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THE LAW COMMISSION

PUBLISHED WORKING PAPER

NO:31

Second Programme Item XVIII

CODIFICATION OF THE CRIMINAL LAW

GENERAL PRINCIPLES

THE MENTAL ELEMENT IN CRIME

16 June 1970

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THE LAW COMMISSION

WORKING PAPER No. 31

SECOND PROGRAMME, ITEM XVIII

CODIFICATION OF THE CRIMINAL LAW
GENERAL PRINCIPLES
THE MENTAL ELEMENT IN CRIME

1. The Working Party,* which is assisting the Commission in the examination of the general principles of the criminal law, have prepared this Working Paper on the Mental Element in Crime as a basis upon which to seek the views of those concerned with the criminal law.

2. The Law Commission, in pursuance of its policy of consulting as wide a body of opinion as possible before making recommendations, is publishing the Working Paper and inviting comments upon it.

3. The Law Commission is in sympathy with the primary purposes of the Working Party's Propositions, which are to set the objectives to be attained in relation to the requirement of the mental element in crime and to define those states of mind which are a condition of culpability. It should be pointed out, however, that the Paper may create the impression that the definitions of specific offences which come to be formulated in future legislation will, as a general rule, make no reference to the mental element required for culpability, since this requirement would be met by provisions of general application implementing the propositions. It is appreciated that this is only one of several possible drafting techniques which might be followed and as between these the Law Commission has formed no opinion at this stage.

4. We have not set out a list of questions to which we seek answers as the subject is not readily susceptible of being dealt with in this way. We are, however, anxious to have any general observations on the objectives and the approach contained in the Paper and

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* For its membership see p.iii.

views and comments upon the Propositions and the Definitions, all of which appear in large type. Communications should be addressed to:

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and it would be helpful to us if we could have any observations, views or comments by 1st January, 1971.

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+ Secretary of the Criminal Law Revision Committee.

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CODIFICATION OF THE CRIMINAL LAW

GENERAL PRINCIPLES

THE MENTAL ELEMENT IN CRIME

INTRODUCTION

Scope and Aims of the Paper

1. In Working Paper No. 17, we reviewed the main topics which in our view would require consideration before any attempt was made to formulate the general principles of the criminal law. As this list of topics received a wide measure of approval, we proceed in the present Paper to put forward propositions concerning two important and related topics in that list, namely, Subjects 8 and 11. These deal with Culpability and Strict Liability. They do not exhaust the main subject-heading "Principles of Criminal Liability" in Working Paper No. 17 under which we also included Causation, Ignorance of law and fact, Complicity, Vicarious Liability and Liability of Corporations. However, although the scope of this Paper is limited, we believe that it is essential for our work of codification to obtain broad agreement on the propositions we have formulated. We, therefore, seek the view of recipients of the Paper on these propositions which are designed to clarify the particular degree of fault required in future, as well as in existing, offences.

2. One of the major stumbling blocks to the orderly development of English criminal law has been the confusion that has existed for the past 100 years or so over the question whether the language used in the creation of a statutory offence imports full mens rea (intention, knowledge or recklessness), some fault element short of mens rea, i.e., negligence,[1] or some form of "absolute" or "strict"

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1. Throughout this Paper, we use the word "fault" to include the traditional terms "intention", "knowledge", "recklessness" and "negligence". When we use the term "the mental element" or mens rea, we exclude negligence which, in contrast to recklessness, does not require actual advertence to the risk of the results or circumstances of conduct.

liability.[2] It is at present the responsibility of the courts in dealing with many regulatory offences and other doubtful cases to determine whether or not an element of fault is a prerequisite of culpability, and, if so, what that element is; but it is notoriously difficult to predict from past cases containing general observations of the courts what degree of fault will be required for a particular statutory offence which has not in this respect hitherto received judicial elucidation. "The mischief aimed at by the Act ... the sort of provision it is, in particular whether it is a public welfare provision, and ... the exact language used",[3] are certainly factors to be taken into account, but their relative importance as indicators of the degree of culpability required may vary from case to case, and there is no readily discernible principle to explain this diversity of treatment.[4]

3. We take the view that it has become essential to identify with precision those areas where the legislature has created offences without a requirement of fault (offences of strict liability), as well as those areas where fault is a prerequisite of liability only to the extent that the offender must have unreasonably failed to attain an objective standard of conduct (offences of negligence). By this means we seek to further the attainment of certainty in the criminal law.

The Propositions

4. The propositions are intended to indicate the character and extent of the fault element which we think appropriate for offences in which there is no specific legislative provision for such an element. Thus, in general, the fault elements specified in the propositions are intended to apply; while

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2. We use the expression "strict liability" throughout this Paper, although the expression "absolute liability" is often used synonymously with it. We are not aware of any offences to which the expression "absolute liability" could accurately be applied. The word "absolute" implies the denial of any possible defence at all; even in those cases where any fault element is irrelevant, defences such as duress, self-defence and automatism are always available in appropriate circumstances.

3. per Lord Parker C.J. in Lockyer v. Gibb [1967] 2 Q.B. 243, 249.

4. Contrast the results of Warner v. Commissioner of Police for the Metropolis [1968] 2 W.L.R. 1303 and Sweet v. Parsley [1969] 2 W.L.R. 470, and note the differing reasons given even in judgments which reach the same result.

for some specific offences there may be express provision for a lower degree of fault or no fault at all. Conversely, a higher degree of fault may be specified, as in those offences which at present require the offender to have acted "with intent to" achieve or "for the purpose of" achieving some particular object.[5] Again, the legislature may wish to provide for a different degree of fault in different elements of the same offences.[6] The propositions, therefore, are subject to any specific provision the legislature may make in relation to the fault element in any particular offence.

5. The propositions[7] also reflect our desire to recast the fault element in certain existing offences. We think it would be unsatisfactory to leave a wide range of existing offences in their present state of uncertainty regarding the degree of fault which they require. We appreciate, however, that there is no easy solution to this difficulty and that the propositions as formulated do not solve all problems which could arise in regard to the degree of fault required in existing offences. For one thing, in the present law there is no standard vocabulary of terms covering the different degrees of required fault. Thus "maliciously", although in general a mens rea word, can, apparently, have a different meaning in two closely related sections of the same Act.[8] Again, it appears that the expression "with intent to defraud" may include recklessness,[9] although it is generally accepted that the expression "with intent to inflict grievous bodily harm" does not. We shall later consider to what extent it may be possible to clarify the existing law by providing a vocabulary by which various terms, for example "maliciously", used in the present law to denote the requirement of a particular degree of fault, may be translated into their

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5. e.g., s.18 of the Offences against the Person Act 1861.

6. As in ss. 6(1) and 6(3) of the Sexual Offences Act 1956. The propositions assume that the definitions of offences will set out all the external elements which are required to constitute the offence. These elements will include all the surrounding circumstances relevant to the offence and, usually though not invariably, the consequences of conduct.

7. They are not, of course, cast in the form of draft clauses.

8. R. v. Mowatt [1968] 1 Q.B. 421 on ss.18 and 20 of the Offences against the Person Act 1861.

9. R. v. Sinclair [1968] 1 W.L.R. 1246.

equivalents in the language of the propositions. We shall also have to consider whether it may be necessary to amend the language of certain offences. Conversely, we shall have to consider whether any, and if so what, existing offences should, for reasons of policy, escape the impact of the propositions.

6. It will be evident that the fundamental assumption underlying the propositions is that fault, whether consisting of mens rea or of negligence, should be the normal requirement of the criminal law, and that strict liability should be exceptional, only to be accepted after careful examination of its particular proposed field of application.[10] We appreciate that this traditional approach to criminal liability has been powerfully attacked.[11] But, even if the purpose of the criminal law should be primarily deterrent rather than retributive, the following considerations have weight -

(a) The law should still accord with the ordinary man's conception of what is just; if it falls below this standard, it will be brought into contempt.

(b) Fairness between individuals requires that persons in like circumstances should be treated in the same way, and that persons who are not in similar circumstances should be treated differently. The degree of fault with which a person of normal capacity commits a prohibited act is generally regarded as an important ground for distinguishing him from other persons of normal capacity who commit the same act with a different degree of fault.[12]

(c) The social interest in economy of punishment requires that a person should not in general be punished for an offence which he does not know he is committing and which he is powerless to prevent, if only because in such cases the threat of sanctions is generally

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10. See Hogan, Criminal Liability without Fault, Leeds University Press, 1969.

11. Notably by Baroness Wootton in Crime and the Criminal Law, 1963.

12. See Hart, The Morality of the Criminal Law, 1965 at p.20.

ineffective as a deterrent in relation to his conduct or the conduct of others.

7. Notwithstanding the assumption referred to in paragraph 6, we would wish to emphasise that the propositions do not and cannot trespass on the right of Parliament ultimately to determine what degree of fault, if any, should be attached to particular forms of criminal conduct. It will, of course, always be possible for Parliament to make special provision as to the degree of fault required for any particular offence.

8. There follow the propositions as to existing and future offences (Propositions 1-6 on pages 6 and 7) and definitions relating thereto (Proposition 7 on page 30). These are supported with illustrations and a commentary. The concluding part of the Paper explains the place of mistake in relation to the mental element.

PROPOSITIONS AS TO FUTURE AND EXISTING OFFENCES AND DEFINITIONS RELATING THERETO

CONDITIONS OF LIABILITY

FAULT AS A REQUIREMENT OF LIABILITY

PROPOSITIONS RELATING TO FUTURE OFFENCES

1. SUBJECT TO PROPOSITION 2, IN EVERY OFFENCE CREATED AFTER [A DATE TO BE PRESCRIBED] THE FAULT REQUIRED IS A MENTAL ELEMENT CONSISTING OF INTENTION, KNOWLEDGE OR RECKLESSNES ON THE PART OF THE DEFENDANT IN RESPECT OF ALL THE OTHER ELEMENTS OF THE OFFENCE, UNLESS THE REQUIREMENT IS EXPRESSLY EXCLUDED.

2. WHERE AN OFFENCE IS AN OFFENCE OF OMISSION OR IS DEFINED SO AS TO INCLUDE AN OMISSION, THE FAULT REQUIRED IS NEGLIGENCE IN THE DEFENDANT AS TO THE OMISSION, UNLESS A MENTAL ELEMENT IS EXPRESSLY OR IMPLIEDLY REQUIRED OR THE OFFENCE IS EXPRESSLY STATED TO BE OF STRICT LIABILITY OR OTHERWISE TO BE INDEPENDENT OF FAULT IN THE DEFENDANT.

3. WHERE THE REQUIREMENT OF INTENTION, KNOWLEDGE OR RECKLESSNESS IS EXPRESSLY EXCLUDED FROM SOME OR ALL OF THE ELEMENTS OF AN OFFENCE, THE OFFENCE REQUIRES NEGLIGENCE IN THE DEFENDANT AS TO SUCH ELEMENTS, UNLESS THE OFFENCE IS STATED TO BE OF STRICT LIABILITY OR OTHERWISE TO BE INDEPENDENT OF FAULT IN THE DEFENDANT IN RESPECT OF SUCH ELEMENTS.

4. UNLESS OTHERWISE EXPRESSLY PROVIDED, IN ALL OFFENCES WHERE NEGLIGENCE IS REQUIRED BY REASON OF PROPOSITION 2 OR 3 ABOVE, NEGLIGENCE MAY BE TREATED AS ESTABLISHED IN THE ABSENCE OF ANY EVIDENCE TO THE CONTRARY.

5. WHERE THE FAULT PROVED BY THE EVIDENCE IS OF A HIGHER DEGREE THAN THAT REQUIRED FOR THE OFFENCE THE FAULT REQUIRED SHALL BE TAKEN AS ESTABLISHED.

PROPOSITION RELATING TO EXISTING OFFENCES

6. SUBJECT TO ANY SPECIFIC EXCEPTIONS, WHERE THE EXISTING LAW DOES NOT REQUIRE A PARTICULAR DEGREE OF FAULT IN RESPECT OF AN ELEMENT OF THE OFFENCE, THAT OFFENCE NEVERTHELESS REQUIRES NEGLIGENCE IN THE DEFENDANT AS TO THAT ELEMENT.

IN SUCH CASES, UNLESS OTHERWISE EXPRESSLY PROVIDED, NEGLIGENCE MAY BE TREATED AS ESTABLISHED IN THE ABSENCE OF ANY EVIDENCE TO THE CONTRARY.

WHERE THE FAULT PROVED BY THE EVIDENCE IS OF A HIGHER DEGREE THAN NEGLIGENCE, NEGLIGENCE SHALL BE TAKEN AS ESTABLISHED.

PROPOSITIONS 1 to 5

WITH ILLUSTRATIONS AND COMMENTARY

[Note: The illustrations have been adapted from the facts of decided cases under existing or former law. When it is postulated that an offence has been created, we ask the reader to assume that the offence has been enacted in terms of its constituent elements other than the element of fault.[13]]

1. SUBJECT TO PROPOSITION 2, IN EVERY OFFENCE CREATED AFTER [A DATE TO BE PRESCRIBED] THE FAULT REQUIRED IS A MENTAL ELEMENT CONSISTING OF INTENTION, KNOWLEDGE OR RECKLESSNESS ON THE PART OF THE DEFENDANT IN RESPECT OF ALL THE OTHER ELEMENTS OF THE OFFENCE, UNLESS THE REQUIREMENT IS EXPRESSLY EXCLUDED.

Illustrations

(a) A law makes it an offence to allow domestic gas to escape in such a way as to injure any person. The defendant stole money from a gas meter by wrenching it from its bracket, thus permitting gas to escape. Persons in an adjoining flat were poisoned by the gas. The defendant will be guilty only if he intended to injure or was reckless as to whether injury occurred or not.[14]

(b) A law makes it an offence to board a vessel while the vessel is in quarantine. The defendant boarded such a vessel which was flying the quarantine flag. He did not see the flag. He will not be guilty unless he knew that there was a risk that it was in quarantine.[15]

(c) A law makes it an offence to be in possession of dutiable goods on which duty has not been

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13. The constituent elements other than fault are conveniently referred to as "external elements".

14. cf. R. v. Cunningham [1957] 2 Q.B. 396.

15. cf. Bullock v. Turnbull [1952] 2 Ll. L.R. 303.

PROPOSITION 1

SUBJECT TO PROPOSITION 2, IN EVERY OFFENCE CREATED AFTER [A DATE TO BE PRESCRIBED] THE FAULT REQUIRED IS A MENTAL ELEMENT CONSISTING OF INTENTION, KNOWLEDGE OR RECKLESSNESS ON THE PART OF THE DEFENDANT IN RESPECT OF ALL THE OTHER ELEMENTS OF THE OFFENCE, UNLESS THE REQUIREMENT IS EXPRESSLY EXCLUDED.

paid. In order to support a conviction, it will be necessary to prove that the defendant was aware that he possessed the goods or was reckless as to this, and that he was aware that duty had not been paid or was reckless as to whether it had been paid or not.[16]

(d) A law makes it an offence to kill a house pigeon. A defendant who killed such a pigeon honestly believing it to be a wood-pigeon will not be guilty, because the mental element laid down by our proposition is lacking in relation to one of the prescribed circumstances of the offence.[17]

(e) A law makes it an offence to obstruct a police officer in the execution of his duty. The defendant did not realise that the man he obstructed was a police officer, or, if he knew that he was a police officer, did not know that he was acting in the execution of his duty. Generally he will not be guilty. But if the prosecution can establish his knowledge of the risk that the person he was obstructing had the requisite status of a police officer on duty, he will be guilty.[18]

Commentary

(1) This Proposition restates the original position at common law that offences (other than offences of omission) require a mental element. In relation to the consequences of conduct, which for the purpose of definition we call "events", this mental element is intention or recklessness. In relation to

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16. cf. R. v. Cohen [1951] 1 K.B. 505.

17. cf. Cotterill v. Penn [1936] 1 K.B. 53. The conflicting authorities that were cited in this case illustrate the difficulty, to which we have referred, of identifying in the existing law the element of fault (if any) that will be imported into an offence. This convenient illustration is used despite the disappearance of the offence on which it is based with the repeal of s.23 of the Larceny Act 1861.

18. cf. R. v. Forbes & Webb (1865) 10 Cox C.C. 362; R. v. Maxwell (1909) 2 Cr. App. Rep. 26. It is, of course, a question of policy whether an offence of this nature should be a negligence offence.

PROPOSITION 1

SUBJECT TO PROPOSITION 2, IN EVERY OFFENCE CREATED AFTER [A DATE TO BE PRESCRIBED] THE FAULT REQUIRED IS A MENTAL ELEMENT CONSISTING OF INTENTION, KNOWLEDGE OR RECKLESSNESS ON THE PART OF THE DEFENDANT IN RESPECT OF ALL THE OTHER ELEMENTS OF THE OFFENCE, UNLESS THE REQUIREMENT IS EXPRESSLY EXCLUDED.

circumstances, it is knowledge or recklessness. We define these terms, as well as negligence, in Proposition 7. The use of the mental element in this sense accords with the approach of modern codes in those countries which are traditionally associated with the common law.

(2) Propositions 2, 3 and 4 contemplate that in the redefinition of specific offences it may well be that the legislature will make more extensive use than heretofore of negligence as the fault element attracting criminal liability. It has, indeed, been suggested by Lords Reid and Pearce in Sweet v. Parsley[19] that liability based on negligence might be substituted for strict liability over a wide field. It is outside the scope of this Paper to consider what existing offences should be treated in this way. This will depend upon policy considerations which will come to be taken into account when the existing law relating to specific offences is reviewed.

2. WHERE AN OFFENCE IS AN OFFENCE OF OMISSION OR IS DEFINED SO AS TO INCLUDE AN OMISSION, THE FAULT REQUIRED IS NEGLIGENCE IN THE DEFENDANT AS TO THE OMISSION, UNLESS A MENTAL ELEMENT IS EXPRESSLY OR IMPLIEDLY REQUIRED OR THE OFFENCE IS EXPRESSLY STATED TO BE OF STRICT LIABILITY OR OTHERWISE TO BE INDEPENDENT OF FAULT IN THE DEFENDANT.

Illustrations

(a) A law makes it an offence for a bankrupt to fail to give a satisfactory explanation of the manner in which he incurred a loss. The defendant, who failed to give a satisfactory explanation, nevertheless took all reasonable steps to do so. He will not be guilty.[20]

(b) A law makes it an offence to fail to comply with an indication given by an authorised traffic sign (for example, traffic lights).

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19. [1969] 2 W.L.R. 470, at pp. 475B and 481-482.

20. See the commentary on Proposition 4 (pp. 19-21) as to the burden of proof and cf. R. v. Salter [1968] 2 Q.B. 793.

PROPOSITION 2

WHERE AN OFFENCE IS AN OFFENCE OF OMISSION OR IS DEFINED SO AS TO INCLUDE AN OMISSION, THE FAULT REQUIRED IS NEGLIGENCE IN THE DEFENDANT AS TO THE OMISSION, UNLESS A MENTAL ELEMENT IS EXPRESSLY OR IMPLIEDLY REQUIRED OR THE OFFENCE IS EXPRESSLY STATED TO BE OF STRICT LIABILITY OR OTHERWISE TO BE INDEPENDENT OF FAULT IN THE DEFENDANT.

A driver, keeping a proper look out, did not stop at traffic lights because they were obstructed in such a way that he had no means of knowing of their presence. He will not be guilty of the offence.[21]

Commentary

(1) There are cases both at common law (for example in the law relating to homicide) and by statute[22] where the existing law requires a mental element in offences of omission. But in the vast majority of offences of omission, now existing or likely to exist in the future, it seems to us natural to lay down negligence as the appropriate fault element. In the field of regulatory offences, the object of punishing omissions is to stimulate the defendant to a course of action, and it is no defence for him to say that he did not think about the matter. It follows from the principles which we have stated in the general Introduction to this Paper that mere accidental omissions will not be punishable, and negligence appropriately distinguishes fault from accident.

(2) The Proposition does not of course affect cases where a law expressly or impliedly requires mens rea. By "impliedly" we refer to implication from the use of words such as "wilfully" or "maliciously" which have, in general, been held to mean "intentionally or recklessly".[23]

3. WHERE THE REQUIREMENT OF INTENTION, KNOWLEDGE OR RECKLESSNESS IS EXPRESSLY EXCLUDED FROM SOME OR ALL OF THE ELEMENTS OF AN OFFENCE, THE OFFENCE REQUIRES NEGLIGENCE IN THE DEFENDANT AS TO SUCH ELEMENTS, UNLESS THE OFFENCE IS STATED TO BE OF STRICT LIABILITY OR OTHERWISE TO BE INDEPENDENT OF FAULT IN THE DEFENDANT IN RESPECT OF SUCH ELEMENTS.

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21. cf. Rees v. Taylor, 14 October 1939 (unrep.) Stone's Justices Manual 100th ed. p.2404, note (d).

22. See Harding v. Price [1948] 1 K.B. 695 on s.22 of the Road Traffic Act 1930 and cf. Deacon v. Evans [1911] 1 K.B. 571 on s.220(b) of the Merchant Shipping Act 1894.

23. R. v. Senior [1899] 1 Q.B. 283; R. v. Cunningham [1957] 2 Q.B. 396.

PROPOSITION 3

WHERE THE REQUIREMENT OF INTENTION, KNOWLEDGE OR RECKLESSNESS IS EXPRESSLY EXCLUDED FROM SOME OR ALL OF THE ELEMENTS OF AN OFFENCE, THE OFFENCE REQUIRES NEGLIGENCE IN THE DEFENDANT AS TO SUCH ELEMENTS, UNLESS THE OFFENCE IS STATED TO BE OF STRICT LIABILITY OR OTHERWISE TO BE INDEPENDENT OF FAULT IN THE DEFENDANT IN RESPECT OF SUCH ELEMENTS.

Illustrations

(a) A law makes it an offence to make an untrue declaration irrespective of intention or recklessness in that regard. The defendant made an untrue declaration, but he did not know, and had no reason to suspect, that it was untrue. He will not be guilty.[24]

(b) A law makes it an offence to sell adulterated milk and states "this offence is an offence of strict liability" or uses other words to the same effect. A defendant who sells such milk is guilty, whether or not he knew or ought to have known that the milk was adulterated.

Commentary

(1) This Proposition is designed to make it clear that a fault element (which may be negligence where appropriate) is required for culpability, unless and so far as liability without fault (strict liability) is expressly imposed. We hope that the effect of Propositions 2 and 3 will be that for the future liability based on negligence will become a general substitute for offences of strict liability, though, as Proposition 3 recognizes, Parliament retains its supremacy. In the case of future offences, therefore, it will be for the legislature expressly to impose strict liability where and to the extent to which this is required.

(2) The Proposition is designed to avoid strict liability being imported into an offence by mere implication drawn from a statute in the absence of express words to that effect,[25] and to limit offences of strict liability to those which are so created by express words. This will avoid for the future the argument that, despite the absence of express provision for it, strict liability can be implied in all the circumstances from consideration of the statute as

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24. For the burden of proof, see Proposition 4 (p.19).

25. Brend v. Wood (1946) 17 S.L.T. 306.

a whole - an argument which, in apparently similar contexts, the courts have sometimes upheld[26] and sometimes rejected.[27]

4. UNLESS OTHERWISE EXPRESSLY PROVIDED, IN ALL OFFENCES WHERE NEGLIGENCE IS REQUIRED BY REASON OF PROPOSITION 2 OR 3 ABOVE NEGLIGENCE MAY BE TREATED AS ESTABLISHED IN THE ABSENCE OF ANY EVIDENCE TO THE CONTRARY.

Illustration

A law makes it an offence for a bankrupt to fail to give a satisfactory explanation of the manner in which he incurred a loss. As explained in the illustrations to Proposition 2, the offence will imply a requirement of negligence in the defendant. But if the prosecution prove the facts, and the defendant remains silent, the proof of those facts will be sufficient to justify his being found guilty.

Commentary

(1) We are conscious of the force of the argument which is often adduced in favour of strict liability in regulatory offences, that the system operated by the defendant is peculiarly within his knowledge, and that therefore it would be an intolerable burden on the prosecution to prove negligence in such cases. The intention of Proposition 4 is, therefore, to place an evidential burden (but only an evidential burden) on the defendant in cases where, by Proposition 2 or 3, negligence is required. By "an evidential burden" we mean that, once the prosecution have proved the actus reus, the triers of fact may infer negligence in the defendant in the absence of any evidence to the contrary which arises whether from the prosecution's case or from

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26. e.g., R. v. Cummerson [1968] 2 All E.R. 863 on s.235(2) of the Road Traffic Act 1960, where the court distinguished between the mental element required in offences created by different parts of the same subsection.

27. e.g., Sherras v. de Rutzen [1895] 1 Q.B. 918 on s.16 of the Licensing Act 1872, now s.178 of the Licensing Act 1964.

any evidence given by or on behalf of the defendant.[28] This Proposition, does not, of course, apply to offences which themselves consist of negligence,[29] or to offences such as driving without due care and attention, where the essence of the prosecution case involves proof that the defendant has been negligent.

5. WHERE THE FAULT PROVED BY THE EVIDENCE IS OF A HIGHER DEGREE THAN THAT REQUIRED FOR THE OFFENCE THE FAULT REQUIRED SHALL BE TAKEN AS ESTABLISHED.

Illustration

A law makes it an offence to sell intoxicating liquor between certain hours, expressly excluding the requirement of intention, knowledge or recklessness in the defendant in relation to the time of the sale, but by reason of Proposition 3 requiring negligence in respect of that element of the offence. The evidence proves that the defendant sold intoxicating liquor knowing that he was doing so during prohibited hours. The defendant will be guilty of the offence.

Commentary

This Proposition makes it clear that where the fault element required for the offence is, for example, negligence in the defendant, the defendant's guilt is established if he acted not merely negligently, but recklessly or with knowledge or intentionally.

EXISTING OFFENCES

Introduction

Most indictable offences in the existing law pose no problems, because they have been held to imply traditional mens rea in the defendant. There are exceptions or partial exceptions,[30] and our Proposition deals with these by

28. See Hill v. Baxter [1958] 1 Q.B. 277.

29. e.g., offences under s.19 of the Allotments Act 1922, and paras. 64 and 65 of Schedule 3 of the Water Act 1945 and para. 29 of Schedule 3 of the Gas Act 1948.

30. Examples are to be found in the area of sexual offences, the dangerous drugs legislation and (to a limited extent) bigamy.

prescribing a fault element of negligence in regard to those elements of the offence for which mens rea is not required. The main purpose of the Proposition is, however, to convert offences of strict liability into offences of negligence in appropriate cases.

PROPOSITION RELATING TO EXISTING OFFENCES

6. SUBJECT TO ANY SPECIFIC EXCEPTIONS, WHERE THE EXISTING LAW DOES NOT REQUIRE A PARTICULAR DEGREE OF FAULT IN RESPECT OF AN ELEMENT OF THE OFFENCE, THAT OFFENCE NEVERTHELESS REQUIRES NEGLIGENCE IN THE DEFENDANT AS TO THAT ELEMENT.

IN SUCH CASES, UNLESS OTHERWISE EXPRESSLY PROVIDED, NEGLIGENCE MAY BE TREATED AS ESTABLISHED IN THE ABSENCE OF ANY EVIDENCE TO THE CONTRARY.

WHERE THE FAULT PROVED BY THE EVIDENCE IS OF A HIGHER DEGREE THAN NEGLIGENCE, NEGLIGENCE SHALL BE TAKEN AS ESTABLISHED.

Illustrations

(a) Section 235(2) of the Road Traffic Act 1960 makes it an offence to make a false statement for the purpose of obtaining the issue of certain certificates. The Court of Appeal has held that this is an offence of strict liability.[31] Under the Proposition, it will be open to a defendant to raise the issue that he was not negligent in making a false statement, unless the offence is specifically excepted from the operation of the Proposition.

(b) Section 157 of the Bankruptcy Act 1914 makes it an offence for a bankrupt to fail to give a satisfactory explanation of the manner in which the loss of a substantial part of his estate was incurred. No words importing fault are used.[32] In R. v. Salter[33] the Court of Appeal held, overruling an earlier case on the same

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31. R. v. Cummerson [1968] 2 Q.B. 534.

32. Except in s.169, which is of peripheral relevance.

33. [1968] 2 Q.B. 793 C.A.

PROPOSITION 6

SUBJECT TO ANY SPECIFIC EXCEPTIONS, WHERE THE EXISTING LAW DOES NOT REQUIRE A PARTICULAR DEGREE OF FAULT IN RESPECT OF AN ELEMENT OF THE OFFENCE, THAT OFFENCE NEVERTHELESS REQUIRES NEGLIGENCE IN THE DEFENDANT AS TO THAT ELEMENT.

IN SUCH CASES, UNLESS OTHERWISE EXPRESSLY PROVIDED, NEGLIGENCE MAY BE TREATED AS ESTABLISHED IN THE ABSENCE OF ANY EVIDENCE TO THE CONTRARY.

WHERE THE FAULT PROVED BY THE EVIDENCE IS OF A HIGHER DEGREE THAN NEGLIGENCE, NEGLIGENCE SHALL BE TAKEN AS ESTABLISHED.

section,[34] that the offence was one of strict liability, and that the defendant's defence that he had done all that could reasonably be expected of him was irrelevant. Under the Proposition the defendant in a case like Salter will have a defence.

Commentary

(1) The principle underlying this Proposition is that whenever an existing offence has been enacted without mention of an element of fault, the enactment should be construed so as to imply a fault element of negligence, and it will be open to the defendant to set up his lack of negligence. In Salter's case, for example, the trial judge's direction (that the prosecution had to prove intent to deceive) would, under our proposition, still be too favourable to the defendant. But the defendant would have been entitled to raise the issue that he had done all that a reasonable person could do to provide a satisfactory explanation.

(2) The Proposition is designed to apply the principles laid down by Propositions 1 to 5 (for offences created in the future) to offences under the present law. The offences with which it has to deal fall into three categories:-

(a) Offences where existing law by clear statutory provision (as in most offences of malicious damage under the 1861 Act or most offences of dishonesty under the Theft Act 1968) or by undisputed application of common law principle (for example, in murder) requires mens rea either in its common law sense of intention, knowledge or recklessness or in a more restricted sense (for example, offences "with intent"). In such cases, the existing principles are preserved. Mens rea may, however, not always be expressed in terms of intention, knowledge or recklessness. For example, under section 1 of the Perjury Act 1911 a false statement must

34. R. v. Phillips (1921) 85 J.P. 120.

PROPOSITION 6

SUBJECT TO ANY SPECIFIC EXCEPTIONS, WHERE THE EXISTING LAW DOES NOT REQUIRE A PARTICULAR DEGREE OF FAULT IN RESPECT OF AN ELEMENT OF THE OFFENCE, THAT OFFENCE NEVERTHELESS REQUIRES NEGLIGENCE IN THE DEFENDANT AS TO THAT ELEMENT.

IN SUCH CASES, UNLESS OTHERWISE EXPRESSLY PROVIDED, NEGLIGENCE MAY BE TREATED AS ESTABLISHED IN THE ABSENCE OF ANY EVIDENCE TO THE CONTRARY.

WHERE THE FAULT PROVED BY THE EVIDENCE IS OF A HIGHER DEGREE THAN NEGLIGENCE, NEGLIGENCE SHALL BE TAKEN AS ESTABLISHED.

be made "... which [the defendant] knows to be false or does not believe to be true ..." It is not intended that the Proposition should affect such cases any more than it affects cases where mens rea is in terms required.

(b) Offences where strict liability is appropriate on grounds of policy which possess the character of strict liability without benefit of a no-negligence defence. These offences would be excepted from the Proposition's application.

(c) Offences other than those falling within (a) or (b) above. It is with these offences (a class defined by elimination) that the Proposition is mainly concerned.

(3) Thus the application of the Proposition to existing offences of class (c) above will effectively result in their conversion into offences of negligence in relation to all the elements of each offence.

(4) For the same reasons as those given in our commentary on Proposition 4, the present Proposition deals with the burden of proof in those existing offences which are converted into offences of negligence. In this Proposition also, we envisage that the normal practice will be followed so that the accused will have the burden of adducing evidence raising the issue of no-negligence. If he does so, it will be for the court to determine the issue. It follows that we do not propose that section 81 of the Magistrates' Courts Act 1952[35] should operate on these "converted" offences.

(5) Defences other than a no-negligence defence may, of course, be open to a person charged with an existing offence. Such defences may be provided by the common

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35. This reads:

"Where the defendant to an information or complaint relies for his defence on any exception, exemption, proviso, excuse or qualification, whether or not it accompanies the description of the offence or matter of complaint in the enactment creating the offence or on which the complaint is founded, the burden of proving the exception, exemption, proviso, excuse or qualification shall be on him; and this notwithstanding that the information or complaint contains an allegation negativing the exception, exemption, proviso, excuse or qualification."

law, as in the case of self-defence, or by statute, as in the case of "lawful authority or excuse" under section 8(1) of the Forgery Act 1913.[36] In the case of these special defences provision is often made placing the onus of proof of the defence on the defendant and our Proposition would not seek to alter this position. It may be, however, that a change will be made when the Criminal Law Revision Committee has completed its review of the subject of the burden of proof.

DEFINITIONS

Introduction

The Proposition that follows contains definitions of the terms which we have employed to designate the element of fault in Propositions 1 to 6, i.e. intention, knowledge, recklessness and negligence. But the definitions are also intended to indicate the degree of fault which we think ought to be implied by those expressions in relation to existing and future offences.

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36. As to this defence, see R. v. Wuyts [1969] 3 W.L.R. 1.

DEFINITIONS RELATING TO THE FOREGOING PROPOSITIONS AND TO EXISTING AND FUTURE OFFENCES

INTENTION AND KNOWLEDGE

7. A. (1) A PERSON INTENDS AN EVENT NOT ONLY

(a) WHEN HIS PURPOSE IS TO CAUSE THAT EVENT BUT ALSO

First alternative

(b) WHEN HE HAS NO SUBSTANTIAL DOUBT THAT THAT EVENT WILL RESULT FROM HIS CONDUCT.

Second alternative

(b) WHEN HE FORESEES THAT THAT EVENT WILL PROBABLY RESULT FROM HIS CONDUCT.

(2) A PERSON IS NOT BY REASON ONLY OF PROPOSITION 7A(1)(b) TO BE TAKEN TO INTEND THE WRONGDOING OF OTHERS.

(3) A PERSON KNOWS OF CIRCUMSTANCES NOT ONLY WHEN HE KNOWS THAT THEY EXIST BUT ALSO WHEN

First alternative

HE HAS NO SUBSTANTIAL DOUBT THAT THEY EXIST.

Second alternative

HE KNOWS THAT THEY PROBABLY EXIST.

RECKLESSNESS

B. A PERSON IS RECKLESS IF,

(a) KNOWING THAT THERE IS A RISK THAT AN EVENT MAY RESULT FROM HIS CONDUCT OR THAT A CIRCUMSTANCE MAY EXIST, HE TAKES THAT RISK, AND

(b) IT IS UNREASONABLE FOR HIM TO TAKE IT HAVING REGARD TO THE DEGREE AND NATURE OF THE RISK WHICH HE KNOWS TO BE PRESENT.

NEGLIGENCE

C. A PERSON IS NEGLIGENT IF HE FAILS TO EXERCISE SUCH CARE, SKILL OR FORESIGHT AS A REASONABLE MAN IN HIS SITUATION WOULD EXERCISE.

DEFINITIONS OF INTENTION, KNOWLEDGE, RECKLESSNESS AND NEGLIGENCE, WITH ILLUSTRATIONS AND COMMENTARY

INTENTION

7. A. (1) A PERSON INTENDS AN EVENT NOT ONLY

(a) WHEN HIS PURPOSE IS TO CAUSE THAT EVENT BUT ALSO

First alternative

(b) WHEN HE HAS NO SUBSTANTIAL DOUBT THAT THAT EVENT WILL RESULT FROM HIS CONDUCT.

Second alternative

(b) WHEN HE FORESEES THAT THAT EVENT WILL PROBABLY RESULT FROM HIS CONDUCT.

Illustrations

(a) The defendant shot at A at long range hoping to kill him, but knowing that the chances of hitting him were extremely small at that range. He killed A. He is guilty of intentionally killing A.

(b) The defendant set a spring gun in his woods, where he knew that trespassers might pass. Apart from being guilty of the specific offence relating to spring guns,[37] he is guilty of intentionally killing if a trespasser is killed by the gun.

(c) The defendant addressed a meeting on the highway. He did not wish to obstruct the highway, but he had no substantial doubt that a certain obstruction would result from his actions. That obstruction, which is found to be unreasonable and therefore illegal, in fact occurred. The defendant is guilty of an offence which requires intention to obstruct the highway.[38] On the

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37. s.31 of the Offences against the Person Act 1861. This offence may be thought to become redundant in the light of the Propositions.

38. Arrowsmith v. Jenkins [1963] 2 Q.B. 561.

INTENTION

A PERSON INTENDS AN EVENT NOT ONLY

(a) WHEN HIS PURPOSE IS TO CAUSE THAT EVENT BUT ALSO

first alternative (b) WHEN HE HAS NO SUBSTANTIAL DOUBT THAT THAT EVENT WILL RESULT FROM HIS CONDUCT.

second alternative (b) WHEN HE FORESEES THAT THAT EVENT WILL PROBABLY RESULT FROM HIS CONDUCT.

second alternative view he would also be guilty of the offence if he foresaw that a certain obstruction would probably result from his action.

(d) The defendant placed a time-bomb on an aircraft. His purpose was to cause loss of property and make an insurance claim. He did not care what happened to the crew or passengers, but he had no substantial doubt that a fatal crash would result from his conduct. If the crash occurred, he is guilty of intentionally killing the victims. On the second alternative view he would also be guilty if he foresaw that a fatal crash would probably result from his conduct.

Note: The commentary on this Proposition, together with the commentary on Proposition 7.A(3), is at page 39.

(2) A PERSON IS NOT BY REASON ONLY OF PROPOSITION 7.A(1)(b) TO BE TAKEN TO INTEND THE WRONGDOING OF OTHERS.

Illustration

The defendant and others took part in a procession knowing from experience that others would molest them. They are not guilty of unlawful assembly (which requires an intention to cause a breach of the peace) because the event foreseen is the result of another's wrongdoing.

Commentary

This Proposition is intended to preserve the principle laid down in Beatty v. Gillbanks.[39] It is, however, self-evident that a person may intend the wrongdoing of another so as to become a party to that other's offence by reason of his foresight of the wrongdoing. The Proposition does no more than prevent such intention being automatically imputed to him.

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39. (1882) 9 Q.B.D. 308.

KNOWLEDGE

(3) A PERSON KNOWS OF CIRCUMSTANCES NOT ONLY WHEN HE KNOWS THAT THEY EXIST, BUT ALSO WHEN

First alternative — HE HAS NO SUBSTANTIAL DOUBT THAT THEY EXIST.

Second alternative — HE KNOWS THAT THEY PROBABLY EXIST.

Illustrations

(a) A law makes it an offence knowingly to possess explosives. The defendant possessed a package which he had left unopened for a long time; he had no idea what it contained. In fact it contained explosives. He is not guilty of the offence.

(b) As in (a), but the defendant received the package from X and, although he had not opened it or been told what it contained, he had no substantial doubt from the circumstances that it contained explosives. He is guilty of the offence. On the second alternative view he would also be guilty if he knew from the circumstances that the packet probably contained explosives.

(c) As in (b), but the defendant was merely suspicious that the contents of the package might be explosives. He is not guilty of the offence. To make him guilty in these circumstances, apt words must be used in the legislation: for example, it should be said that it is an offence for a person to be in possession of articles knowing that they are or may be explosives: or the legislation may be drafted in terms making the defendant guilty on the basis of recklessness as to the quality of the thing.

(d) The defendant bought an article in short supply, in X's shop. He paid a fair price. He knew that X had been convicted more than once of handling stolen goods and he realised that there was a fair possibility, indeed a probability, that this particular article was stolen, but the fact was by no means certain in his mind.

(1) A PERSON INTENDS AN EVENT NOT ONLY

(a) WHEN HIS PURPOSE IS TO CAUSE THAT EVENT BUT ALSO

first alternative

(b) WHEN HE HAS NO SUBSTANTIAL DOUBT THAT THAT EVENT WILL RESULT FROM HIS CONDUCT.

second alternative

(b) WHEN HE FORESEES THAT THAT EVENT WILL PROBABLY RESULT FROM HIS CONDUCT.

(2) A PERSON IS NOT BY REASON ONLY OF PROPOSITION 7A(1)(b) TO BE TAKEN TO INTEND THE WRONGDOING OF OTHERS.

(3) A PERSON KNOWS OF CIRCUMSTANCES NOT ONLY WHEN HE KNOWS THAT THEY EXIST BUT ALSO WHEN

first alternative HE HAS NO SUBSTANTIAL DOUBT THAT THEY EXIST.

second alternative HE KNOWS THAT THEY PROBABLY EXIST.

The article was in fact stolen. He is not, on the first alternative formulation of this definition, guilty of handling stolen goods, knowing them to be stolen,[40] but he is on the second.

(e) The defendant bought an article for far less than its value from a stranger in a public house. The article was stolen. If he is charged with handling stolen goods, the question is whether the defendant knew (in the extended sense of the definition of knowledge) from the circumstances that this was a stolen article.

INTENTION AND KNOWLEDGE

Commentary

(1) Where consequences are included in the elements of an offence, the defendant's intention to bring these about may often be conditional, in the sense that he expects that events may happen or that other persons may behave in a predictable way and upon that expectation he plans his criminal enterprise (for example, booby trap offences against the person). On this assumption, the question arises whether our definition of intention is adequate to cover such cases. We think that the word "purpose" is wide enough to include, in its natural meaning, this kind of conditional intention.

(2) It will be observed that, in Proposition 7.A(1)(b) and 7.A(3), two alternative formulations of the definitions of intention and knowledge have been put forward. The first of these equates intention as to consequences or knowledge of circumstances with states of mind in which the defendant has no substantial doubt that the consequences will result or that the circumstances exist. The second equates them with foresight of the probability of consequences or knowledge of the probable existence of circumstances. The fact that these alternatives are here put forward gives effect to a difference of view in the Working Party, and we invite the views of readers of this Paper on their respective merits. We are all agreed, however, that

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40. For the purposes of the illustration we have ignored the alternative state of mind of "believing" in s.22 of the Theft Act 1968. See R. v. Woods [1969] 1 Q.B. 447 (p.45 below) on the meaning of "believing".

INTENTION AND KNOWLEDGE

(1) A PERSON INTENDS AN EVENT NOT ONLY

(a) WHEN HIS PURPOSE IS TO CAUSE THAT EVENT BUT ALSO

first alternative

(b) WHEN HE HAS NO SUBSTANTIAL DOUBT THAT THAT EVENT WILL RESULT FROM HIS CONDUCT.

second alternative

(b) WHEN HE FORESEES THAT THAT EVENT WILL PROBABLY RESULT FROM HIS CONDUCT.

(2) A PERSON IS NOT BY REASON ONLY OF PROPOSITION 7A(1)(b) TO BE TAKEN TO INTEND THE WRONGDOING OF OTHERS.

(3) A PERSON KNOWS OF CIRCUMSTANCES NOT ONLY WHEN HE KNOWS THAT THEY EXIST BUT ALSO WHEN

first alternative HE HAS NO SUBSTANTIAL DOUBT THAT THEY EXIST.

second alternative HE KNOWS THAT THEY PROBABLY EXIST.

there ought to be cases in which intention and knowledge should be imputed where the defendant's state of mind does not amount to intention in the narrowest sense or certain knowledge.[41] We further think that the test for knowledge should so far as possible be in line with the test for intention.

The first alternative

Intention

A PERSON INTENDS AN EVENT [NOT ONLY WHEN HIS PURPOSE IS TO CAUSE THAT EVENT BUT ALSO] WHEN HE HAS NO SUBSTANTIAL DOUBT THAT THAT EVENT WILL RESULT FROM HIS CONDUCT.

Knowledge

A PERSON KNOWS OF CIRCUMSTANCES [NOT ONLY WHEN HE KNOWS THAT THEY EXIST BUT ALSO] WHEN HE HAS NO SUBSTANTIAL DOUBT THAT THEY EXIST.

(3) This formulation gives effect to the majority view that imputed intention ought to be severely circumscribed, so that foresight of consequences or absence of substantial doubt as to the existence of circumstances ought to be treated as equivalent to intention or knowledge only if the foresight or lack of doubt amounts to practical certainty. While the words "practical certainty" might have been used, the majority think that the suggested formulation is easier to understand in that it is very like a concept (proof beyond a reasonable doubt) with which the courts are already familiar.

(4) It seems to the majority of the Working Party that the alternative "probability" test has the disadvantage that it postulates a state of mind which is insufficiently distinguishable from recklessness. Recklessness, according to our definition, involves the knowledge of risk coupled with the unreasonable taking of the

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41. Such as "bomb in aircraft" cases, where the defendant may be indifferent to the fate of the passengers of may even hope that they will escape if his purpose is, for example, to recover insurance money consequently upon the aircraft's destruction.

(1) A PERSON INTENDS AN EVENT NOT ONLY

(a) WHEN HIS PURPOSE IS TO CAUSE THAT EVENT BUT ALSO

first alternative

(b) WHEN HE HAS NO SUBSTANTIAL DOUBT THAT THAT EVENT WILL RESULT FROM HIS CONDUCT.

second alternative

(b) WHEN HE FORESEES THAT THAT EVENT WILL PROBABLY RESULT FROM HIS CONDUCT.

(2) A PERSON IS NOT BY REASON ONLY OF PROPOSITION 7A(1)(b) TO BE TAKEN TO INTEND THE WRONGDOING OF OTHERS.

(3) A PERSON KNOWS OF CIRCUMSTANCES NOT ONLY WHEN HE KNOWS THAT THEY EXIST BUT ALSO WHEN

first alternative HE HAS NO SUBSTANTIAL DOUBT THAT THEY EXIST.

second alternative HE KNOWS THAT THEY PROBABLY EXIST.

risk; the line between an unreasonable taking of a known risk (recklessness) and acting with foresight of a probable result (intention on the "probability" test) seems, in the view of the majority, not to be sharp enough.

(5) The definition of knowledge favoured by the majority coincides with the view recently expressed by the Court of Appeal,[42] where the Court held that on a charge of "handling goods knowing or believing them to be stolen" under section 22 of the Theft Act 1968, "having a pretty good idea" that they were stolen is insufficient to support a conviction. In such cases, the majority think that it would be unjust to convict on the basis that the defendant had a suspicion that they were probably stolen. If it is desired to extend the offence to cover the state of mind to which we have just referred, the majority consider that it would be better to provide that the offence can be committed recklessly as well as with knowledge. In the same way, if it is thought desirable to widen the scope of the small number of existing offences where the defendant's mental state must amount to intention or knowledge, the majority would suggest that this should be done by providing that the mental element in these offences should include recklessness, rather than by widening the definition of intention or knowledge. In short, the majority would wish clearly to distinguish intention and knowledge from recklessness and to keep the two former concepts as near to their ordinary meaning as possible.

The Second Alternative

Intention

A PERSON INTENDS AN EVENT [NOT ONLY WHEN HIS PURPOSE IS TO CAUSE THAT EVENT BUT ALSO] WHEN HE FORESEES THAT THAT EVENT WILL PROBABLY RESULT FROM HIS CONDUCT.

Knowledge

A PERSON KNOWS OF CIRCUMSTANCES [NOT ONLY WHEN HE KNOWS THAT THEY EXIST BUT ALSO] WHEN HE KNOWS THAT THEY PROBABLY EXIST.

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42. R. v. Woods [1969] 1 Q.B. 447. See also the authorities cited in Glanville Williams, Criminal Law 2nd ed., pp. 38-42.

INTENTION AND KNOWLEDGE

(1) A PERSON INTENDS AN EVENT NOT ONLY

(a) WHEN HIS PURPOSE IS TO CAUSE THAT EVENT BUT ALSO

first alternative

(b) WHEN HE HAS NO SUBSTANTIAL DOUBT THAT THAT EVENT WILL RESULT FROM HIS CONDUCT.

second alternative

(b) WHEN HE FORESEES THAT THAT EVENT WILL PROBABLY RESULT FROM HIS CONDUCT.

(2) A PERSON IS NOT BY REASON ONLY OF PROPOSITION 7A(1)(b) TO BE TAKEN TO INTEND THE WRONGDOING OF OTHERS.

(3) A PERSON KNOWS OF CIRCUMSTANCES NOT ONLY WHEN HE KNOWS THAT THEY EXIST BUT ALSO WHEN

first alternative HE HAS NO SUBSTANTIAL DOUBT THAT THEY EXIST.

second alternative HE KNOWS THAT THEY PROBABLY EXIST.

(7) The second alternative formulation is, like the first, directed to solving the problem of the extent to which foresight of risk of consequences, or belief in or suspicion of the existence of circumstances short of actual knowledge, ought to be regarded as equivalent to actual intention or knowledge. The preference of the minority for a "probability" test for foresight of consequences is in part based on the view that such a test represents little or no change in the existing law.[43] If the same test were to be applied for knowledge of circumstances this would seem to be wider than the existing test, though there is doubt about this.[44] Unlike the majority, the minority see nothing unjust in the extension in the law which their formulation would involve. They think it right, for example, that an alleged handler of stolen goods should be convicted if his state of mind, having regard to all the circumstances, is found to be that, when he handled the goods, he thought that they were probably stolen. This, they argue, is not by any means the same thing as saying that the accused could be convicted if he thought that the goods might be stolen. In these circumstances, he has been no more than reckless, and the present law does not punish reckless handling of stolen property. The minority also see practical difficulties arising from the words "no substantial doubt" which the majority prefer. What is a "substantial doubt?" How are juries to be directed? The probability test is one that has proved satisfactory in the past and is one which all can readily understand and apply.

(8) Whatever the present position may be, the minority favour, as do the majority, the same test for knowledge as for intention. They consider the test proposed to be simple, easy to understand and fair, and the word

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43. See Chandler v. D.P.P. [1964] A.C. 763, 805, per Lord Devlin.

44. Contrast R. v. Woods [1969] 1 Q.B. 447 (in "handling stolen goods knowing or believing them to be stolen" under s.22 of the Theft Act 1968 a belief that they were probably stolen is not enough) with Warner v. Commissioner of Police for the Metropolis [1968] 2 All E.R. 356, 367D, per Lord Reid ("It is a commonplace that if the accused had a suspicion but deliberately shut his eyes, the court or jury is well entitled to hold him guilty".).

(1) A PERSON INTENDS AN EVENT NOT ONLY

(a) WHEN HIS PURPOSE IS TO CAUSE THAT EVENT BUT ALSO

first alternative

(b) WHEN HE HAS NO SUBSTANTIAL DOUBT THAT THAT EVENT WILL RESULT FROM HIS CONDUCT.

second alternative

(b) WHEN HE FORESEES THAT THAT EVENT WILL PROBABLY RESULT FROM HIS CONDUCT.

(2) A PERSON IS NOT BY REASON ONLY OF PROPOSITION 7A(1)(b) TO BE TAKEN TO INTEND THE WRONGDOING OF OTHERS.

(3) A PERSON KNOWS OF CIRCUMSTANCES NOT ONLY WHEN HE KNOWS THAT THEY EXIST BUT ALSO WHEN

first alternative HE HAS NO SUBSTANTIAL DOUBT THAT THEY EXIST.

second alternative HE KNOWS THAT THEY PROBABLY EXIST.

"probable" to be one which juries will be able to comprehend without explanation. In their view, the same cannot be said of the majority's formulation, if only because it suffers from the disadvantage of being expressed in negative terms.

Further commentary on Proposition 7.A(3)

(9) Neither of the definitions of knowledge makes any attempt to deal separately with the "blind eye" cases. If the person who turns a "blind eye" is merely feigning absence of knowledge which he in fact possesses,[45] it will be for the court on the relevant evidence to draw the inference that that person in fact knew of the circumstances. But the definitions do not cover cases where an inference of knowledge is sought to be drawn merely from an omission, even a negligent omission, to make inquiries. We all share the view of Devlin J.[46] that, in principle, constructive knowledge has no place in the criminal law. Where, in the case of specific offences, it is appropriate to introduce tests of "proper inquiry" as to circumstances, such offences should fall amongst those where the negligence test should be specifically imposed.

RECKLESSNESS

B. A PERSON IS RECKLESS IF,

(a) KNOWING THAT THERE IS A RISK THAT AN EVENT MAY RESULT FROM HIS CONDUCT OR THAT A CIRCUMSTANCE MAY EXIST, HE TAKES THAT RISK, AND

(b) IT IS UNREASONABLE FOR HIM TO TAKE IT HAVING REGARD TO THE DEGREE AND NATURE OF THE RISK WHICH HE KNOWS TO BE PRESENT.

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45. Ross v. Moss [1965] 2 Q.B. 396.

46. Roper v. Taylor's Central Garage (Exeter) [1951] 2 T.L.R. 284, 289.

RECKLESSNESS

A PERSON IS RECKLESS IF,

(a) KNOWING THAT THERE IS A RISK THAT AN EVENT MAY RESULT FROM HIS CONDUCT OR THAT A CIRCUMSTANCE MAY EXIST, HE TAKES THAT RISK, AND

(b) IT IS UNREASONABLE FOR HIM TO TAKE IT HAVING REGARD TO THE DEGREE AND NATURE OF THE RISK WHICH HE KNOWS TO BE PRESENT.

Illustrations

(a) The defendant topped his garden wall with broken glass (in full view) to deter trespassers. He realised that a trespasser who climbed the wall might be injured. He is not reckless as to that risk, if the step he has taken is reasonable for the protection of his property.

(b) A surgeon undertook an operation which he knew to be risky as the only hope of restoring the patient to active life. The patient died during the operation. The surgeon cannot be guilty on the basis of having recklessly caused the death of the patient. Although he knew that there was a risk, he did not take it unreasonably.

(c) The defendant spun the cylinder of a revolver, only one chamber of which carried a cartridge. When the cylinder came to rest he pointed the revolver at a friend in jest and pulled the trigger, thinking it very unlikely that the revolver would fire. In fact it did fire and the friend was killed. Assuming that the mechanism of the revolver was such that the chance of the cylinder coming to rest in a position which would allow the bullet to be discharged by the pulling of the trigger was very remote (say not more than one in a thousand), then it was an extraordinary mischance that the cartridge was discharged. The defendant may nevertheless, be guilty of causing death recklessly, since, although the known risk was very small, the jury are entitled to take the view that even this risk was taken unreasonably. If, however, the defendant thought it impossible that the weapon would fire he is not guilty of recklessness, as he would not have known of the risk.

(d) The defendant when driving a car pulled out on a blind corner. He was involved in a head-on collision and another person was killed. If he realised that his act involved a degree of risk of causing death beyond that involved in ordinary

RECKLESSNESS

A PERSON IS RECKLESS IF,

(a) KNOWING THAT THERE IS A RISK THAT AN EVENT MAY RESULT FROM HIS CONDUCT OR THAT A CIRCUMSTANCE MAY EXIST, HE TAKES THAT RISK, AND

(b) IT IS UNREASONABLE FOR HIM TO TAKE IT HAVING REGARD TO THE DEGREE AND NATURE OF THE RISK WHICH HE KNOWS TO BE PRESENT.

driving, and if this risk was unreasonable, he can be found to have caused the death recklessly.

(e) The defendant took out his car in a fog. He drove rather too fast and was involved in a fatal accident. Even if he realised that there was a risk in driving in fog, and his manner of driving was negligent, he cannot for these reasons alone be found to have caused the death recklessly. It is not enough that he realises that all driving in fog (or, indeed, all driving) carries some risk. He must realise that his conduct carries a particular risk of causing a death and the taking of the risk must have been unreasonable in the circumstances.[47]

(f) A law makes it an offence to board a vessel that is in quarantine. The defendant boarded such a vessel knowing that it might be in quarantine and taking no steps to find out whether it was or not. He is guilty of the offence on the basis of recklessness as to circumstances.

(g) As in (f), but the defendant looked for the quarantine flag and failed to see it before boarding. He therefore assumed that the vessel was not in quarantine. He is not guilty of an offence on the basis of recklessness.[48]

(h) A law makes it an offence to take a girl under the age of 16 out of the possession of her parent or guardian against his will.[49] The defendant met a girl of 15 in the street and persuaded her to go off with him. He knew that the girl was under 16, and made no enquiry as to her home circumstances. If he knew that there was a risk that she was "in the possession of" a parent or guardian (and this would be a legitimate matter of inference against him) he is guilty.

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47. See commentary (4) at p.55.
48. cf. Bullock v. Turnbull [1952] 2 Ll. L.R. 303.
49. s.20 of the Sexual Offences Act 1956.

RECKLESSNESS

A PERSON IS RECKLESS IF,

(a) KNOWING THAT THERE IS A RISK THAT AN EVENT MAY RESULT FROM HIS CONDUCT OR THAT A CIRCUMSTANCE MAY EXIST, HE TAKES THAT RISK, AND

(b) IT IS UNREASONABLE FOR HIM TO TAKE IT HAVING REGARD TO THE DEGREE AND NATURE OF THE RISK WHICH HE KNOWS TO BE PRESENT.

Commentary

(1) The definition of recklessness regarding both events and circumstances imposes a double test. The first question is whether the defendant realized that he was running the risk. The second element is whether, having such knowledge, it was unreasonable for him to take the risk. We have thus endeavoured to give effect to the common-sense view that the defendant who appreciates the existence of risks but conducts himself "regardless" is reckless. The definition, with its two parts, is designed to state clearly this double test. Recklessness is wider than intention and knowledge in that appreciation of any risk - irrespective of its degree of probability or otherwise - allows the first test to be satisfied. Here we follow the broad pattern laid down by section 8[50] of the Criminal Justice Act 1967. It is accepted that whether or not actual foresight or actual appreciation of the risk was present is a matter which in some cases may be difficult to prove, but we are not proposing any departure from the general principle that the court of trial may draw appropriate inferences from what in fact happened in order to reach a conclusion upon these matters.

(2) The second part of the definition requires that the defendant should have acted unreasonably in taking the risk. The inquiry as to the reasonableness of his conduct will involve a number of factors, amongst which will be the social importance or otherwise of what he was doing. The operation of public transport, for example, is inevitably accompanied by risks of accident beyond the control of the operator, yet it is socially necessary that these risks be taken. Dangerous surgical operations must be carried out

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50. i.e., "A court or jury in determining whether a person has committed an offence, -
(a) shall not be bound in law to infer that he intended or foresaw a result of his actions by reason only of its being a natural and probable consequence of these actions; but
(b) shall decide whether he did intend or foresee that result by reference to all the evidence, drawing such inferences from the evidence as appear proper in the circumstances."

RECKLESSNESS

A PERSON IS RECKLESS IF,

(a) KNOWING THAT THERE IS A RISK THAT AN EVENT MAY RESULT FROM HIS CONDUCT OR THAT A CIRCUMSTANCE MAY EXIST, HE TAKES THAT RISK, AND

(b) IT IS UNREASONABLE FOR HIM TO TAKE IT HAVING REGARD TO THE DEGREE AND NATURE OF THE RISK WHICH HE KNOWS TO BE PRESENT.

in the interests of the life and health of the patient, yet the taking of these risks is socially justifiable. On the other hand, the social benefit achieved by keeping an appointment to the minute does not justify the taking of foreseen risks of accidents which may be caused by driving dangerously in particular circumstances. Situations in which these considerations arise are of common occurrence and do not present the courts with undue difficulty.

(3) This use of the "unreasonableness" test does not mean that recklessness ceases to depend on a subjective test. The test of unreasonableness comes to be applied only when it is known that there is a risk and in that case the question is: "Did he, the defendant, behave unreasonably in taking the risk of which he knew?". The question is the same whether it is asked of the results or the circumstances of conduct.

(4) It is true that there are cases under the present law, such as crimes requiring "intent" and attempts to commit crimes, where a mental element of recklessness is irrelevant to fault because provision is made for a higher degree of fault.[51] The definition will not, therefore, apply to such cases. On the other hand, we are conscious of the fact that a concept of recklessness sometimes figures in the present law in contexts where it has a special meaning distinct from that provided by our definition, which is merely aimed at following the traditional common law. Recklessness is sometimes given a special meaning in offences such as manslaughter[52] and reckless driving,[53] where the term is most nearly equated with "gross negligence" or with what has been described as "an attitude of mental indifference to obvious risks". We think it highly undesirable to allow the same word to possess in future a different meaning in special contexts. No doubt the Criminal Law Revision Committee will consider this in its review of homicide and other

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51. See p.2, para. 4.

52. Andrews v. D.P.P. [1937] A.C. 576.

53. ss. 1 and 2 of the Road Traffic Act 1960.

offences against the person. It may be that the simplest way to deal with reckless driving is to attach our meaning to it, bearing in mind that an offence of negligent driving ("without due care") already exists. We think that it is necessary to make clear that recklessness does not merely mean negligence, even gross negligence. Recklessness in deception offences seems, in most existing laws, to require foresight of risk.[54]

NEGLIGENCE

C. A PERSON IS NEGLIGENT IF HE FAILS TO EXERCISE SUCH CARE, SKILL OR FORESIGHT AS A REASONABLE MAN IN HIS SITUATION WOULD EXERCISE.

Illustrations

(a) A law makes it an offence to drive a motor car negligently. The defendant is charged with this offence after an accident. If it can be shown that a driver exercising reasonable care, skill and foresight would have avoided the accident, the defendant is guilty notwithstanding that he was doing his best, because his conduct does not measure up to the standard required. His fault may have been that in pulling out of his lane to pass another vehicle he forgot to look in his mirror and collided with another vehicle which was in process of overtaking him. He is guilty of negligent driving notwithstanding that he did not deliberately violate any rule of prudence.

(b) The defendant, driving a vehicle, saw another driver veering across the road towards him, evidently drunk. In order to avoid the oncoming vehicle the defendant decided to swerve to his

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54. There may be an exception in the Prevention of Fraud (Investments) Act 1958, s.13, by which false statements made knowingly or recklessly though not necessarily dishonestly are made punishable in certain circumstances. We do not regard this as a satisfactory use of the word "recklessly" in a wider context. See also the Protection of Depositors Act 1963, s.1.

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off-side, as involving a lesser risk than maintaining his course or pulling up. In doing so he collided with another car. He is not guilty of negligent driving if his action was reasonable in the circumstances; in an emergency of this kind perfect judgment and presence of mind are not required.

(c) A surgeon performed a dangerous operation which offered the only hope of restoring the patient to active life. The patient died as a result of the operation, though it was performed with due skill and care. In determining whether it was negligent to perform the operation, regard must be had to whether a competent surgeon could reasonably have advised the operation.

(d) A physician decided not to continue efforts to prolong his patient's life by advanced techniques, after all hope of restoring the patient to a conscious and reasonably comfortable existence had been abandoned. In determining whether his decision was negligent, regard must be had not only to the above facts but to the accepted standards of behaviour of physicians.

(e) A law makes it an offence negligently to store a specified inflammable substance within 100 yards of a building which is not protected in a specified way. A defendant would not be guilty of this offence if he reasonably believed that the building was protected in the specified way, or if there were no reasonable grounds for supposing that the substance he was storing was the specified substance.

Commentary

(1) The definition of negligence, which relates both to events and to the circumstances of conduct, will have two main areas of application. The first will be those offences which in one way or another are or will become offences of negligence, whether by positive act or by omission. This area is, as we have indicated, likely to be more extensive in future. The second area relates to the objective element in recklessness.

NEGLIGENCE

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(2) As to offences of negligence, the essence of the definition of negligence is to introduce standards of care in behaviour which are determined by the application of objective tests. In relation to consequences, the defendant's state of mind will not be a relevant matter in determining whether he was negligent. The question will be: "Did his conduct in fact involve a risk and, if it did, would a reasonable person have conducted himself as the defendant did?" The reasonable man's conduct is determined by elements of foresight, of knowledge and of belief and by factors of care and skill in his behaviour and activity. It will be for the court to determine in each case whether the defendant fell short of the reasonable man's standards. This determination involves a consideration of all the circumstances, including the degree of hazard involved in the defendant's conduct.

(3) In the application of the definition to the circumstances of conduct, the questions involved are somewhat more complicated than those which relate to consequential events. Two different cases arise. The first is where the defendant is aware or believes that relevant circumstances exist, and in this state of mind proceeds with his conduct, not disregarding their existence but failing to take them sufficiently into account. In this case the question is whether a reasonable man with a similar awareness would have done as the defendant did. The second case is where the defendant lacks any awareness or belief as to the relevant circumstances. Here the question is: "Would a reasonable man have been concerned to enquire into the relevant circumstances and, if so, would he as a result of his enquiry, have done as the defendant did?"

(4) In relation to offences of recklessness two factors are involved: the one is the foresight or appreciation of a risk, the other is whether with that foresight or appreciation the conduct of the defendant was reasonable. The factors affecting the reasonableness of conduct have been discussed

above, but the criminal liability of the defendant is not to be tested by his own view as to what it was reasonable to do, but by the objective test of what a reasonable man's view would be in the circumstances.

THE PLACE OF MISTAKE IN RELATION TO THE MENTAL ELEMENT

(1) As we have made clear in the Introduction, this Paper is based on the assumption that criminal liability should as a general rule depend on fault on the part of the defendant. It follows that if intention, knowledge or recklessness is lacking in relation to some or all of the external elements of any offence which requires a mental element, the defendant should, in principle, escape culpability. This may occur when, for example, he is mistaken as to the existence or non-existence of a material circumstance. This raises two general problems. The first arises when such a mistake, though honest, is a negligent mistake. According to some of the authorities, and in relation to some offences, "honest mistake" is broadly speaking, a defence. In other cases, there is authority for the view that only "reasonable mistake" should constitute a defence. The borderline between "honest mistake" and "reasonable mistake" is confused and it is often true that the reasonableness or unreasonableness of a mistake throws light upon its honesty. We, nevertheless, prefer the former view. The definitions by implication adopt the precedent now provided by sections 2(1) and 21(1) of the Theft Act 1968 and reject the requirement that for a mistake to be a defence it must be reasonable.[55]

(2) The second problem arises where the mistake relates to a fact included in the statement of a specific offence charged, for example that X murdered a named person, A, a fact which forms no part of the definition of the offence, and so is irrelevant to culpability. No rational system of law can allow a defence of mistaken victim. If the defendant fires bullets into the body of A, it cannot normally be any excuse that he believes the body to be that of B, for he has no right to do this to either of them. Nor can it make any

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55. See also the observations in relation to Malicious Damage in the Law Commission's Working Paper No. 23, paras. 41 to 45.

difference that his mistake was a reasonable one. The only exception is where the defendant would have had a defence if the victim had actually been B, as where B is seeking to take the defendant's life and he would have been acting in lawful self-defence if he had fired at B. Here, the mistake of identity forms part of the defence. Nor, in fact, need there be a mistake of identity. If the defendant shoots A, as he believes, in self-defence because he thinks that A is going to kill him, it does not matter that A has no such intention and there is no B who has. The situation in the well-known case of Levett[56] was very like this. The same principles apply in the case of "mistaken property", as where the wrong property is stolen by mistake, or there is burglarious entry of the wrong house. We would not think it necessary to spell them out in a Code.

(3) Mistake will, of course, be irrelevant in those areas where as a matter of policy it is decided to dispense with the requirement of a mental element (or any fault element) in relation to certain external elements which go towards the constitution of a crime. Offences against girls under particular ages may provide examples. Where these factors operate the provisions would have to be so framed as, in the one case, to impose a fault requirement of negligence and, in the other case, to dispense with the requirement of any fault element in respect of such matters as may be specified. Questions of this kind are best left for consideration when the time comes to review the particular offences.

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56. (1638) Cro. Car. 538.