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# LAW AND ITS PRESUPPOSITIONS

## ACTIONS, AGENTS AND RULES

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*Actions, agents and rules*

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# I

## THE CONCEPT OF ACTION

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Among the most basic of legal concepts of concern to the practitioners of law at all levels we find those of defence, culpability, negligence, responsibility and obligation. But to wield these concepts requires understanding of another concept – the concept of what it is to do something. Law is about actions. We intend to describe the relevant rudiments of that concept of action which is part of our common understanding. Clearly, this cannot be the final position on such matters but it will tell us where we are. The law, in order to operate as it does, must in an unself-conscious way already work with some concept of action or other. A later project, in Chapter II, will deal with the relations between the assumed or implied legal conception of an action and the conception we argue is part of our common understanding. Once in possession of that concept we shall be in a favourable position to evaluate many of the legal notions which have been derived without benefit of the realization that they must be compatible with the idea of what an act is. We turn now to that matter.

### 1 ADJUSTERS

There will exist in any natural language or other representation of our understanding of the world a primary set of concepts which classifies favoured phenomena according to a rather stable set of criteria and a secondary set of concepts which classifies the

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well-known and recurrent aberrations of these favoured cases. Thus we have 'tomatoes' and things which on occasion we can say 'look like tomatoes'<sup>1</sup> but may or may not be; we have 'John's poisoning the pigeons' and 'John's accidentally poisoning the pigeons'.

Standard and adjuster terms are common phenomena in natural language. Two broad classes of adjusters are action adjusters and epistemological adjusters; the first marks well-known and recurrent deviations from a standard in our claims about actions, the second marks well-known and recurrent deviations from a standard among our knowledge claims. Naturally we will be concerned here only with the former.

Consider the following list of action adjusters:

- (1) *Accidentally*
- (2) *Mistakenly*
- (3) *Inadvertently*
- (4) *Carelessly*
- (5) *Involuntarily*
- (6) *Unintentionally*

Each action adjuster cancels a feature or set of features of a standard case of action, thus marking an important way in which an action deviates from the standard. Notice that each of these terms except 'accidentally' contains an overt negative, a fact in keeping with its cancelling function. 'Accidentally', however, contains an overt negative in its dictionary definition: 'An act due to an *unforeseen* event, etc.' The attenuated cases of action are worthy of treatment as standard deviants because each marks an important way in which a standard action may fail. Each such well-known aberration, marked by an adjuster term, is retained within the radius of the concept of an action. One of the objects of this chapter will be to explain why that, rather than another, should be our taxonomical policy.

Despite our present conceptual arrangements, each aberration does have a possible description quite independent of its present agreed dependence upon the standard case of an action. Thus, as we shall see, we can give a description of any action adjuster in terms of the abilities of agents.

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The following things about these cancellers must be remembered:

- (1) They mark standard or typical deviations from a standard.
- (2) They are kept within the conceptual ambit of the standard concept for various good policy reasons, which we will discuss later.
- (3) They each cancel a set of features of the standard case.
- (4) They assert (or imply) specific ways in which the deviations are like the standard case.
- (5) They also assert (or imply) specific ways in which the deviations positively differ from the standard case.
- (6) They are independently describable (although, as pointed out, we choose to keep them as deviations to a dominant conceptual theme).
- (7) Since each adjuster functions by cancellation upon some feature of the standard concept to which it is attached, we can, by conversion, uncover these feature we have affirmatively and originally set into the standard case itself.

We propose to do the following: give an account of each typically deviant case which shows what features of the standard are cancelled; schematize each such deviant case to show what constitutes its deviance affirmatively and apart from the cancellation of features of the standard; show which features the standard case of an action has by converting the cancellations performed by the terms for the deviants; discuss the policy that motivates the concept of an action through its attenuated descriptions; and outline the significance of the theory for the law. Although we think the distinctions among the actions to be described are properly named, nothing important hangs on the propriety of the names. What is important is that these are the *bona fide* independent distinctions which function in the way we describe, however named.

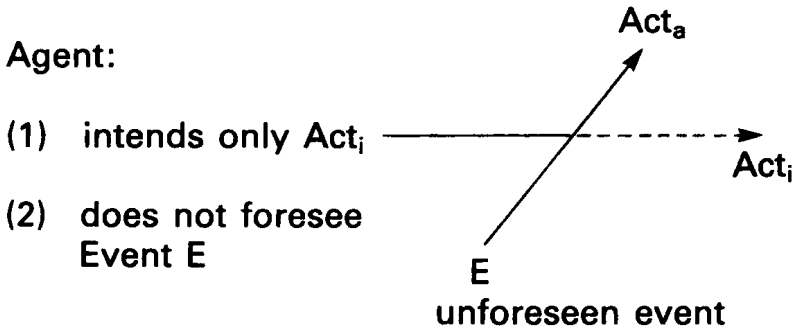
### *(1) Accidentally*

J.L. Austin has set us on the right track with a lucid and now famous example which allows us to readily separate accidents



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from mistakes:<sup>2</sup> I intend to shoot my donkey which is pastured along with yours in the field behind the house. I have him in my sights preparatory to squeezing the trigger; your donkey suddenly veers and, just as I squeeze off the shot, charges across the fatal line of flight. I have accidentally killed your donkey. It will be useful to schematically diagram this sort of deviation (Figure 1.1).



*Figure 1.1*

To generalize: in cases of accident the agent intends to perform an action,  $Act_i$ , which does not succeed because an unforeseen event occurs which produces a vector effect on the agent's behaviour and, consequently, an unintended result: the accidental  $Act_a$ .

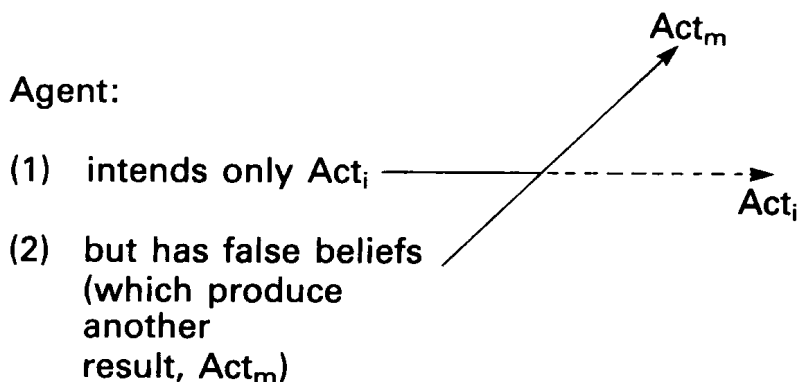
A classical legal example of an accident is furnished by the facts of *Stanley v. Powell*<sup>3</sup> where a pellet from a gun fired, according to the jury, without negligence ( $Act_i$ ) glanced off a branch of a tree (the unforeseen event) and struck the plaintiff in the eye ( $Act_a$ ).

### *(2) Mistakenly*

A patient enters a hospital to have an ingrown toe-nail removed. The doctor, believing the patient to be someone else, performs a vasectomy on him.<sup>4</sup> The doctor has mistakenly sterilized the patient.

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The generalization of this case is to be easily seen from its schematic representation (Figure 1.2).



*Figure 1.2*

$Act_i$  would be the intended sterilization of the other patient and  $Act_m$  is the sterilization of the unfortunate one.

### *(3) Inadvertently*

Menlove stacked his hay in his hayrick. The hay spontaneously ignited and burned down Vaughan's cottages.<sup>5</sup> Menlove inadvertently burned the cottages. To say that he burned them unintentionally is true but incomplete since he could have burned them accidentally, mistakenly or carelessly. The absence of intent does not distinguish between these aberrant actions, but it does serve to distinguish them from involuntariness. What then has to be added in order to fill out inadvertence or, to put the question more naturally, what has been cancelled from a standard case of action by the concept of inadvertence? Clearly, intention has been cancelled, but not the intention of the main act. Menlove did intend to stack his hay. But he did not intend nor foresee the *resultant* event. The schematic representation of inadvertence would look as shown in Figure 1.3.

Agent:

- (1) intends only  $Act_i \longrightarrow Act_i \longrightarrow Act_{inad}$   
(2) does not foresee  $Act_{inad}$

Figure 1.3

The agent performs  $Act_i$ ;  $Act_{inad}$  results but is not intended. We can see now how accident and inadvertence are distinct: the first implies an unforeseen interfering event, the second only an unforeseen result of the completed act.

(4) *Carelessly*

If in pushing a passenger on to a moving train a guard dislodges a package from under his arm, causing it to fall under the wheels of the train, he could be said to have dislodged the parcel carelessly.<sup>6</sup> Notice that the canceller 'carelessly' makes it clear that the dislodging of the parcel was unintentional and is in that regard indistinguishable from 'inadvertently'. Notice though that in the Menlove case discussed above, we cannot say that Menlove *stacked his hay* inadvertently with the consequence of burning down the cottages. He did *not* stack his hay inadvertently; he *burned down the cottages* inadvertently. So the canceller does not go with the main action. But we can say that the guard pushed the passenger on to the train carelessly. So, the canceller is allowed to go with the main action in the case of carelessness but not in the case of inadvertence. Why should this be the case?

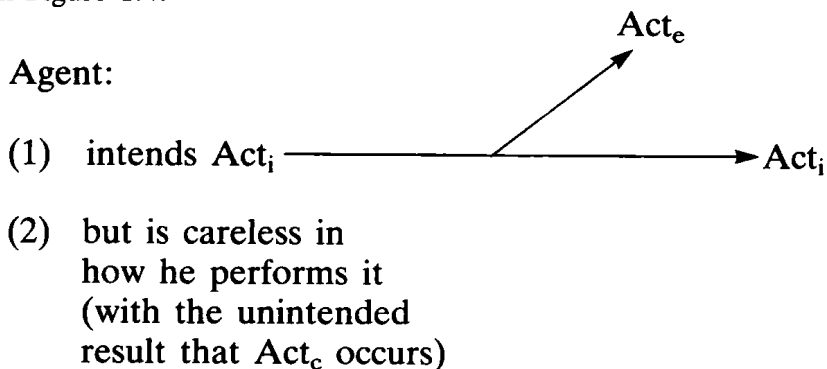
The reason is that in pushing the passenger on to the train carelessly, the guard's negligence was in not attending to *how* he did it. Menlove, on the other hand, probably stacked the hay with great care: he was careful not to swing his fork too wide and careful to produce a stable stack. That is *how* one should stack hay to avoid unwanted results. So if I am criticized for carelessness, the criticism is for the *quality* of the actual execution of the act. If I am criticized for inadvertence, the criticism is for

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the quality of my attention to the *consequences* of what is otherwise a satisfactory act. This is why the adverb 'carelessly' goes with the act that produces the unwanted result (the guard pushed the passenger on to the train carelessly) and why 'inadvertently' goes with the unwanted result (Menlove inadvertently burned Vaughan's cottages); they go with that part of the matter which is the basis of the criticism or excuse. In the case of 'carelessness', the adverb goes with the causal act, not its result; in the case of 'inadvertence', it goes with the resultant act not its cause.

It seems to be implied in the conceptual independence of these two aberrations that two separate psychological factors are at work: one which, with a regard to consequences, controls the manner of execution of the behaviour ('you didn't gauge the distance properly' or 'you did it too quickly' or 'you didn't pay attention to what you were doing'); another which controls, with a regard to consequences, the selection of the time and/or place of the behaviour. Both inattention and inadvertence deal with the avoidance and encouragement of certain consequences, perhaps even the same consequences; but each deals, by hypothesis, with a separate way of controlling those consequences. We may say finally that inattention or carelessness refers to the absence of that relation which is required between the cognitive and the physical parts of agency. It is implied that our bodies must be under the control of our cognitive faculties in the fully responsible cases of action.

A schematic representation of carelessness would be as shown in Figure 1.4.



*Figure 1.4*

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The agent intends to do  $Act_i$  which he may or may not complete. In the course of it he brings about  $Act_c$  due to a lack of care in how he does  $Act_i$ .

This completes the class of deviations whose members share the features of being unintentional and are differentiated by the special ways in which the unintentional result is produced.

### *(5) Involuntariness*

We turn then towards the deviation which may be called 'involuntariness'.<sup>7</sup> It differs from the foregoing class in that the involuntary act is intentional. In the hackneyed but paradigmatic case where the agent has a gun held at his head and is thereby forced to commit a wrong such as trespass and theft,<sup>8</sup> he has nevertheless done it intentionally, however unwillingly. Hence the agent's intention is not outwitted by events or let down by ignorance or inattention or lack of attention in performance as it is in accident, mistake, inadvertence and carelessness. What is overridden in cases of involuntariness is his normal selection of goals from among the array normally integral to him.

Consider the following ingredients of our mechanism of choice. There is an ordered set of goals and a means of selecting which of these goals to actuate. The means will include an ability to reckon the consequences of one's choice and to relate the effect of that back to the remainder of one's needs and desires. In the gun-at-the-head sort of case, the preservation of normal choice is overridden in that we are forced to accept the preservation of our own safety at the expense of harming another. We have had our choice constrained by the fact that we cannot preserve our own life unless we harm another. The harm we do to another is then chosen only out of necessity.

There is, however, some difficulty in deciding how extensively this class of aberration is to be allowed to range. What if it is not the will of another, but circumstances which impose the necessity? A ship's officer throws six passengers overboard to avoid the loss of the lifeboat and the remaining crew members and passengers.<sup>9</sup> He has had his choice constrained by the fact that to prevent the death of all forty-one passengers and crew he must throw six overboard. If he chooses the latter, he does so out

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of necessity. The captain's case and the gun-at-the-head example are both aberrations of choice for the same reasons. In both cases choice is made out of necessity.

Another sort of case is when the agent acts under an internal compulsion, such as kleptomania. Here the agent's desires and needs are, from our point of view, distorted, which results in a malfunction in his capacity to choose. He has as a need what we may have as only a desire. Thus, consequences cannot function for him as they do for us.

Whether, then, it be another's will or motive, or the exigencies of events, or the malfunction of one's own capacity to choose, in each case the agent's choice has been affected in such a way that his own knowledge and preferences and plans or intentions have not been allowed to come to the fore as determinants. The schematic representation of all these cases of involuntariness could then be as shown in Figure 1.5.

**Agent:**

(1) 'chooses' and

(2) intends  $\text{Act}_{\text{invol.}}$   $\longrightarrow$   $\text{Act}_{\text{invol.}}$

but his 'choice' is either

(3) subject to events which  
require him to 'choose' out  
of necessity and/or

(4) his ability to reckon  
the consequences of his  
'choice' is itself impaired

*Figure 1.5*

This means that an agent acts involuntarily when, due to the sort of overriding causes just given, his choice of a goal is produced in such a way that it is not due to that system of actual and potential causes which defines the agent. The agent's normal choice mechanism is thus 'short-circuited' or by-passed, as it were. But his *intention*-forming mechanism goes forward separately and normally. If the agent can be said to have acted involuntarily, he can be said to have intended to achieve the goal he has had imposed upon him; he resolves to act although he has not freely chosen. So involuntary actions are intentional.

Notice that our concept of action has taken another empirical-theoretical position on our psychology: that we have as agents *two* separate mechanisms, one choice-forming and the other resolve-forming. These mechanisms are deemed separable in that when the former is overridden by defect, circumstance, or other agents, the latter need not be. This is another psychological point buried in the phenomenology of our concept of action.

## 2 THE CONVERSIONS

We can now begin the process of conversion in order to see which features surface as constitutive of non-pathological or standard actions.

The conversions give the following results:

- (1a) If I did *x accidentally* then *x* was the result of an unforeseen event *z*, which, while I was engaged doing *y*, so affected events therein that *x* rather than *y* resulted.
- (1b) If I did *x simpliciter* then (whatever else the doing of *x* is) it is the result of events foreseen by me. If the act is not, to some reasonable extent, due to events foreseen by me, it becomes an act which is depreciated in some fashion as either lucky or unintentional or perhaps accidental, if the luck is bad. In general, the degree to which the act is due to events not foreseen by me is the degree to which the act becomes less attributable *simpliciter* to me. This suggests that there has to be some workable sense of my having foreseen the events which resulted in *x* even though, as we know, I cannot have foreseen them

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- all. Some notion like 'relevant, normal (causal) events' will have to be worked out.
- (2a) If I did x mistakenly then I had a false belief which was instrumental in the effecting of x. (What is cancelled here is not belief, but true belief.)
  - (2b) If I did x *simpliciter* then there were instrumental beliefs relevant to the commission of x, and they were true.
  - (3a) If I did x *inadvertently* then x was the unforeseen result of my having done y.
  - (3b) If I did x *simpliciter* then if x is a result of something else I have done, y, it is foreseen by me to be a result of y.
  - (4a) If I did x *carelessly* then it was done without attention to the prevention of undesirable effects which would be due to *how*, with my body, I did x. This is to be distinguished from the standard of care, or, as we prefer, mindfulness, which is that standard which *all* the above abilities of agency, including (4), must meet.
  - (4b) If I did x *simpliciter* then I did pay proper care and attention to *how* I did x.
  - (5a) If I did x *involuntarily* then my choices were unavoidably subject to circumstances, agents or a suspension or defect in the mechanism of choice itself.
  - (5b) If I did x *simpliciter* then my choices resulted from that normally functioning system of causes which we call the Self.
  - (6a) If I did x *unintentionally* then what occurred was not matched in my intention due to, as we have seen, mistake or inadvertence or carelessness or accident.
  - (6b) If I did x *simpliciter* then what occurred was, whatever else it was, matched in my intention.

In each of these a-cases (1a-6a) I *did* x, although I did it 'adjustedly'. There is clearly some minimal sense of action still in function in each of these cases and even in some of their combinations.

(7a) Finally, we can say that I did not do x.

7a is the ultimate cancellation, the negation of the concept. It is required in order to bring about whatever (necessary)



condition(s) might still be harboured by the ascription of the concept even in its most qualified form.

It must be remembered that the concept of action is still applied in all these cases where an act is done 'adjustedly', that is in all these cases where these positive putative ingredients, 1b-6b, are cancelled. Suppose that A shoots B carelessly and involuntarily while cleaning his gun: what remains of the act? Whatever *not* doing it inadvertently, unintentionally and accidentally would contribute positively. But what if A shot B inadvertently or accidentally and also (therefore) unintentionally? We should still say A shot B. None of the positive conditions so far seems on its own a necessary condition for ascription. Some combination of them might be necessary, but combinations of aberrant actions are difficult to put together because some of the aberrations refer to effects, either of precedent actions or psychological states, and some of them refer to the various other causes of actions. (That is why, if A shoots B carelessly, he could not also do it accidentally.) It seems safe to say that the concept of an action does not require for its adjusted description any of the standard cancellable ingredients as a necessary condition – *ex hypothesi*. The concept of an action ascribed *simpliciter*, however, obviously has all of the standard cancellable ingredients as necessary conditions.

There does seem to be one additional ingredient which is not cancelled by the standard cancellers and which has the status of a necessary condition for the ascription of an action to an agent: my body must stand in a causal relation to any event which is ascribed to me as my action. In the absence of this ingredient the concept of an action cuts out entirely. Thus, a person who is carried on to someone else's land has not performed any action and therefore cannot be liable in trespass.<sup>10</sup>

(7b) If I did x *simpliciter*, then x is an effect of my behaviour.

This, then, is the seventh ingredient of the concept of an action. It is what is represented in our model by the arrow. The list again, of the positive ingredients of an act *simpliciter* is as follows: