

D stabbed young woman seriously, had she received blood transfusion she would have been saved, but was Jehovah's witness, refused and died – although her refusal was deliberate and informed, was not free because she was bounding conscious as result of her religious belief – did NOT break chain

Not informed:

- Saunders & Archer [1573]

Archer supplied arsenic and roseacre to Saunders to kill his wife, put in apple, but wife gave to daughter and she died – Archer NOT guilty because not aware of turn of events (child and not wife); contribution of wife was not INFORMED because didn't know was poisoned so Archer still liable

Victim's interventions

As long as the victim's reaction was within a **range** of responses that may be **reasonably foreseeable** the chain would NOT be broken

- *Roberts*

woman jumped out of car and injured because of D's sexual advances against her

- *Martin*

child offered sip of wine, downed the entire glass and died, wholly unforeseeable circumstance which DID break the chain

- *Dhivali*

D had been abusive towards V, V committed suicide, D charged with manslaughter through UDA (individual blows struck towards her), but no evidence of psychiatric disorder that could be said to have led her to commit suicide because of D's abuse so case collapsed

Negligent medical treatment

- *R v Smith* – NOT break
 - If at the **time of the death** the original wound is **still an operating and a substantial cause**, then the death can properly be said to be the result of the wound, albeit that some other cause of death is also operating
 - Only if it can be said that the original wounding is merely **the setting** in which another cause operates can it be said that the death does *not* result from the wound

- But supplying heroin didn't create danger – taking it did; but contributing to problem by doing nothing
- Supply of heroin – remained in premises- observed and realized her dangerous situation– failure to take reasonable steps to save her by calling ambulance= conviction
- But only 16 and a heroin addict – not entirely free?

There is a risk that all drug suppliers will be held to have satisfied Miller criteria, if the victim dies in the supplier's presence.

Domestic Violence Crimes and Victims Act 2004.

D is guilty:

- (a) if a child or vulnerable adult in the same household, and with whom D had frequent contact, is killed,
- (b) there was a significant risk of serious physical harm being done to V,
- (c) D ought to have been aware of that risk;
- (d) D did not take reasonable steps to prevent the harm

Week 4

It is also important to remember that a 'conduct' element *may* have a *mental* or fault element intrinsic to it.

- (a) Conspiracy- a conspiracy is termed when there is an 'agreement' to commit a crime; but whilst the 'agreement' is the conduct element, agreements clearly also have mental elements: there must an intention to agree.
- (b) Attempts- we cannot make sense of the conduct element ('a more than merely preparatory act'), unless we know what D's intention was, what s/he was preparing to do.

Varieties of *mens rea*

- Intention
- Recklessness
- Negligence
- Dishonesty (e.g. theft, fraud)
- Belief (e.g. handling stolen goods)
- Knowledge (e.g. handling stolen goods)
- Inconsiderateness
- Indifference

2. **Morris** [1984] AC 320 (HoL case) (dishonest shopper switched price tags for items in the store- civil trespass to goods instead of theft?)
3. Two points in *Morris*:
 - (a) Is appropriation under s.3 another way of speaking about 'taking/carrying away'? switching price tags **IS** the right of the owner – at **THAT** moment the labels were switched it **was stolen** – dishonest, property belonging to another and intention to permanently deprive present
 - (b) Does it matter that the 1968 Act omits the words 'without the consent of the owner'?

5(b) *Removing goods from shelf* is not an 'assumption...of the rights of an owner because such an act is 'expressly or impliedly authorised', and is not, 'an adverse interference with or usurpation of [the owner's] rights'

*This claim (at 331) is **no longer good law.***

5(a) Changing the labels on the goods was an appropriation (at 331) as it is an assumption of one of the owner's rights. Still good law.

Morris is good authority for the view that D can appropriate **without literally 'taking away'**.

Morris interprets, 'the owner's rights' in s.3 to mean, any one of the owner's rights:

The consequences of this wide view can be seen in earlier case of **R v Pitham and R v Hehl** (1977).

While V was in prison, D offered V's goods for sale to X. The CA ruled that the **offer of sale** was itself an 'appropriation' even if property was never touched because the *right to sell* is one of the rights of the owner.

So following this line of reasoning the logical consequence is that it is theft to offer a gullible-but-rich tourist the Crown jewels for a cut-price £2 million for instance.

Professor Sir John Smith also highlighted a curious feature of the new rule:

Suppose D comes up behind V, intending to take a wallet from D's pocket. D reaches inside the pocket, touches the wallet, but then decides to withdraw his hand and leave the wallet.

- But note: what if D borrows V's pen without permission, writes a note, then returns it?

There are other important cases to look out for:

- *Duru (1973)*; *Velumyl (1989)* Crim L 299: in latter, D dishonestly took £1,050 from his employer's safe, intending to repay the same amount.
- D convicted of theft because D **intended to deprive V permanently** of the **actual** notes and coins taken: he intended only to **replace them with other notes/coins**.
- In that regard, the fact that D thought that V would not mind V having different notes/coins, replaced later, is a matter going to **dishonesty**.
- S.6, mentioned above, is of importance here:
- S.6: "D...is to be regarded as having the intention to deprive the other of it if his intention is to treat the thing as his own to dispose of regardless of the other's rights..."
- ...**borrowing or lending** of it may amount to so treating it if...the borrowing or lending is for a period and in circumstances making it **equivalent to an outright taking** (by **depriving** the **value** of it)."

Fault: The element of 'dishonesty'

- No definition of dishonesty in the 1969 Act.
- Section 2 provides three instances in which D's behaviour is not to be regarded as dishonest – negative definition:
- 1. Where D **believes** s/he has in law the **right to deprive another by appropriation**;
- 2. Where D **believes** that s/he **would have the other's consent** if they **knew of the appropriation** and the **circumstances**;
- 3. Where D appropriates property in the **belief** that the **owner cannot be discovered by taking reasonable steps**.
- Finally, section 2(2) says that a **willingness to pay will not necessarily prevent D being found dishonest** e.g. if seller refused to sell.
- The definition of dishonesty is left to the common law: **Ghosh (1982)**.
- D was a surgeon. He claimed fees for work that others had carried out, or that was NHS work.
- The judge told the jury to use their common sense in determining whether D was dishonest.
- The CA upheld the conviction, but said this test was too uncertain.
- The CA laid down the current rule, that **dishonesty has both an objective and a subject element**. It is a **two-part test**.

- The shop is assured payment by the bank. So the assistant may not be concerned by whether D's card is or is not stolen or invalid – not deceived

Examples:

- *Cooke* (1986) a Rail employee made and sold his own sandwiches on a train. He was convicted of obtaining the customer's money by deception – really?
- *Hensler* (1870): D sent a begging letter to a priest pretending to be someone poor. The priest saw through the deception but sent the money anyway – so not deceived?
- 1. dishonesty (*Ghosh* definition)
 - **Objective** question: Was D's conduct 'dishonest' by the standards of **reasonable** and **honest** people
 - **subjective** question: Did D **realise** that his conduct was dishonest by those standards: the standards of reasonable and honest people
- 2. Ways in which fraud can be committed
 - (i) false representation (s.2);
 - (ii) failing to disclose information (s.3);
 - (iii) abuse of position (s.4)
- 3. The conduct must be engaged in *with intention*
 - to make a gain; or
 - to cause loss to another person; or
 - or to expose them to a risk of loss (Section 5).
 - The gain/loss must be or **money** or other **property**. So, obtaining sexual intercourse by a false representation is not covered
- No consequence element – only conduct element
- **Specific intent:** dishonesty and INTENT to make gain... etc.
- No need to show that the victim was deceived – only need to show AR of false representation... etc.

Jeevarajah [2012] EWCA Crim 1299.

- Ds ran a corner shop at which V bought his lottery tickets. When V bought new tickets he would ask whether his old ticket had won. One day, his previous ticket had won, but Ds falsely told him it had lost and sought to claim the money themselves.

- Ds pleaded guilty to fraud by false representation
- Under old law would only be guilty of an attempt to obtain by deception when seeking to claim the money

Dishonesty

- Dishonesty is itself a concept with uncertain boundaries as we have seen.
- What makes intention also very wide - the requirement for an intention to make a gain or cause a (risk of) loss - is that s.5 includes:
 - 'a gain by keeping what one has', and 'a loss by not getting what one might get'
- It follows that the following might be fraud:
- D falsely tells V that he (D) cannot pay a debt he owes V until the following day.
- Here D keeps what he has by a false representation. It does not matter that the 'gain' – keeping what he has - is only temporary.; But it may not be dishonest.
- Notice in this last example how fraud can capture temporary financial gains or (risks of) losses: contrast need for intent of *permanent* deprivation in theft.
- Even if in the case of **wills**, there are no actionable rights but can still be fraud if e.g. D is the sole beneficiary under X's will. X tells D he (X) has been thinking about dividing his property between D and V. D tells X (falsely) that V is dead. Here D dishonestly intends to make a (greater) gain by his false representation

MUST BE A **CAUSAL LINK** BETWEEN THE **METHOD** AND THE **INTENTION**

- Suppose D sends V promotional literature intending that V should read it and consequently give D money. D knows that some, but not all the information in the literature is false.
- Here, D may realise that the false information could lead to the gain, but does not necessarily *intend* the gain to come by that means

Week 3

Automatism

Week 5

Attempts

Problems with confrontation:

1. Underinclusive:
 - Doesn't include what it ought to include
 - *Geddes*
 - *Campbell*
2. Overinclusive:
 - *Dagnall*
 - A-G's ref no.1 1992

Law Com's justifications of attempt law (2007, Law Com 183 [14.8])

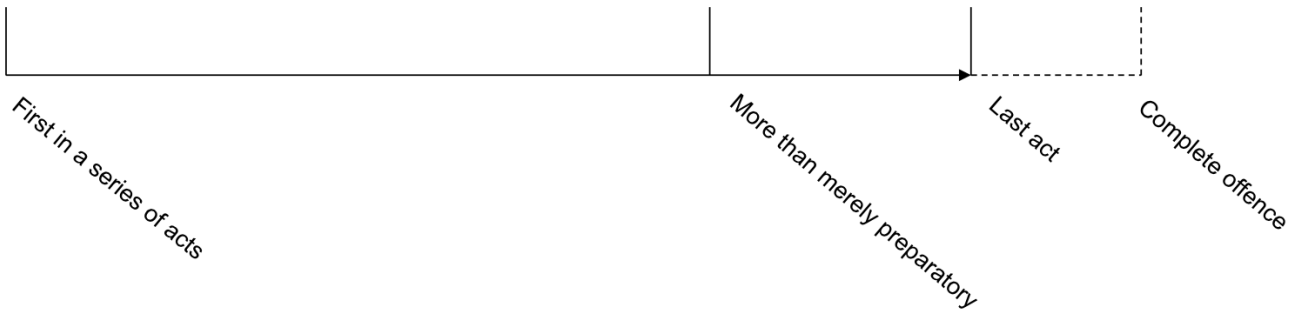
1. Imposing criminal liability commensurate with the **moral culpability** of D's conduct and the concomitant **risk of harm** associated with it
2. affording the **police** the opportunity to intervene in good (early) time to prevent harm associated with the complete offence
3. the **deterrent** effect criminal liability has on potential offenders

The presence of attempt is therefore the product of a **delicate balancing** act between two needs. On the one hand there is the need to allow **effective intervention to prevent harm**. On the other there is a need to ensure that only sufficiently culpable individuals, whose conduct brings with it a clear threat of harm, are **labelled** and punished as "attemptors"

Subjectivist inchoate liability



Objectivist inchoate liability



O: should not be just merely intention, act should be manifestly wrong and constitute criminality, **attack** on interests of another person

S: some culpability and risk of harm from the very beginning

- **Before** the attack = **place to repent** without any disturbance/harm/license to other people to use force
- Should punish only after confirmation if not would be penalizing dangerous people instead of dangerous acts (what the criminal law should punish)

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Subjectivism or objectivism?

- | | |
|---|---|
| • any conduct corroborative of intention | • conduct manifesting criminal intentions in public |
| • conduct not objectively defined | • conduct objectively defined |
| • conducive to early intervention | • limits scope early intervention |
| • deters preparation | • reduces incentive to desist |
| • discounts 'space to repent'/ D's autonomy | • respects 'space to repent'/ D's autonomy |
| • coerces D as dangerous person | • coerces D for dangerous acts |

ISSUES

1. Thinning the act requirement (conduct) element

Offence type	Conduct ...
Preparation	Any preparatory conduct
Possession with intent	State of affairs/omission to divest? – no act
Simple possession	State of affairs/omission to divest? – no act
Remote encouragement	Business dealings, expression of political opinions
Failure to report	Omissions
Breach of preventive order	Any conduct necessary to preventive purpose of order e.g. terrorism / sex offences / football matches etc.
Encouragement	Any act capable of encouraging another to commit an offence

2. Prohibiting remote conduct with no proper harm prevented

Future choices (intervening actions) of *defendant* that need to take place

- Preparation
- Possession
- Breach of preventive order

- D liable notwithstanding remaining place to repent
- D's autonomy discounted, D not to be **trusted** once form **intent** to commit a crime (cross threshold) – no longer trust D to use freedom of choice
- Underlying principle of presumption of innocence subverted – Crown still has to prove MR – but jury doesn't have to sure that D would have gone on to commit the crime – goods grounds not to trust D / "reasonable suspicion that D did it"
- Deterrence of risk creation but desistance disincentivised because criminal liability imposed too early – why not complete the whole offence if going to be liable anyway?
- Deterrence of intentional preparations?
Why is complete offence insufficient?
- Incapacitation of the dangerous

- *National Rivers Authority v Alfred McAlpine Homes East Ltd* [1994]

s85(1) Water Resources Act 1991

- Due diligence or reasonably practicable - industry standard
- Absolute liability - constant pressure to raise standards
- Cost (of enforcing standards of safety expected) allocation
 - not borne by claimants
 - pushed into process of production – borne by industry – until work it out in the market – self-correcting of externalities
 - precautions and standards maintenance costs
 - enforcement costs

Fair Warning in the regulatory context

YES because for e.g. driving have driving test – great deal/effort into trying to warn people of the obligations they are under

Corporate context – most likely lawyered up – *Smithkline Beecham v Freeborn* [1974] AC 839

Caterpillar in canned peas

s2(1) Food and Drugs Act 1955 – extraneous material found in foodstuff

Already did everything they could to prevent this – impossible to prevent entirely – evolved and camouflaged – and were harmless because they were sterilized and also nutritious!

But still convicted – fairly warned because should have looked into the law – bear all the burden of the risk!

The regulatory effect of SL – incentivises improvement in quality and safety of a practice

Enforcement of regulatory law

- Specialist regulatory agencies e.g. local authorities
- Orientation to raising / improving standards / behaviour and not particularly to punish people
- Discretionary enforcement than true crimes