

W201 The Individual and the State

Study notes on the mental element in crime

Different offences require different mental states.

These mental states are:

- 1 Intent
- 2 Recklessness
- 3 Negligence
- 4 No mental state at all (strict liability)

Intent

If you desire a consequence you intend it (**direct intent**).

If you foresee a consequence as virtually certain (although you may not desire it) you may be held to intend it (**oblique or indirect intent**).

An example is placing a bomb on an aircraft to kill the pilot (direct intent) but it is virtually certain that the passengers will die (oblique or indirect intent).

If voluntary intoxication is raised by the defence intent is further subdivided into crimes of **basic intent** (eg assault damage) where drunkenness is no defence and **specific intent** (eg murder theft wounding with intent) where it may be.

The expression **ulterior intent** is sometimes used where an offence includes an extra level of intent eg wounding with intent to commit grievous bodily harm (this can overlap with specific intent).

To understand cases defining intent it is important to remember that in a criminal trial at the Crown Court the judge is limited to giving a direction on the law. The jury decides the facts.

The way this happens in the area of intent is that the judge (based on the latest appeal court guidance) explains what evidence the jury can consider and the jury then decide whether in their view (applying the judge's direction) intent is proved. Always remember that different juries may reach different decisions on the same facts. If the judge gets the direction on law wrong the case may be appealed.

What is the direction on intent?

- a) where there is clear evidence that the defendant desired the consequence (direct intent) the issue can be left to the jury to decide on all the evidence without further explanation.
- b) where the evidence is that the accused may not have wanted the consequence but may have foreseen it as a byproduct (oblique or indirect intent) the jury must be told they are not entitled to find intent from the evidence unless the consequence was a virtual certainty and the accused appreciated this.

This direction was set out in **Nedrick** 1986 C A and amended in **Woollin** 1998 Lords when the word 'find' was substituted for the word 'infer'. Previous cases show how this area of the law has developed:

Steane 1947 Court of Criminal Appeal - no clear test
(probably wrongly decided - it confuses intent and motive - motive was to save his family intent was to achieve this by broadcasting)

Hyam 1975 House of Lords - highly probable test

Moloney 1985 House of Lords - natural consequence test

Hancock and Shankland 1986 House of Lords - natural and probable consequence test

Nedrick 1986 Court of Appeal - **virtual certainty test**

Woollin 1998 House of Lords approve Nedrick (substituting the word 'find') and disapprove use of 'substantial risk'

The trend in these cases is to narrow the test for inferring intent and therefore separate it more clearly from recklessness.

In which cases is 'intent' important?

| Main offences | Intent required |
|----------------------|--|
| murder | intent to kill or inflict GBH |
| wounding with intent | intent to inflict GBH or resist or prevent lawful apprehension or detainer |
| attempts | intent not recklessness always required |

In other cases mens rea (if required) will include intent or recklessness (eg assault or damage) so the prosecution can obtain a conviction by proving the lesser requirement of recklessness.

Recklessness

The dictionary definition of reckless is "regardless of consequences" so the every day meaning would encompass foresight of consequences and proceeding regardless. The following account will show how far some courts have strayed from this definition.

The **legal** meaning of recklessness has varied depending on the statute.

1) **Maliciously**

In some 19th century statutes (eg the Offences Against the Person Act) the word 'maliciously' appears. It signifies mens rea which includes intent or recklessness.

In the case of **Cunningham** 1957 the Court of Criminal Appeal defined ‘maliciously’ in Section 23 of the Offences Against the Person Act 1861 (which created an offence of maliciously administering a noxious thing so as to endanger life). (This was the case of the man who stole a gas meter and gassed his future mother in law next door as she slept). The case was important as the word ‘maliciously’ appears in the more common offence of wounding or inflicting GBH in Section 20 of the same Act.

The court held that it covered intent and recklessness. It did not involve proving malice in the sense of wickedness. Recklessness was defined as “**where the accused has foreseen the particular kind of harm and gone on to take the risk of it**”.

This is called a subjective test of recklessness as it involves the foresight of the accused and not of the reasonable man.

If the test was what a reasonable man would foresee it would be an objective test and easier to satisfy and therefore easier to obtain a conviction.

2) **Intent or recklessness**

The new Criminal Damage Act 1971 (replacing the Malicious Damage Act of 1861) did not use the word maliciously it used the words “intending or being reckless”.

For some time the courts continued to define reckless by the Cunningham subjective test. Eg **Stephenson** 1979 C A (The schizophrenic and the fire in the haystack case.)

Then in 1982 in **Caldwell** (An intoxicated man with a grievance set fire to a hotel.) the House of Lords by 3 to 2 extended recklessness in criminal damage to include an objective test. Lord Diplock in the majority judgment held the defendant could be liable because he failed to give any thought to a risk which would be obvious to a reasonable person. They felt able to do this as there had been a new act of parliament and they felt that parliament had intended to redefine recklessness.

Cunningham was not overruled as it was based on interpretation of the word ‘maliciously’ in another act of parliament altogether. Caldwell however created a new definition of recklessness for criminal damage (which included arson).

Many commentators preferred the minority judgment of Lord Edmund Davies which favoured the Cunningham test. Subsequently the Draft Criminal Code of the Law Commission suggested Cunningham recklessness should apply to all offences. However for over twenty years Caldwell remained the law as far as damage (including arson) was concerned.

Caldwell produced harsh results especially if the accused by reason of age or handicap did not possess the foresight of the reasonable man eg

Elliot v C 1983 Div Ct (14 year old backward girl set fire to shed.)

Stephenson 1979 C A (overruled by Caldwell) (Schizophrenic set fire to a haystack.)

Later in **R v G and R** 2003 Lords it was decided Caldwell should not be followed. The facts were that two boys (aged 11 and 12) set fire to newspapers in the yard of a Co-op at Newport Pagnell. They left without extinguishing them not appreciating the risk of the fire spreading. In the event the fire caused damage of one million pounds. Based on Caldwell both were convicted. After a thorough review of the law Lord Bingham said that Lord Diplock's objective interpretation of recklessness was a "misinterpretation" that was "offensive to principle and was apt to cause injustice". Instead in the Criminal Damage Act recklessness by an accused now means "**he is aware of a risk ... and it is in the circumstances known to him unreasonable to take the risk**".

The House of Lords could have chosen the wording of the test in Cunningham so that there was a single identically worded subjective test for recklessness but instead have adopted the wording of the Law Commission's Draft Criminal Code of 1989. Despite the difference in wording both offer subjective tests which are likely to achieve the same outcome in practice.

Generally

Over the years courts encountered problems with the Caldwell test. It may have produced a fair result on the facts of Caldwell (self intoxicated man with grievance set fire to hotel) but it operated harshly on the young or the retarded who were unaware of risks. Some courts made it clear they only followed it because of precedent. It is certainly logical to have a single definition of recklessness which applies to all criminal offences.

Negligence

This can be divided up on the basis of seriousness:

Gross negligence

This is a ground for liability in manslaughter which is the major exception to the rule that generally serious crimes require intent or recklessness.

Negligence

The statutory offences of dangerous driving and causing death by dangerous driving penalise driving which "falls **far** below the standard of the careful and competent driver".

Carelessness

The statutory offences of careless driving and causing death by careless driving penalise driving which "falls below the standard of the careful and competent driver".

Strict liability

No mens rea is required in respect of one or more aspects of the offence.

In the past there were no hard and fast rules which decided which offences were strict liability (in practice you had to look in a textbook to find out).

The following were pointers only.

- 1) If the statute is silent there is a presumption parliament did not intend to punish an innocent person **Sweet v Parsley** 1970 Lords (Teacher let house to students who smoked drugs.)
- 2) This can be displaced if the statute would encourage greater vigilance in a matter of social concern by the imposition of strict liability (eg pollution offences).
- 3) If the penalty is only financial or the offence only summary this may indicate strict liability.
- 4) The use of words importing mens rea elsewhere in the statute may be an indicator of strict liability.
- 5) Where there is strict liability a statute will frequently provide a statutory defence if the accused can show he used due diligence.

However in **B v DPP** 2000 Lords and **R v K** 2001 Lords the presumption in **Sweet v Parsley** was stated in stronger terms. There is now a common law presumption in favour of mens rea. It must be excluded expressly or by necessary implication.

Absolute liability

No mens rea at all is required. Conduct can be involuntary eg **Winzar v CC of Kent** 1983 Div Ct (Drunk removed from hospital to highway.) Beware as some judges use the terms absolute liability and strict liability interchangeably.

Transferred Malice

If you have the mens rea of an offence for victim A and accidentally injure victim B your intent or recklessness is transferred. **Latimer** 1886 CCCR (man in pub aims blow at C with belt and hits and injures R). The doctrine only applies if the offence is the same in each case. **Pembliton** 1874 CCCR (man outside pub threw stone at opponent and missed breaking pub window - no conviction).

Intention Chart

1. **Consequence desired = intent**
2. **Consequence foreseen as virtually certain = intent may be found**
3. **Consequence foreseen as probable or possible = recklessness (subjective Cunningham test or subjective R v G and R test)**
4. **Consequence not foreseen but ought to have been = negligence or (until 2003) objective Caldwell recklessness**
5. **Consequence reasonable man would not have foreseen = strict liability**

Must actus reus and mens rea coincide?

The general rule is yes. As with most rules the common law has created exceptions.

Continuing act

If the actus reus extends over a period of time then it is enough if mens rea occurs at some stage during the continuing act even though it is absent at the outset. **Fagan v MPC** 1969 Div Ct (D unintentionally drives car onto policeman's foot, when made aware D refuses to drive off. Assault conviction upheld.)

Series of events

This is different from a single act which continues. Here there are a series of completed events which form a sequence.

In **Thabo Meli v The Queen** 1954 P C the victim was taken to a hut and struck over the head with intent to kill. His unconscious body was then rolled over a cliff to make it look like an accident. The victim was not killed by the blow but died later from exposure. The court treated the two stages as a single plan. Lord Reid said it was "impossible to divide up what was really one transaction".

In **Le Brun** 1991 C A this was taken a stage further and liability found where there was a sequence of events but no plan. D struck his wife and knocked her unconscious in a street. As D attempted to move her body her head struck the pavement fracturing her skull and she died. The court upheld the manslaughter conviction.