committed when a man of sound memory, and of the age of discretion, unlawfully kills within any county of the realm any reasonable creature in being under the King's peace, with malice aforethought either expressed by the party or implied by law, so as the party wounded or hurt die of the wound or hurt within a year and a day after the same.”

Hence, the major elements of murder are: the killing must be unlawful; the victim of the homicide must be a person (being) and must be under the jurisdiction of the United Kingdom. Hence, it can be committed anywhere in the UK or on any British ship or aircraft.

ACTUS REUS

The *actus reus* of murder is satisfied when certain elements are fulfilled. The killing must be unlawful. It is lawful to kill another person, for example, when enemy soldiers are killed during battle, in cases of death penalty and in self-defence.

General Principle: The victim of the homicide must be a person.

Attorney-General's Reference [1996] 2 All ER 10

Facts: A man stabbed his pregnant girlfriend in the abdomen. She gave birth prematurely, and the baby died some four months later as a result of its immaturity. The Defendant was acquitted of murder at the judge's direction and the Attorney-General referred various points of law to the Court of Appeal. **Ratio: Lord Taylor CJ said the elements of the *actus reus* of murder are that the defendant did an act, that was intentional rather than accidental, that was unlawful, that was a substantial cause of the death of a person in being and (as the law then stood) that the death occurred within a year and a day of the act. The *mens rea* is that at the time of the act the Defendant intended either to kill or to cause really serious injury to the victim or (subject to the extent of transferred malice) to some other person. The House of Lords subsequently reversed Lord Taylor's judgement as to the applicability of transferred malice in this case and disagreed with his suggestion that the foetus could be regarded as part of the mother, but this definition of murder appears to be sound. Application:** The House of Lords held that a child was not a live person and therefore this could not be murder.

CAUSATION: CAUSING DEATH

The killing must cause the death of a person. What needs to be proved is that the acts or omissions of the Defendant caused the death of the victim. Technically, “causing death”, can be misconstrued because everyone will eventually die. The courts have acknowledged the fact, and consider it equally liable to cause death.

There are two important things to establish causation, both of which have to be proved by the prosecution. Firstly, the jury must be satisfied that the acts of omissions in question resulted in the relevant consequence. Secondly, it must be proved that the acts or omissions of the accused were a legal cause of the consequence.

General Principle: There must be a causal link between the act or omission and the death of the victim

Attorney-General's Reference (No.3 of 1994) [1997] 3 All ER 936, HL

Facts: A man was charged with stabbing his pregnant girlfriend in the abdomen while she was pregnant. This led to her giving birth prematurely, and the baby died some four months later as a result of its immaturity. **Ratio:** The House of Lords said that the man could not be guilty of murder because he did not have the necessary *mens rea* towards the death of B, but had no doubt the *actus reus* of murder. The man's act changed the maternal environment of the foetus, said Lord Mustill, so that when the baby was born she died (albeit of "natural causes" and not of a minor injury sustained during the stabbing) when she would otherwise have lived. Lord Hope agreed, and said the *Actus Reus* of murder and manslaughter required evidence of an unbroken chain of causation between the defendant's act and the victim's death, the time interval now being unimportant. The presumed facts of the reference certainly created a *prima facie* case to go to the jury. **Application:** If the prosecution cannot prove a causal link between the Defendant's act and the victim's death, there can be no conviction for murder.

In deciding the issue of causation, the jury must apply the following legal principles:

- **FACTUAL CAUSATION: THE 'BUT FOR' TEST**

This is a question of fact. It must be proved that 'but for' the act or omission of the Defendant, the relevant consequence would not have happened the way that it did. Which means that in the absence of the defendant's act or omission would the defendant have died?

General Principle: A factual link must be established between the act or omission of the accused and the victim's death.

R v White [1910] 2 KB 124, CCA

Facts: Meaning to kill his mother, the accused put a few drops of cyanide into her lemonade. Soon afterwards, before drinking the lemonade, his mother died of a heart attack. **Ratio: According to**

the ‘but for’ test, it must be established that the consequence would not have occurred as and when it did but for the Defendant’s action. Application: Since the medical evidence showed that the death of the mother was not due to poisoning and no trace of cyanide was found in the body the court acquitted the Defendant on the murder charge.

- **LEGAL CAUSATION**

This is a question of law. Quite generally a question becomes one of law where there is more than one operative cause. If I invite you around for dinner and throw a TV out the window as you ring the door bell and you are thrown into the road, hit by a cyclist who throws you into the way of an oncoming car and if you die. Who is the cause of death? The law will prevent a person from being responsible for everything that arises from his acts or omissions. The law will acknowledge the liability of the Defendant before imposing any penalty.

General Principle: The consequence must be caused by the Defendant’s culpable act.

R v Dalloway (1847) 2 Cox CC

Facts: The Defendant was driving a horse cart without holding the reins. A child ran in front of the cart and was struck by the wheels and killed. It appeared in evidence that even if the Defendant would have been holding the reins, the child would have still been killed as he would not have been able to stop the cart in time. However, if he would not have been driving the cart then the child would not have been killed so in that way he did “cause death”.

Ratio: The issue for the court was to establish whether the consequence could be said to be the result of the Defendant not holding the reins. Application: Evidence shew that even if the Defendant had been holding the reins, he could not have stopped the cart in time. Therefore, the Defendant was held not liable. The child’s death was not the Defendant’s fault.

General Principle: The defendant's act need not be the only cause of death.

R v Bengo (1865) 4 F & F 504

Facts: Bengo was a foreman of some railway track layers. He was under the impression that the next train was not due for a few hours and so he ordered the track to be taken up. He asked a man to go down the track with a red flag to stop any trains. However, this man did not go an appropriate distance and the driver of the train was not keeping a good look out. The train crashed and many people died as a consequence. **Ratio: The issue for the court was that the deaths were a combination of elements: The Defendant's misreading the train timetable, the signalman's failure to stand in the appropriate position, the train's driver's failure to keep a proper lookout. Before a situation of multiple causes, the court focused on which one of them was the major cause of the crash. Application:** The jury convicted the Defendant on the ground that his conduct mainly caused the deaths.

INTERVENING ACTS OR ACTS WHICH BREAK THE LINK OF CAUSATION.

This is where the act of a third party breaks the causal effect of the original Defendant. The courts have to decide whether the link of causation has been broken and can the Defendant be held liable in such situations.

General Principle: Courts are reluctant to consider medical negligence as breaking the chain of causation.

R v Smith [1959] 2 All ER 193, CMAC

Facts: Smith and Creed were involved in a fight in barracks, in which Smith stabbed Creed with his bayonet. Creed's friend took him to the first aid post, but on the way he tripped over and dropped Creed twice. When they got there, the medical officer was busy and took some time to get to Creed. Creed died about two hours after the stabbing, but had he been given proper treatment he would probably have recovered. Smith was charged with murder. **Ratio: The treatment he was given was thoroughly bad and**

might well have affected his chances of recovery, said Lord Parker CJ, but medical treatment, correct or not, did not break the chain of causation. If at the time of death, the original wound is still an operating cause and a substantial cause: then death can be said to be a result of the wound albeit that some other cause is also operating. Only when the second cause of death is so overwhelming as to make the original wound merely part of the history can it be said that death does not flow from the wound. **Application:** Generally, medical malpractice does not break the chain of causation. Therefore, the Defendant was not convicted.

General Principle: Bad medical treatment does not break the link of causation.

R v Cheshire [1991] 3 All ER 670, CA

Facts: The Defendant shot the victim in an argument, and the victim was taken to hospital where a tracheotomy was performed. Six weeks later, the victim suffered breathing problems as a result of the tracheotomy scar and died. The hospital had been negligent - perhaps even reckless - in not recognising the likely cause of the victim's problems and responding to them. **Ratio: The Defendant's actions need not be the sole or even the main cause of death as long as they contributed significantly to that result. Medical negligence does not exclude the Defendant's liability unless it was so independent of his acts and so potent as to make his own contribution insignificant.** **Application:** Only in the most extraordinary and unusual case would treatment, whether right or wrong, given in good faith by a generally competent doctor, be regarded as independent of the original injury. The Court of Appeal held that this did not break the chain of causation from the shooting.

- **INTERVENTION OF THIRD PARTIES**

General Principle: There will be a break in the chain of causation only if the acts of the third party are free and informed.

R v Pagett (1983) 76 Cr App R 279, CA

Facts: Pagett was convicted of manslaughter following the death of his pregnant girlfriend that had been hit and killed by police bullets while Pagett was using her as a human shield. **Ratio:** **The judge while directing the jurors on causation opined that they had to be sure that the accused had first fired at the police officers and that act caused the officers to fire back, which resulted in the girl being killed. The jury had to be satisfied that the police officers fired in self-defence or while performing their duties as a police officer. If the jury was not sure about these two then the link of causation would be broken. The jury convicted Pagett. The decision was appealed. The Court of Appeal said Pagett's act was not only a factual cause of Gail's death but a legal cause too: it was an unlawful and dangerous act, and the police return of fire was a foreseeable consequence.**

Application: There will only be a break in the chain of causation if the actions of the third party were 'free, deliberate and informed'.

- **THE 'THIN- SKULL' RULE**

The Thin-skull rule refers to the principle that the Defendant must take the victim as he finds him. This means if my victim is prone to internal bleeding and I hurt them unknowingly, I am still responsible for their injuries.

General Principle: **A person who inflicts harm on another cannot simply escape liability if the victim due to some pre-existing infirmity suffers greater harm than would be expected as a result of his act. In other words, the defendant must be taken as he/she has been found.**

R v Hayward (1908) 21 Cox CC 692

Facts: The Defendant threatened his wife with violence and chased her out of the house, where she died from a rare medical condition aggravated by violent exercise and fright. Both Defendant and wife were unaware of the medical condition. **Ratio:** **The issues for the court were: firstly, whether the Defendant was liable even if he did not physically touch her. Secondly, should the peculiar medical condition of the victim have been taken into account. An ordinary person of reasonable fortitude**

would not have died in the same circumstances. Application: Ridley J told the jury that death from fright alone, caused by an illegal act such as a threat of violence, was enough to sustain a charge of manslaughter. The Defendant had to take the victim's condition as he found it. The Defendant could not escape liability on the grounds that the death was caused by a medical condition.

- **ACTS OF THE VICTIM**

This issue generally arises in fright and flight cases. The issue falls on the question whether such escape was foreseeable by a reasonable man, if not then the Defendant can be acquitted.

General Principle: There must be some proportionality between the gravity of the threat and the action of the deceased in seeking to escape from it.

R v Mackie (1973) 57 Cr App R 453, CA

Facts: The Defendant threatened his three-year-old stepson with a severe thrashing for some minor misbehaviour. The boy tried to run away but fell downstairs, dislocated his neck and died. The Defendant was charged with manslaughter. The man was convicted and his conviction was upheld by the Court of Appeal.

Ratio: The judge had put four questions to the jury: Was the boy in fear of the Defendant? Did that fear cause him to try to escape? Was that fear well-founded? Was it caused by the Defendant's unlawful conduct, allowing for the fact that Defendant was in loco parentis and could lawfully administer reasonable punishment? These were the right questions and the jury had evidently answered each of them affirmatively.

Application: The defence that the boy had effectively killed himself by running and falling down the stairs was not accepted by the Court.

General Principle: If the victim has bled to death from the original wound, his act or omission done to commit suicide will not break the chain of causation.

R v Dear [1996] Crim LR 595, CA

Facts: A man attacked another man who had allegedly molested the defendant's 12-year-old daughter, cutting him repeatedly and

deeply with a Stanley knife. The victim died two days later and the defendant was charged with murder. On appeal, the defendant argued that the victim had in fact committed suicide by reopening his healing wounds, or alternatively by failing to stem the bleeding from them after they had reopened themselves. **Ratio: The Court of Appeal said if the victim mistreats or neglects to treat his injuries, this would not break the chain of causation.** **Application:** The jury was directed in considering the Defendant liable since the victim's wounds were still the operating and substantial cause of the death. The defence that the chain of causation got broken due to suicide or failure to take steps to staunch the blood flow were not available.

- **REFUSAL OF MEDICAL TREATMENT**

In these cases, the courts have to decide the position when the victim refuses medical treatment.

General Principle: Even if the victim refuses medical treatment, the Defendant will be liable for causing the death of the victim.

R v Holland (1841) 174 ER 313

Facts: The Defendant assaulted the victim and injured one of his fingers. A surgeon advised the victim to have the finger amputated to prevent infection. The victim refused and subsequently died of tetanus. **Ratio: The Defendant was held to have caused the death of the victim. The fact that the wound did not instantly cause death and became a cause of death after the victim refused treatment did not matter. The issue that only needed to be established was whether the wound was the cause of the death.** **Application:** Refusal of medical treatment by the victim could not be used a defence for murder. The Defendant was held liable.

General Principle: The Defendant cannot escape liability on the grounds that the victim had refused treatment on religious grounds.

R v Blaue [1975] 3 All ER 446, CA

Facts: The Defendant stabbed a 18-year-old woman and punctured her lung. At the hospital, the woman was told that she would have needed a blood transfusion to save her life, but she refused this as contrary to her religious beliefs. She died next day. The Defendant was charged with murder which was subsequently reduced to manslaughter by reason of diminished responsibility. **Ratio: It has long been the policy of the law, said Lawton LJ that those who use violence on other people must take their victims as they find them. This principle clearly applies to the mental as well as the physical characteristics of the victim, and the courts will rarely make a judgement as to whether the victim's response was reasonable.** **Application:** The Defendant could not escape liability because the victim had refused treatment on religious grounds.

SUMMARY

- Homicide means causing the death of another human being.
- Murder is the most serious kind of homicide. The Defendant must not only kill someone but he must act with a specific intent.
- The element of Actus Reus of murder is satisfied whether the killing is unlawful.
- There must be a link between the action of the Defendant and the death of the victim. It must be established that the consequence would not have occurred as and when it did but for the Defendant's action.
- The courts have to decide whether the link of causation has been broken by considering acts of third parties, the thin-skull rule and acts of the victim.

Chapter 3 - Mens Rea

INTRODUCTION

The *mens rea* is the mental element of crime. It is the guilty intention to bring about a desired result which is considered criminal. The mens rea of murder is conventionally explained as "malice aforethought", but this can be deceptive because (as Lord Hailsham LC pointed out) neither word takes its usual meaning. Malice needs not be truly malicious - euthanasia for reasons of compassion is still murder - and no more than a split second's premeditation is necessary. Moreover, murder can be committed without the intention to cause death: the *mens rea* is an intention to cause either death or grievous bodily harm to any person.

The Homicide Act of 1957 explains *mens rea* for murder, 'malice aforethought' as:

- 1) An intention to kill (express malice) or
- 2) An intention to cause grave bodily harm (implied malice)

DIRECT INTENTION

There are two kinds of intention in criminal law: direct intention and oblique intention. Direct intention is where the consequence is what the Defendant wanted to happen by his act, it was the purpose of the Defendant's act.

General Principle: The intention will be direct whether the Defendant desires an outcome.

R v Calhaem [1985] 1 QB 808

Facts: The Defendant hired a killer to murder a woman. The killer testified that after being paid by the Defendant he had decided not to carry out the killing, but instead to visit the victim's house, carrying an unloaded shotgun and a hammer, to act out a charade that would give the appearance that he had tried to kill her. When he had stepped inside the front door of the woman's house, she

started screaming. He panicked, hitting her several times with the hammer. The Defendant appealed, submitting that there was no causal connection between him and the death of the woman. **Ratio: Hiring someone to kill carries a direct intention of a specific outcome which is murder a person. Application:** The Court of Appeal affirmed the Defendant's conviction on the ground that by hiring the killer he had the *actus reus* and direct *mens rea* required for being guilty of murder.

General Principle: It is the jury's task to decide on the matter of intention.

R v Moloney [1985] 1 All ER 1025, HL

Facts: The Defendant and his stepfather, who had been drinking, got into an argument as to which could load and fire a shotgun more quickly. They decided to test their respective claims by practical experiment, in the course of which the Defendant shot his stepfather in the face at a range of about six feet, killing him instantly. The defendant claimed that he had not deliberately aimed the gun, and had simply pulled the trigger in response to the victim's taunts, but the jury found him guilty of murder. **Ratio: The House of Lords were highly critical of a statement in Archbold that a man intends the consequence of his action when he foresees that it will probably happen. Lord Bridge suggested that where a special direction was necessary the jury might be invited to consider (i) whether death or serious injury was a "natural consequence" of the Defendant's actions, and (ii) whether the Defendant foresaw that consequence and to infer the appropriate intention if and only if they could answer yes to both questions. Application:** Although it has since been suggested that it may sometimes be necessary to give a jury an elaborated direction on the meaning of intention in rare cases where the Defendant does an act which is manifestly dangerous, and as a result someone dies, but where the primary desire or motive may not have been to harm that person.

OBLIQUE INTENTION

Oblique intention refers to those circumstances where the Defendant does not necessarily desire an outcome but he appreciates as inevitable the side effect of his action. He will be

considered to have an intention to commit the *actus reus* even if he has oblique intent.

The Draft Criminal Code includes oblique intention in the definition of intention:

According to Section 1 'a person acts

(a) 'intentionally' with respect to a result when –

(i) it is his purpose to cause it, or

(ii) although it is not his purpose to cause it, he knows that it would occur in the ordinary course of events if he were to succeed in his purpose of causing some other result

General Principle: The foresight of virtual certainty can be used as an evidence of intention.

Hyam v DPP [1974] 2 All ER 41, HL

Facts: The Defendant, who was a man's lover, became suspicious of his relationship with another woman. She went to the other woman's house, poured petrol through the letter-box, and lit it, causing a serious fire. The woman's two daughters died in the fire, and the Defendant was charged with their murder. Her defence was that she intended only to frighten the woman into breaking off her relationship with her lover and that he had not intended to kill anyone. **Ratio:** Lord Hailsham LC said it was sufficient for murder that the Defendant knew there was a serious risk of death or grievous bodily harm and went on to commit the acts with the intention of exposing a potential victim to such a risk. Lords Diplock and Kilbrandon dissented as to the sufficiency of grievous bodily harm, but all agreed that foresight was as good as intention. **Application:** The House of Lords by a majority dismissed the Defendant's appeal against conviction. This decision flew in the face of Section 8 of the Criminal Justice Act 1967 and is now generally regarded as having been wrongly decided.

General Principle: It is for the jury to decide that what degree of foresight is required for an inference of intention.

R v Hancock & Shankland [1986] 1 All ER 641, HL

Facts: During the coal miners' strike, two striking miners decided they would try to stop non-strikers from getting to work. They stood on a bridge over the motorway and when they saw a taxi approaching in which a blackleg was travelling, they pushed over a lump of concrete meaning for it to land on the road in front of the taxi. In fact, the concrete hit the taxi itself and killed the taxi-driver, and the two miners were charged with murder. **Ratio: The greater the probability of a consequence, the more likely it is that it was foreseen. If it was foreseen, the more likely it is that it was intended. But it is entirely up to the jury to decide what degree of foresight is required for an inference of intention and no simple formula can replace the jury's right and duty to make its own decision.** **Application:** The Defendants could have easily foreseen that their act could lead to these consequences. Therefore, his conviction was confirmed.

General Principle: The necessary intention can be inferred when death or serious bodily harm was a virtual certainty.

R v Nedrick [1986] 3 All ER 1, CA

Facts: The Defendant set fire to a house belonging to a woman against whom he had a grudge. The woman's child died in the fire. **Ratio: The trial judge (before the judgements in Moloney and Hancock & Shankland had been published) directed the jury as to intention in a way that was now clearly inappropriate, and the Court of Appeal quashed the defendant's conviction for murder and substituted manslaughter. Where the charge is murder, said Lord Lane CJ, and in the rare cases where a simple direction as to intention is not enough, the jury should be directed that they are not entitled to infer the necessary intention unless they feel sure that death or serious bodily harm was a virtual certainty - barring some unforeseen intervention - as a result of the Defendant's actions, and that the defendant realised such was the case. Where a man realises that it is for all practical purposes inevitable that his actions will result in death or serious harm, the inference might be**

irresistible that he intends that result, however little he might desire or wish it to happen. The decision is one for the jury to be reached on a consideration of all the evidence. Application: The Court of Appeal held that there was a clear misdirection of the jury by the judge. The directions illustrated are the ones the jury should have followed.

General Principle: The jury is not entitled to find the necessary intention unless death or serious bodily harm was an obvious conclusion to the defendant's act.

R v Woollin [1998] 4 All ER 103, HL

Facts: A man lost his temper with his three-month-old son and threw the child onto a hard surface, causing head injuries from which the child died. The Defendant was charged with murder and the judge directed the jury, largely in accordance with the Nedrick guidelines, that they might infer the necessary intention if they were satisfied that the Defendant realised there was "a substantial risk" of serious injury. **Ratio: The House of Lords said this would enlarge the scope of murder and blur the distinction between that and manslaughter. The jury, said Lord Steyn, should be directed that they are not entitled to find the necessary intention unless they feel sure that death or serious bodily harm was a virtual certainty - barring some unforeseen intervention - as a result of the defendant's actions, and that the defendant realised such was the case, but should be reminded that the decision is one for them on a consideration of all the evidence. Application:** The House of Lords accepted the appeal of the Defendant. The Courts, by leaving the direction on oblique intention in the negative and thus giving juries some leeway to avoid convicting, have allowed juries to make moral judgments in appropriate circumstances.

MOTIVE AND INTENTION

Intention must not be confused with motive or desire. Even though the defendant has a motive (for example, a reason to kill) that does not mean that when he commits the *actus reus* he can be automatically be taken to have the intention to kill.

General Principle: Motive is not same as intention.

Chandler v DPP [1964] AC 763

Facts: The Appellants were against nuclear weapons and planned a non-violent action to immobilise an aircraft at a RAF station for six hours. They were convicted of conspiracy under section 1 of the Official Secrets Act 1911 since they entered ‘a prohibited place for a purpose which is prejudicial to the safety or interests of the state’. **Ratio: If a person enters a prohibited place in order to cause obstruction and interference which is prejudicial to the defence dispositions of the state, an offence is committed. The Defendant cannot claim that his ultimate purpose was not to commit the offence.** **Application:** The judge held that where the jury was satisfied that the appellant’s immediate purpose was proven, it was right to find the appellant’s guilty. Their motive behind their action was irrelevant as they still intended the method of achieving it.

RECKLESSNESS

The Defendant takes an unjustified risk that might cause a serious consequence with awareness of that risk.

General Principle: It is necessary to establish that the Defendant took an unjustifiable risk to establish recklessness as clarified in the following case.

Cunningham [1957] 2 QB 396 (CA)

Facts: Cunningham was convicted of unlawfully and maliciously causing the victim to take a noxious thing which endangered her life, contrary to section 23 of the Offences Against the Person Act 1861. **Ratio: It was held that the term “maliciously” in an offence assumes foresight of the consequence. Hence, while dealing with offences involving ‘malice’ it is not enough that the risk would have been obvious to the Defendant if he had reconsidered his decision. He must know the existence of ‘risk’ and must consciously take it. The prosecution will have to prove that the Defendant had a particular state of mind while committing the offence as opposed to considering the state of mind of any reasonable person.** **Application:** An actual intention

to cause the kind of harm that was done is important. The Defendant was convicted.

General Principle: The Defendant may escape liability if he was subjectively unaware of the risks.

R v G and Another [2003] UKHL 50

Facts: Two boys, aged 11 and 12 went to the back yard of a shop and lit some newspapers and threw them under a wheelie bin. The burning papers set fire to the shop which spread to the eaves of building which consequently caused the roof to fall, amounting to £1million worth of damage. The boys were charged with reckless arson to the building contrary to Section 1(3) of the Criminal Damage Act 1971. **Ratio: The House of Lords held that subjective recklessness (defined in *Cunningham*) should apply to criminal damage. Lord Bingham referred to the definition of recklessness laid down in Clause 18 of the Law Commissions Draft Criminal Code (1989):**

A person acts recklessly within the meaning of Section 1 of the Criminal Damage Act 1971 with respect to –

i) a circumstance when he is aware of a risk that it exists or will exist;

ii) a result when he is aware of a risk that it will occur;

and it is, in the circumstances known to him, unreasonable to take that risk.

Application: Hence, since the boys were subjectively unaware of the risk their convictions were quashed. The House of Lords established that the legal test of recklessness coming from *Cunningham* and *R v G* was the same but they referred to different crimes. The test from *R v G* covers cases relating to criminal damage and the *Cunningham* test is applicable to all the other scenarios. The test from *R v G* overturns and confines *Caldwell* recklessness to the history books.

TRANSFERRED MALICE

Whether the Defendant has the *mens rea* of a particular crime and he acts causing the actus reus of that crime, he cannot say that the *actus reus* was carried out in a way that was not exactly as he intended it.

General Principle: An intention to kill one person can be transferred to another if the second is the one who actually dies from the Defendant's act.

R v Mitchell [1983] 2 All ER 427

Facts: The Defendant and another man became involved in a scuffle in a Post Office. The Defendant pushed the other man, who fell onto an elderly lady, causing her injuries from which she later died. **Ratio: The Court of Appeal upheld the Defendant's conviction for manslaughter as his intention to assault the man was transferred to the elderly lady, the victim. Application:** The Court saw no reason to hold that an act calculated to harm someone could not be transferred to manslaughter on that person that was actually killed by the action of the Defendant.

General Principle: If two people are engaged in serious conflict and in the process one kills an uninvolved person, the other engaged party would be treated as in a joint enterprise with the killer. Coupled with transferred malice, when one of the parties kills another, his malice transfers, and so is the other combatant guilty of the murder (by being in conflict with the person who killed another while trying to kill you.)

R v Gnango [2011] UKSC 59

Facts: The defendant was a teenager engaged in gang warfare, and had been in conflict with another person known as TC, took a gun and went to look for him. While out searching in a car park, the defendant came under fire from a person known as "Bandana Man" (suspected to be TC). The defendant returned fire. a 26 woman crossing the car park was shot by a BM, and died. BM was not apprehended and nor was TC (if they were different people). The defendant was charged with murder under the joint enterprise rules. The issue was whether the defendant could be guilty of

murder, through a joint between the principles of joint enterprise and transferred malice **Ratio: The law on joint enterprise could treat two defendants as acting together, even if they were only engaged in attempting to harm or kill one other. Therefore, if one kills another while attempting to kill his target, as his malice/intention will be transferred toward the victim, thus whoever he is in joint enterprise with is also guilty.** **Application:** Therefore, as BM intended to kill the defendant, his malice is transferred when he kills the victim, and because the defendant was in conflict with BM, he was in joint enterprise and hence inherited BM's liability. The defendant was guilty.

CO- INCIDENCE OF *ACTUS REUS* AND *MENS REA*

The *actus reus* and the *mens rea* must normally coincide in time, but the courts are prepared to take a broad view.

General Principle: The requirement that the *actus reus* and *mens rea* must go together may be interpreted by the court in the light of the facts of the case.

R v Thabo Meli and others [1954] 1 All ER 373

Facts: The Defendants took the victim to a hut. They beat him. Believing him to be dead, they threw his body over a cliff in the attempts to make it look as an accident. The victim was still alive when thrown and he died afterwards from exposure. The Defendants tried to argue that the *actus reus* on which the death for exposure was based was separated in time from the *mens rea*. **Ratio: The court pointed out that it is not possible to divide up what is one series of acts.** **Application:** The court convicted the Defendants on the ground that all their acts were set out to achieve a specific plan. The fact that their purpose was achieved before the actual death of the victim did not separate the two elements of *actus reus* and *mens rea*.

General Principle: In case of a continuing act, it is enough that the Defendant had *mens rea* at some point during the act. This is known as the 'continuing act theory'.

Fagan v Metropolitan Police Commissioner [1969] 1QB 439

Facts: Fagan drove on a policeman's foot accidentally. When asked to move off his foot by the policeman, Fagan refused to comply. He was charged with assaulting a police officer in the execution of his duty. At the time of driving on the foot, which was *actus reus* of the crime he did not have *mens rea*. **Ratio: Whether an action of the Defendant is not at first criminal since the Defendant has no *mens rea*, but it becomes criminal when the Defendant intentionally decides to carry out the action, the exact coincidence between the two elements become irrelevant.** **Application:** Even though the defendant did not have the *mens rea* at the beginning of his unlawful action, he had it at some point during the act. Therefore, the Defendant was convicted since he intentionally left the wheel on the officer's foot.

THE TRANSACTION PRINCIPLE

General Principle: The courts sometimes categorise the series of acts of the Defendant into a transaction and it is enough to establish that the Defendant has *mens rea* at some point during this transaction.

R v Thabo Meli and others [1954] 1 All ER 373, PC (South Africa)

Facts: Thabo Meli and his friends took their victim to a small hut and beat him over the head intending to kill him. Thinking they had succeeded, they rolled his body over a cliff to make the death appear accidental. In fact, the victim survived both the beating and the rolling, but died from exposure shortly afterwards. Meli and the others were convicted of murder. **Ratio: The Privy Council, dismissing their appeal, said that where the *actus reus* consists of a series of linked acts, it is enough that the *mens rea* existed at some time during that series, even if not necessarily at the time of the particular act which caused the death.** **Application:** The fact that *mens rea* existed at some point during the transaction was enough to uphold their conviction.

CAUSATION

The two elements of *actus reus* and *mens rea* can be looked at in terms of causation. A link between the two may be considered sufficient whether they cooperate in reaching the outcome.

General Principle: The problem of co-occurrence of *actus reus* and *mens rea* can be overlooked by considering the act done with the *mens rea* (the first act) as causing the subsequent acts.

R v Masilela (1968) (2) SA 558

Facts: The Defendants hit the victim over his head, left him on his bed and then set the house on fire. Evidence showed that the death of the victim was caused by the fire. **Ratio:** The judge held that the earlier acts of Defendants which were committed with the *mens rea* of murder were the cause of the death because if the victim had not been unconscious he would not have stayed in the house. **Application:** The Defendants' earlier acts of beating were done with *mens rea* of murder and were the actual cause of death.

MISTAKE

There are circumstances in which the court may take into consideration a mistaken consideration of the Defendant. Nevertheless, the defence of ignorance of the law does not allow the escape from liability.

General Principle: The type of mistake will determine the effect on the Defendant's liability when he commits a mistake.

IGNORANCE OF LAW

General Principle: The Defendant's ignorance of the law does not absolve him of his liability. Hence, the saying, 'ignorance of law is no excuse'.

R v Lee [2000] EWCA Crim 53

Facts: The defendant had failed a breath test. He looked at the test result and saw an air bubble which pushed the test over the limit. When the officer tried to arrest him for drink driving the defendant

punched him. He was convicted of assaulting a police officer with intent to resist arrest under s.38 Offence against the Person Act 1861. He contended that he genuinely believed that the arrest was unlawful. **Ratio: If the mistake was one of the law, the defence will not apply. Application:** As the mistake was one of law, the defendant was found guilty.

MISTAKES THAT NEGATE THE *MENS REA*

General Principle: A mistake of some element of the *actus reus* can prevent the Defendant from having the required *mens rea*.

R v Smith [1974] 1 All ER 632

Facts: A tenant with his landlord's consent, installed in his flat some electrical wiring for stereo equipment and covered it over with ceiling and wall panels and floor boards. When he surrendered his lease, he tore away the panels (which as a matter of land law had now become the landlord's property) to remove the wiring and was charged with criminal damage. **Ratio: Allowing his appeal and quashing his conviction, the Court of Appeal declined to apply Section 5(2)(a) of the Criminal Damage Act 1961, but said that where the Defendant honestly believed the property was his own he lacked the necessary *mens rea* with regard to the circumstances. Application:** The Defendant did not recklessly or intentionally damage property belonging to the other as required by the Criminal Damage Act.

SUMMARY

- The concept of *mens rea* refers to the mind of the person committing the unlawful action.
- *Mens rea* may constitute intention, recklessness, malice, negligence and dishonesty.
- Intention is the highest form of *mens rea* essential in order to establish murder.
- Recklessness is the form of *mens rea* used in non-fatal offences against persons.

- ‘Transferred malice’ is a principle that refers to those circumstances where the Defendant has actus reus and mens rea but the way he carried out the actus reus was not exactly as he planned.
- The elements of actus reus and mens rea must coincide at some point in time.
- The court might take into consideration in some specific circumstances whether the Defendant has mistakenly acted.

Endnote

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