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MENS REA 1

INTRODUCTION

The prosecution must prove that the defendant committed the *actus reus* while in a certain state of mind. The *mens rea* (guilty state of mind) required before a person can be convicted of a crime is specified in the definition of every crime. There are three states of mind which separately or together can constitute the necessary *mens rea* for a criminal offence. These are **intention**, **recklessness** and **negligence**.

Sometimes the definition of a criminal offence will make it clear which of these three mental states is appropriate, but sometimes court decisions explain the requirements of the definition more precisely.

1. INTENTION

DIRECT AND OBLIQUE INTENT

In law there are two types of intention. *Direct intent* (also known as purpose intent) is the typical situation where the consequences of a person's actions are desired. *Oblique intent* (also known as foresight intent) covers the situation where the consequence is foreseen by the defendant as virtually certain, although it is not desired for its own sake, and the defendant goes ahead with his actions anyway.

Example
An aeroplane owner decides to make a fraudulent insurance claim on one of his planes.
(a) He plants a bomb on it knowing that when it explodes, some passengers will certainly die but he does not mind and wants this to happen as it will make his claim more realistic. This is direct intention - the consequences of his actions (the deaths of the passengers) are desired.
(b) Alternatively, he knows that some passengers will certainly die, although he can honestly say that he does not want them to die, and would be delighted if they all survived! This is oblique intention - the consequences (the deaths of the passengers) were not what he planned, but he nevertheless knew that they would inevitably follow from his actions in blowing up the plane.

(See *R v Moloney* (1985) for the examples given by Lord Bridge.)

To require proof that it was the defendant's purpose to bring about a particular consequence may involve placing a very heavy evidential burden on the prosecution. Not surprisingly, given the above example, criminal law normally only requires proof of oblique intent (ie, foresight intent) as opposed to direct intent.

INTENTION BASED ON FORESIGHT OF CONSEQUENCES

The courts have stated that foresight of consequences can only be ***evidence*** of intention if the accused knew that those consequences would definitely happen. Thus it is not sufficient that the defendant merely foresaw a possibility of a particular occurrence.

How can a jury be directed to understand how the existence of such foresight is to be ascertained?

At one time, *DPP v Smith* [1961] AC 290, was authority for the view that a person foresaw and intended the natural and probable consequences of his acts. However, this was reversed by Parliament. **Section 8 of the Criminal Justice Act 1967**, which now deals with how intention or foresight must be proved, provides:

> 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 those 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.

Consequently, where foresight needs to be established a person is not to be taken as intending the natural and probable consequences of his act simply because they were natural and probable, although a jury may infer that from looking at all the evidence. The test is therefore subjective and a jury is to decide what the defendant's intention was from considering all the evidence.

The relationship between foresight and intention was considered by the House of Lords in:

Hyam v DPP [1975] AC 55.
R v Moloney [1985] 1 All ER 1025
R v Hancock and Shankland [1986] 2 WLR 257.

And by the Court of Appeal in:

R v Nedrick (1986) 83 Cr App 267
R v Walker and Hayles (1990) 90 Cr App R 226.

It is important to note that foresight of consequences is not the same as intention but only evidence of intention:

R v Scalley [1995] Crim LR 504.

R v Woollin
22 July 1998
House of Lords

The most recent case in this area is the decision of the House of Lords in:

R v Woollin [1998] 4 All ER 103.

CONCLUSION

The explanation of foresight of consequences in *Hancock and Shankland* and the *Nedrick* direction, where appropriate, are relevant to all offences and not just murder. In the light of these two decisions Smith and Hogan, *Criminal Law* state that:

(1) A consequence is intended when it is the accused's purpose.

(2) A court or jury may also infer that a consequence is intended, though it is not desired, when -

(a) the consequence is a virtually certain result of the act, and
(b) the accused knows that it is a virtually certain consequence.

REFORM

The Law Commission (No. 122, 1992) proposes the following definition in cl 2 of the DCCB:

> … 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 that result, he is aware that it would occur in the ordinary course of events if he were to succeed in his purpose of causing some other result.

RECKLESSNESS

Recklessness is the taking of an unjustified risk. However, two different tests have been developed by the courts, the result of which is that recklessness now has two different legal meanings which apply to different offences.

CUNNINGHAM OR SUBJECTIVE RECKLESSNESS

The first test for recklessness was subjective, ie the defendant knows the risk, is willing to take it and takes it deliberately. The question that must be asked is "was the risk in the defendant's mind at the time the crime was committed?" This test was established in:

R v Cunningham [1957] 2 QB 396.

CALDWELL OR OBJECTIVE RECKLESSNESS

The second test for recklessness is objective, ie the risk must be obvious to the reasonable man, in that any reasonable man would have realised it if he had thought about it.

A person is reckless in the new wider sense when he performs an act which creates an obvious risk, and, when performing the act, he has either given no thought to the possibility of such a risk arising or he recognised that some risk existed, but went on to take it. This test was established in:

MPC v Caldwell [1982] AC 341.

The risk must be obvious to the reasonably prudent person; it need not be obvious to the defendant:

Elliott v C [1983] 1 WLR 939.
R v Coles [1994] Crim LR 820.

The person who stops to think will still be liable if he realised there was some risk:

Chief Constable of Avon v Shimmen (1987) 84 Cr App R 7.

The Caldwell "loophole"

There may be a case where a defendant considered whether there was a risk of harm and decided that there was none. Such a person is not reckless within the precise wording of Lord Diplock's definition in Caldwell because he has given considerable thought to the risk but come to the wrong conclusion as to its significance. This situation is sometimes referred to as the "lacuna" or "loophole" in the Caldwell principle. The matter was considered by the House of Lords in:

R v Reid [1992] 3 All ER 673.

The most recent attempt to test the lacuna was:

R v Merrick [1996] 1 Cr App R 130.

CUNNINGHAM OR CALDWELL RECKLESSNESS?

A situation now exists where there are two distinct concepts of recklessness in criminal law.

Which offences are still based on Cunningham recklessness?

(1) Those like *Cunningham* where the word "maliciously" is used. In the case of *W (A Minor) v Dolbey* [1983] Crim LR 681, the defendant was charged under s20 of the Offences Against the Person Act 1861 with malicious wounding. The Divisional Court said that in an offence under s20, Cunningham recklessness should apply.

(2) This view was endorsed by the House of Lords in *R v Parmenter* [1991] 3 WLR 914, where it was also confirmed that *Cunningham* recklessness applied to assault. The defendant was involved in assaults which caused harm. The main point at issue was the relevant *mens rea* required under s47 and s20 of the 1861 Act. The Court of Appeal decided that the prosecution must prove that the defendant knew of the risk of assaulting the victim and the risk of causing harm. This was clearly the *Cunningham* test. The House of Lords agreed that the test was subjective.

(3) Subjective recklessness would appear to be the requisite *mens rea* for the crime of rape. Previously, s1(1) of the Sexual Offences (Amendment) Act 1976 defined rape and used the word "reckless". In *R v Satnam* (1983) 78 Cr App R 149, the Court of appeal held that an appreciation by the defendant of the risk that the woman was not consenting is necessary to form the basis of a conviction for the crime of rape. The new definition of rape in s1 of the Sexual Offences Act 1956 (as amended by the Criminal Justice and Public Order Act 1994) still uses the term "reckless".

Which offences are based on Caldwell recklessness?

(1) *Caldwell* recklessness now only applies to the offence of criminal damage.

(2) *Caldwell* recklessness was sufficient for causing death by reckless driving (now replaced with causing death by dangerous driving: Road Traffic Act 1991). See *R v Lawrence* [1981] AC 510.

(3) *Caldwell* recklessness formerly applied to cases of manslaughter (for example see *R v Seymour* [1983] 2 AC 493). However, in *R v Adomako* [1994] 3 WLR 288 Lord Mackay LC explained that *Seymour* should not be followed as the underlying statutory provision (Road traffic Act 1972) had been repealed.

CRITICISM

(a) It is unjust to have two meanings of recklessness.
(b) The *Caldwell* test does not make a distinction between the person who knowingly takes a risk and the person who gives no thought to whether there is a risk or not.
(c) Since *Caldwell*, there is now a substantial overlap between recklessness and gross negligence.

REFORM

Clause 18(c) of the DCCB proposes a 'subjectivist' formulation for the concept of recklessness:

> … a person acts-
> (c) 'recklessly' 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 the risk;

NEGLIGENCE

Negligence consists of falling below the standard of the ordinary reasonable person. The test is objective, based on the hypothetical person, and involves the defendant either doing something the reasonable person would not do, or not doing something which the reasonable person would do.

It does not matter that the defendant was unaware that something dangerous might happen, if the "reasonable person" would have realised the risk, and taken steps to avoid it. For an example see:

McCrone v Riding [1938] 1 All ER 157.

MENS REA 2

TRANSFERRED MALICE

Under the doctrine of transferred malice a defendant will be liable for an offence if he has the necessary *mens rea* and commits the *actus reus* even if the victim differs from the one intended. The basis for this principle is the decision of the court in:

R v Latimer (1886) 17 QBD 359.

If the defendant has the *mens rea* for a different offence from that which he commits however, the intent cannot be transferred. See:

R v Pembliton (1874) LR 2 CCR 119.

COINCIDENCE OF ACTUS REUS AND MENS REA

It is a general principle in criminal law that for a person's liability to be established it must be shown that the defendant possessed the necessary *mens rea* at the time the *actus reus* was committed - in other words the two must coincide.

In some cases a literal interpretation of this rule would manifestly lead to injustice, and the courts have developed ways of finding coincidence of *actus reus* and *mens rea* (a) when the events take place over a period of time, and (b) where they constitute a course of events.

(a) *CONTINUING ACTS*

Where the *actus reus* involves a continuing act a later *mens rea* during its continuance can coincide. See:

Fagan v MPC [1969] 1 QB 439
Kaitamaki v R [1985] AC 147.

(b) *CHAIN OF EVENTS*

The second way the courts have dealt with the problem is to consider a chain of events (ie, a continuing series of acts) to be a continuing *actus reus* for the purposes of the criminal law. If the *actus reus* and the *mens rea* are both present at some time during this chain of events, then there is liability. See:

Thabo Meli v R [1954] 1 WLR 228
R v Church [1966] 1 QB 59
R v Le Brun [1991] 3 WLR 653.