ENGLISH STUDIES IN CRIMINAL SCIENCE

MENS REA IN STATUTORY OFFENCES

By

J. LL. J. EDWARDS

Edited for
THE DEPARTMENT OF CRIMINAL SCIENCE, FACULTY OF LAW,
UNIVERSITY OF CAMBRIDGE
by
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VOLUME VIII

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EDITORIAL NOTE

DR. Edwards's book may be regarded as the first comprehensive and critical examination of the judicial interpretation of the language which is used in the definition of statutory offences. It will be of considerable interest to the academic lawyer, providing as it does authoritative material for the current discussions of the theories of criminal liability.

It will also prove itself indispensable to practising lawyers, and through them to those whose task it is to determine the difficult issues of culpability, which arise whenever the language used leaves either the purpose of the legislature or the scope of the particular offence obscure.

Finally, this valuable monograph demonstrates the inconsistencies which have inevitably arisen in the interpretation of existing enactments, and so provides an indication of some of the difficulties to be avoided by the draftsmen of future legislation.

For all these reasons the Cambridge Department of Criminal Science welcomes the inclusion of this new volume in its *English Studies of Criminal Science*.

LEON RADZINOWICZ

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PREFACE

In the entire field of criminal law there is no more important doctrine than that of *mens rea*, embedded as are its roots in the principle that no man shall be punished for committing a crime unless a guilty mind can be imputed to him. Since the turn of the last century this principle has been assailed in no uncertain manner by the legislature. Long before then, however, Parliament had been prepared to use the sanctions of the criminal law as a means of securing a well-ordered structure of social and economic conduct. Two world wars, with their vast output of regulations creating new offences, have served to foster and enlarge this practice, in which it has become increasingly common to by-pass the above cardinal principle. In its place there has arisen a theory of strict liability in which the question of a guilty mind is wholly irrelevant.

This departure from the earlier concept of criminal liability based upon a moral standard of wrong-doing is not the exclusive prerogative of Parliament. It has exercised a varying influence upon the judiciary, the present mood being manifestly suspicious of attempts to extend the field of strict liability in crime. This was not always so, and in this work an examination is carried out of the judicial interpretation of statutory offences founded upon such familiar epithets as "maliciously", "wilfully", "knowingly", "fraudulently", "permits" and "suffers". In carrying out this critical study I have been conscious of the difficulties confronting the judges, and where certain decisions are considered to be untenable I have endeavoured to analyse the reasons for such unsatisfactory decisions and to suggest alternative interpretations. Attention is also given to the application of the doctrine of vicarious liability in statutory offences, and to the question whether actual knowledge and connivance alone constitute the criminal degrees of knowledge or whether negligence also should be included. The various theories of liability for statutory offences have been considered against a fluctuating background of ethical, social and economic interests; and though appreciating the hazards of suggesting a guiding principle for adoption, I felt the attempt should be made. Perhaps I may be allowed to voice the hope that, whatever the deficiencies of this study, it will at least

direct attention to the serious danger of the criminal law falling into disrepute if both the legislature and the courts allow statutory offences to be administered with scant regard for the doctrine of *mens rea*.

Originally, this work was written as a thesis for the degree of Doctor of Philosophy in the University of London, since when it has been expanded into its present form. For permitting me to incorporate certain articles which have previously been published in *The Modern Law Review* and in *Current Legal Problems* I wish to thank the respective editors. Finally, I should like to express my gratitude for the many helpful suggestions I received from my friends Professor Glanville Williams and Mr. A. Ll. Armitage, and for the constant support and encouragement that has been extended to me in preparing this book by Dr. L. Radzinowicz, Director of the Department of Criminal Science, and Mr. F. J. Odgers, then Assistant Director of Research.

J. Ll. J. E.

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I

MALICE

PRE-EMINENT amongst words describing states of mind in criminal law is the term "malice" or "malicious", than which, according to Sir James Stephen, "there is no word in the whole range of criminal law which it is more important to understand correctly."[1] Perhaps best known of all is its use in the phrase "malice aforethought", which describes the manifold degrees of *mens rea* in the crime of murder. Another context in which malice appears is in relation to criminal libel. These two common law crimes are mentioned mainly as a matter of interest and, except where necessary for comparative purposes, no further reference will be made to them. As to offences created by statute, examination of the Malicious Damage Act, 1861, shows that out of fifty-four sections, defining various offences against property, only four omit the word "maliciously",[2] while in the Offences against the Person Act, 1861, twelve sections in all require proof of malice.[3] In sharp contrast, the term appears only once throughout the Larceny Act, 1916.[4] There are, of course, other minor statutory offences[5] in which the word "maliciously" appears, but inasmuch as the reported cases almost invariably arise under the two major statutes of 1861, it is inevitable that attention is principally directed to that fertile field of case law.

DEVELOPMENT OF STATUTORY MALICE

Before proceeding to classify the different kinds of malice to which the judges have given their attention, it will be advisable to trace very briefly the development of malice through the statute

[1] *General View of English Criminal Law*, p. 81.

[2] The exceptions are ss. 36, 47, 50 and 54. In his *History of Criminal Law*, II, p. 119, Stephen is guilty of an error in including, as exceptions, ss. 52 and 53. Both these sections contain the term "maliciously".

[3] These are ss. 16, 17, 18, 20, 23, 24, 26, 28, 29, 30, 32 and 33.

[4] In section 10, which deals with the malicious or fraudulent abstraction of electricity.

[5] E.g., Electric Lighting Act, 1882 (45 and 46 Vict. c. 56), s. 22; the Explosives Substances Act, 1883 (46 and 47 Vict. c. 3), s. 2; and the Post Office Act, 1953 (1 and 2 Eliz. 2, c. 36), s. 56.

law of the past seven hundred odd years.[1] The earliest mention of malice as a mental element in crime was in the middle of the thirteenth century, when Bracton, writing of arson, indicated the necessity for proving that the burning was done with evil design, *mala conscientia*.[2] Certainly arson owes its origin to the common law, but its importance in relation to malice becomes evident when it is realised that upon the law of arson was founded the entire structure of statutory offences dealing with malicious damage to property. Coke, writing in the seventeenth century, repeats Bracton's language and points to the form of indictment in arson which required that the burning be *voluntarie, ex malitia sua praecogitata*. "If it be done by mischance, or negligence,"[3] says Coke, "it is no felony".[4] What was written then remains true today, but there will be observed a considerable change in the interpretation of *malitia*.[5]

The first statute to punish injuries to property, passed in 1285,[6] contained no mention of the word "malice", but we find the expression in one of the earliest measures designed to punish crimes against the person. Enacted in 1403,[7] this statute made it a felony to cut out the tongue or put out the eyes of any person, by any malice prepense. In 1545, we find a more extensive enactment

[1] For a full account, see East, *Pl. of Cr.*, Vol. 2, pp. 1015–1017; Stephen, *History of Criminal Law*, III, pp. 109–113 and 188–190, and L. Radzinowicz, *A History of English Criminal Law*, Vol. I, pp. 49–73, 574–575, 630–631, 654–657.

[2] *De Legibus*, 146*b*.

[3] Yet 6 Ann, c. 31 made it an offence for any servant to *negligently* set fire to a house or outhouse.

[4] *Third Institute*, f. 67. One of the early statutes dealing with arson was in 1723, *viz.* 9 Geo. I, c. 22. Strangely, it contained no reference to the necessity for malice, but in *Susan Minton's Case* (East, *Pl. of Cr.*, Vol. 2, p. 1033) it was held that malice was still necessary.

[5] In Pollock and Maitland's *History of English Law*, Vol. 2, at p. 467, the view is put forward that it is rather the popular than the legal sense of the word that has changed. When it first came into use, they explain, *malitia* hardly signified a state of mind, some qualifying adjective such as *praemeditata* or *excogitata* was needed if much note was to be taken of intention or of any other psychical fact. Regarding *malice prepense* (see statute 5 Hen. 4, c. 5 referred to in the text above) they are of opinion that its earliest meaning was little more than intentional wrongdoing. This interpretation is not shared by East and Foster, for whose views see text above.

[6] 13 Edw. I, st. I, c. 46, which punished the throwing down of enclosures rightfully made by a person entitled to approve a common. Together with subsequent enactments, it provides an interesting commentary on the items of property considered sufficiently important to warrant legislation for their protection. To give only two examples, 37 Hen. 8, c. 6 dealt with "unlawful, wilful, malicious injuries to trees", and 22 and 23 Chas. 2, c. 11, s. 12, related to the "wilful" destruction of ships.

[7] 5 Hen. 4, c. 5.

dealing with offences against both the person and property.[1] Beginning with the preamble, "Where divers and sundry malicious and curious persons being men of evil and perverse dispositions, and seduced by the instigation of the devil . . . of their malicious and wicked minds have of late invented and practised a new damnable kind of vice," the statute then proceeded to list certain offences, including the burning of timber frames for houses, cutting out of beasts' tongues, cutting off the ears of the King's subjects and the barking of various kinds of trees.[2] The next enactment of any importance was the Coventry Act, 1670,[3] which provided that it shall be a felony "of malice, forethought and by lying in wait, to unlawfully cut out or disable the tongue, put out an eye, slit the nose, or cut off or disable any limb or member . . . with intention in so doing to maim or disfigure". Commenting on this statute, East writes that "if a corporal violence be intended, the more malignant the intention the more clearly it falls within the malice described by the Act".[4] Another statute,[5] closely following the Coventry Act, is cited by Foster to illustrate the frequent use of the terms "malice" and "maliciously" to denote "a wicked, perverse and incorrigible disposition".[6] The same writer later states that the words *per malitiam* and *malitiose* constantly mean an action flowing from a wicked and corrupt motive, a thing done *malo animo, mala conscientia.*[7]

If assistance is sought from the reports as to the early meaning of malice, it will be found that the cases mainly turned on the provisions of the Black Act, 1723.[8] Among other offences, this famous statute made it a felony maliciously to kill, maim or wound any cattle. In three cases decided in 1789,[9] it was held that to bring an offender within the statute it was necessary to show that the

[1] 37 Hen. 8, c. 6.

[2] Whereas the burning of timber frames was made a felony, punishable with death, all the other offences were punishable by a fine of £10!

[3] 22 and 23 Chas. 2, c. 1.

[4] I *Pl. of Cr.*, p. 400.

[5] 4 and 5 Wm. and M., which made it an offence to "maliciously command, hire or counsel any person to do any robbery".

[6] *Crown Cases*, p. 257, citing *Lord Raym*, 1487. This passage was cited, with approval, by Mellor, J., in *R.* v. *Ward* (1872) 1 C.C.R. 356, at p. 360. See, too, *R.* v. *Mawgridge*, Kelyng 119, at p. 127.

[7] *Ibid.*, p. 256.

[8] 9 Geo. I, c. 22. For a detailed survey of the provisions of this Act see (1945) 9 *Cambridge Law Journal*, pp. 56–81.

[9] *R.* v. *Pearce*, 1 Leach 527; *R.* v. *Hean*, 3 B. and C. 252, and *R.* v. *Shepherd*, 1 Leach 539.

maiming of the animal was done from some malicious motive towards the owner of it, and not merely from an angry and passionate disposition towards the beast itself. Some years later,[1] it was held by all the judges that it is not sufficient to prove malice even against a servant or relation of the owner; it must be against the owner of the cattle. As a result of these decisions, legislation was passed,[2] providing that it is immaterial whether the malice is conceived against the owner of the property in respect of which it shall be committed or otherwise. A similar provision has been retained in the Malicious Damage Act, 1861, s. 58.

Can it justifiably be argued, however, that in making this provision the legislature had in mind the extension of the law to cover cases involving malicious injury to the defendant's own animal or, as must follow, the defendant's personal but inanimate property. This astonishing interpretation was adopted by Lord Russell, C.J. (after consulting Grantham, J.), in the case of *R.* v. *Parry*,[3] where a man in a fit of drunken spite kicked and stabbed his own horse, and was convicted of maliciously wounding the animal. Such a case, it is suggested, falls more appropriately within the Protection of Animals Act, 1911. The logical extension of the decision in *R.* v. *Parry* would make a farmer liable, e.g., under section 15 of the Malicious Damage Act, who, incensed with his agricultural machinery which through some mechanical default had constantly failed to work smoothly, sets about destroying it. Unless there is some ulterior object in view by the

[1] *R.* v. *Austen* (1822) Russ. and Ry. 490. The same construction was adopted in *Curtis* v. *The Hundred of Godley* (1824) 3 B. and C. 248, in relation to the offence of maliciously destroying trees planted for ornament, shelter or profit, Bayley, J., referring to *R.* v. *Taylor* (1819) in which it had been unanimously held, by all the judges, that for such offence "malice against the owner was essential".

[2] (1823) 4 Geo. 4, c. 54, s. 2 and (1827) 7 and 8 Geo. 4, c. 30, s. 25. In the United States, however, the majority of cases still seem to require proof that the malice was directed against the owners of the property injured. This view is criticised by Miller, *Criminal Law*, p. 403.

[3] (1900) 35 L. J. Newsp. 456. See, too *R.* v. *Welch* [1875] 1 Q.B.D. 23, in which case there was no evidence to show that the prisoner was actuated by any ill-will towards the owner of the mare, nor by any spite towards the mare itself. In fact, the prisoner's only motive was the gratification of his own depraved tastes. He was convicted under the Malicious Damage Act, 1861, s. 40 (1). For Kenny's view, approving the decision in *R.* v. *Parry*, see *Outlines of Criminal Law* (15th ed.), p. 195, but doubts as to the correctness of the decision in *R.* v. *Parry* are expressed by the learned editor of the 16th edition of *Kenny* (at p. 190), Mr. J. W. C. Turner, who, in *Russell on Crime*, (10th ed.) p. 1908, suggests that the judges in that case were carried away by their natural feeling of indignation at the cruelty displayed.

accused, such as defrauding a third party[1] (e.g., an insurance company), there would appear to be no reason why the legislature should seek to punish a man under the Malicious Damage Act, 1861, for damaging his own property, whether animate or inanimate.

In the field of damage to property no further enactments of note were passed until 1827, when an attempt was made to secure some order out of the previous haphazard legislation. This had been designed solely to meet particular kinds of mischief which, from time to time, happened to require attention; a conclusion borne out by the fact that twenty-eight statutes in all[2] were repealed by the consolidating Act.[3] This was itself repealed and enlarged by the present governing statute, the Malicious Damage Act, 1861. So far as injuries to the person were concerned, Lord Ellenborough's Act of 1803[4] is generally regarded as the germ from whence sprang, through the medium of one intermediate statute,[5] the comprehensive Offences against the Person Act, 1861, which is still in force. It is with these two major statutes and the superimposed case-law that we are principally concerned.

Classification of statutory malice

The next task is to classify, if possible, the different degrees of *mens rea* which are said to fulfil the requirement of statutory malice. This can only be done by examining the language used by the judges. It will be found that such analysis indicates four different senses in which the term is applied, namely, express malice, implied malice, transferred malice, and, grouped together, general and particular malice. It is proposed to take each of these categories in turn.

Express malice[6]

This is sometimes referred to as actual malice[7] or malice in fact,[8] and indicates the commonly accepted meaning of malice,

[1] See, for example, section 3 of the Malicious Damage Act, 1861.

[2] For the full list, see Stephen, *Hist. of Cr. Law*, III, p. 190.

[3] Repealed by 7 and 8 Geo. 4, c. 27, the law was consolidated by 7 and 8 Geo. 4, c. 30.

[4] 43 Geo. 3, c. 58.

[5] (1828) 9 Geo. 4, c. 31, which repealed, so far as related to England, all the earlier Acts concerning personal violence.

[6] E.g., *R.* v. *Davies* (1858) 1 F. and F. 69, *per* Crompton, J., at p. 71.

[7] E.g., *R.* v. *Pembliton* (1874) 2 C.C.R. 119, *per* Lush, J., at p. 123.

[8] E.g., *Bromage* v. *Prosser* (1825) 4 B. and C. 247, *per* Bayley, J.

namely, wickedness, or a disposition to injure others without cause, merely to procure personal gratification or from a spirit of revenge.[1] As we have already seen, this was the construction placed upon the old statutes dealing with malicious crimes. Today, its principal application in criminal law is in libel where, as in the law of tort, evidence of express malice is necessary to destroy the defence of qualified privilege or fair comment. Evidence is available, however, that at least up to the end of the last century many of the judges were imbued with the idea that it was necessary to prove malice in its natural sense in all crimes of malice. Thus, in 1839, we find a case[2] in which the accused was charged with maliciously killing a sheep, evidence being given that the intent of the prisoner was to steal the carcase. Both Alderson, B., and Parke, B., were agreed that killing with intent to steal came within the spirit of the term "maliciously to kill" which, they said, "ought to be construed to mean killing *malo animo*: any improper motive or bad intention would satisfy the statute". A slightly different twist was given by Parke, B., in *R.* v. *Prestney*,[3] to the offence of maliciously destroying any fence under the consolidating Malicious Injuries to Property Act 1827, s. 23. "To constitute the offence," Parke, B., declared, "the injury done ... must be a wanton act of cutting or the like, with the object of doing damage to the thing injured. Here there was spiteful object in damaging the fence; it was done merely in prosecution of the intention to kill the game." In *Daniel* v. *James*,[4] decided in 1877, we find Lord Coleridge, C.J., expressing a similar opinion. In that case the accused was charged with maliciously killing a dog, contrary to section 41 of the Malicious Damage Act, a section which has recently been the subject of an unsatisfactory decision

[1] *Webster's Dictionary. The Oxford English Dictionary* defines malice as wrongful intention, that kind of evil intent which aggravates the guilt of certain offences. Miller, *Criminal Law*, p. 69 gives seven separate definitions commonly used which the learned author says, reflect an ascending scale of wickedness or malignity. They are:

(i) a wrongful act done intentionally without just cause or excuse;
(ii) a wrongful act done intentionally which the doer knows will injure another;
(iii) a disposition to injure another;
(iv) a wilful disregard of the rights or safety of others;
(v) a spiteful or malevolent design;
(vi) deliberate cruelty;
(vii) the expression of a wicked and depraved heart and mind.

[2] *R.* v. *Fordham* (1839) 4 J.P. 397. See, too, Lord Abinger, C. B., in *R.* v. *James* (1837) 8 C. and P. 131, at p. 132, a case which turned on the same statute, *viz.*, 7 and 8 Geo. 4, c. 30, s. 16.

[3] (1849) 3 Cox C.C., 505.

[4] [1877] 2 C.P.D. 351.