NEW

Nutshells

CRIMINAL LAW

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Series Introduction

New Nutshells present the essential facts of law. Written in clear, uncomplicated language, they explain basic principles and highlight key cases and statutes.

New Nutshells meet a dual need for students of law or related disciplines. They provide a concise introduction to the central issues surrounding a subject, preparing the reader for detailed complementary textbooks. Then, they act as indispensable revision aids.

Produced in a convenient pocketbook format, *New Nutshells* serve both as invaluable guides to the most important questions of law and as reassuring props for the anxious examination candidate.

Criminal Law looks at procedure and the burden of proof before explaining the concepts of *actus reus*, *mens rea*, strict and vicarious liability. Subsequent chapters deal with accomplices, inchoate offences, homicide and assaults. There is a lengthy consideration of theft and the work concludes with a section on defences.

Contents

INTRODUCTION

This book is an aid to the passing of examinations in criminal law; it is not a textbook. No student will gain an understanding of the subject until he has read weightier tomes and, more importantly, the major cases, for in the end, the law can only be predicted by an understanding of why leading cases were decided as they were.

Concentration in this book will be on providing a framework, and on the problems which examiners tend to draw on, year in, year out. Always remember that the examiner wants to know that you understand the law; not merely that you can recite the names of legion of semi-relevant cases. Remember also that questions often involve consideration of more than one area of the criminal law—always look carefully to see how many separate points are involved. Always plan your answer carefully, listing each of these points in order and stick to that plan—this avoids repetition, the bane of an examiner's life. Stick to the point—examiners are not fooled by waffle, and remember that it is seldom necessary to recite the facts of manor cases in great detail—highlight facts only when directly relevant to your argument.

Crime and Tort

Here our concern is with the criminal prosecution of an offender. There may be a civil remedy against him also, but this will usually be in the realm of tort. (There are exceptions, *e.g.* Common Assault, where a criminal conviction bans a civil action). Often, unfortunately, a civil remedy is of little use to the victim in practice. Note that under the *Theft Act* a court may award restitution, and grant a Compensation Order under the *Criminal Courts Act*.

Procedure (outline)

1. A summary offence is one triable solely by magistrates. These are set out in Schedule 1 to the *1977 Criminal Law Act.*

2. An offence triable on Indictment only will be heard by judge and jury in the Crown Court. The statement of offence read out to the defendant is known as "The Indictment."

3. Schedule 3 of the 1977 Act sets out offences which are triable either way. It is up to the magistrates to decide which form of trial is appropriate, but the accused must consent to a summary hearing.

The Burden of Proof

> "Throughout the web of English Criminal Law, one golden thread is always to be seen—that it is the duty of the prosecution to prove the prisoner's guilt . . . If at the end of, and on the whole of the case, there is a reasonable doubt, created by the evidence given by either the prosecution or the prisoner, as to whether the prisoner [killed the deceased] the prosecution has not made out the case and the prisoner is entitled to an acquittal:" Lord Sankey L.C. in *Woolmington* v. *D.P.P.* (1935).

Thus the prosecution must prove each of the elements of the offence. If, however, the defendant admits that he performed the act in question but denies his responsibility because he lacked the *actus reus* (*i.e.* he was an automaton); or the *mens rea* (*e.g.* was mistaken); or he claims a defence (*e.g.* self defence), then he must adduce some evidence of this: the *Evidential Burden*. Once he has satisfied this burden, the burden of proof again returns to the prosecution.

Exceptionally, the burden of proof is cast upon the defence, *e.g.* on a claim of insanity. Here the burden is to prove such facts "*on the balance of probabilities*" and not beyond reasonable doubt.

Criminal Justice Act 1967 s. 8:

> "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 these 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."

The test of intention and foresight is thus subjective, though this was not always so. (See, *e.g. D.P.P.* v. *Andrews*). Section 8 is only relevant if the constituents of a crime require that intention or foresight need be proved, (see infra., *D.P.P.* v. *Majewski*).

CHAPTER 1

PRELIMINARY CONCEPTS

The Crown must show that the accused brought about a state of affairs forbidden by the criminal law (the *actus reus*) and that at the time, he possessed the necessary state of mind towards that act, or its consequences (the *mens rea*). The defendant may admit both, but deny liability because he has a "defence" ("I did hit X intentionally, but I thought that he was going to kill me"). Generally speaking, motive ("I hit him because he insulted my sister") will not be relevant.

(a) Actus Reus

This is all the elements of a crime except those relating to the accused's state of mind. If there is no *actus reus*, there is no crime. Thus in attempt, the *actus reus* will be carrying out a series of acts sufficiently proximate to the completion of the crime, in conspiracy, coming to an agreement.

It is argued, however, that there must be some mental element in the actus, *i.e.* the state of affairs constituting an actus must be as a result of *willed conduct*, thus if D injures P simply as a result of accidentally falling over, there is no willed assault; likewise where X pushes D's hand into P's face, or D suffers a "spasm" which causes him to hit P. Here, D is an "automaton," not in control of his actions. It would seem that automatism is not therefore a true "defence" as D has no need of one—there has been no *actus*. (See *Hill* v. *Baxter* (1958).) D may still be liable, however, if he has deliberately put himself in the position where he may react in such a way. Thus D, knowing he suffers from epilepsy, drives a car and causes an accident. Here it seems sound to say that his putting himself in such a position is the willed *actus reus* which causes the accident.

Quare where D is too drunk to will an *actus* but physically causes one; see *Majewski* v. *D.P.P.*, *infra*.

R. v. *Dadson* (1850)
D was guarding a copse when he saw P, who had stolen some wood, running away. P failed to stop at D's call so D shot him. D was charged with shooting with intent to cause grievous bodily harm. The court accepted that such conduct might be justifiable if D had stopped an "escaping felon," *i.e.* a person with convictions for such offences. P had such convictions, but D did not know of them. D was convicted.

The case has been criticised as lacking an *actus reus*, *i.e.* D *was* shooting an escaping felon, which is no crime. However, the *actus reus* is *not* shooting at a man who is not an escaping

felon, but simply shooting at a man. This D did. He also intended to shoot, and is thus liable unless he can bring himself within a defence. The defence of arresting an escaping felon is not open to D as a defendant must know of facts that constitute a defence. Thus if I shoot you and you, unknown to me, were about to shoot me, I cannot claim "self-defence" as I did not know of facts which, objectively, seem to give me a defence.

R. v. *Deller* (1952)

D was charged with obtaining one motor car by the false pretence that he had a right to sell another, that other being "free from incumbrances." D had, however, signed an agreement to mortgage his car which, if valid, would have deprived D of the right to sell or exchange it. There would have been no doubt about D's liability had the prior "mortgage" been legally enforceable, but it was invalid. Because of this, and completely unknown to D, his car actually was "free of encumbrances" when he sold it. D's conviction was quashed. Note that the *actus reus* is obtaining by false pretences. Here, by chance, the pretences are true. D intended to commit an illegal act but, by chance, nothing he did or said was illegal.

N.B. D is *not* setting up a defence—he does not need to, there is no *actus reus* to defend.

Could D have been charged with an attempt? (*Infra*, see *Haughton* v. *Smith*).

Causation

It must be proved that D's act caused any consequences implicit in the *actus reus*. Thus, *e.g.* in murder, it must be proved that D's assault caused the death. Note that firstly the act must cause the result in fact, and then in law. The second is narrower; thus if I invite you to dinner at 8.00 p.m. and you are injured by a bus outside my door at 7.55 p.m. I may have partly caused your injury in fact, but not in law.

In *R.* v. *White* (1910) D put cyanide into his mother's drink intending to kill her. She was found dead later having sipped from the glass, but medical evidence showed that she died from a heart attack and not the poison. D, therefore, was found guilty of only attempted murder.

In *R.* v. *Hensler* (1870) D wrote a begging letter to P, pretending to be a poor widow. P was not deceived, but sent the money in order to trap D. One may say that *in fact* D was a cause of this result, as it would not have happened without his letter, but *in law* the direct cause test is not satisfied. Examine the offence; obtaining by false pretences. The pretences must deceive P, who will give to D. The pretences did not succeed; P gave the money for another reason, thus it was not the "pretences" that "obtained." D was convicted of an attempt.

Where D has directly caused a series of events which result in harm to P, the courts are loath to say that an extraneous event has broken the chain of causation, unless the event is wholly unconnected with the original incident. Thus if D puts a victim in such fear that P is injured in escaping from him, D will be liable (*R.* v. *Halliday*, *infra*).

R. v. *Smith* (1959)

D wounded P in a fight involving several other soldiers. The medical orderly was extremely pressed due to "near battle conditions" and P received what would, in normal circumstances, have been grossly negligent treatment. Considering the occasion, the treatment was understandable and D was found guilty of murder. The Court distinguished *R.* v. *Jordan* as there it appeared that D may have died not from the wounds, but from "palpably wrong" treatment. The Court of Appeal had felt constrained to quash Jordan's conviction on hearing the new evidence establishing this, but note their very guarded words. The test is; has the original injury, albeit badly treated, caused the injury, or is there a completely new cause? *Jordan* is undoubtedly the exception, as can be seen in:

R. v. *Blaue* (1975)

D was convicted of manslaughter. As a result of his attack on a child, a blood transfusion was essential to save her life. The child's parents, being Jehovah's Witnesses refused permission for this on religous grounds. D's conviction was upheld. D must take his victim as he finds him, and though a wholly unreasonable refusal of treatment might break the chain of causation, religous beliefs cannot constitute that.

What if a victim refused treatment because "I will only be treated by white Anglo-Saxon doctors" and none was available, the patient therefore dying?

Omissions

An omission may constitute an actus, but only where D is under a duty to perform the act omitted, thus Winfield's spectator watching the drowning of an unknown child in two feet of water is not criminally liable. The duty may be by law—*e.g.* parent and child—or by agreement—*e.g.* an employment contract. (See *R.* v. *Pitwood*, *infra*). Thus if Winfield's observer had been the father of the child, or a lifeguard under contract to patrol the beach, he would doubtless be guilty of manslaughter. It is difficult to imagine liability for crimes other than those of negligence coming about by omission (see "Manslaughter," *infra*).

Perhaps the most curious omission case is *Fagan* v. *M.P.C.* (1968). D accidentally placed his car on a policeman's foot, but deliberately omitted to remove it. The court held that the assault was a "continuing act."

Lastly consider *R.* v. *Larsonneur* (1933) D was convicted under the 1920 Aliens Order for being present in the U.K. being a prohibited alien. D was brought to this country not by her voluntary will, but under force by the police. This "state of affairs" decision has been universally condemned, though one can argue that the physical movements which caused D to be here were willed, *i.e.* not the acts of an automaton. However,

the judgment of Lord Hewart C.J. shows no real discussion of either the *actus* or *mens,* and it is best treated as exceptional.

(b) Mens Rea

I.e. the "guilty mind" that must accompany the criminal act. Note the *mens rea* does not require an "evil" mind, a man's motive may be good or bad. *Mens rea* is usually described as consisting of four heads.

1. *Intention*

Broadly, intention is of two types. First, those objects which D *desires* to bring about, and subsequently tries to; secondly, those which he does not desire to bring about, but he recognises that he must bring them about in order to achieve whatever he does desire. Thus if D decides to shoot at P through a closed window, breaking the window is a condition precedent to obtaining his desired end (hitting P). It thus seems reasonable to say that he intends to break the window. (Sometimes known as "oblique intention.")

This has been applied to the case where D blows up an aeroplane intending to collect the insurance money on one of the passengers. However, as collecting the money is no part of the *actus reus* of murder, this seems best ignored as purely motive. The direct intention is to kill P, and perhaps destroying the plane is the "oblique intent." There must obviously be a line drawn between those consequences which are certain to result from D's action, and those which may result. Where D *desired* the consequences, the fact that that result is merely possible does not matter, if it in fact happens. Thus if I desire to harm you when I shoot, the fact that I have only a 100 to 1 chance of hitting you does not prevent my having the intention of hitting you. If, on the other hand, I do not desire a consequence, but realise that it is something less than "virtually certain" or "highly probable," then I do not intend that consequence (See Lord Hailsham in *Hyam* v. *D.P.P.*).

2. *Recklessness*

This involves the voluntary acceptance by D that a forbidden consequence may result from his actions, yet he goes on nevertheless. The consequence must not be virtually certain, and it must not be desired. All that is necessary is the realisation by D that his actions *risk* bringing about the illegal consequence, thus if D does not foresee what might happen, he is not reckless.

If D, when driving down a road at 80 m.p.h. sees an old lady in the road and thinks "there is an old lady," that, in itself, is not recklessness. When he thinks "I suppose I might hit her if I carry on, oh dear!" and does not slow down, he is reckless, for then he accepts the risk of hitting her. He will not be saved from liability by saying that he did not wish to hit her. Note that recklessness is a *relative* standard. The surgeon performing an operation to save life may lawfully accept *some* risk; the man shooting his pistol for fun will not be allowed to take *any* risk at all.

3. *Negligence*

Here the test is objective; would a reasonable man have realised that there was some risk involved? Crimes of negligence are few, the most important being manslaughter by gross negligence. There are, however, elements of other crimes that require consideration of negligence, *e.g.* the "reasonable mistake" test. Note that there are really two different ways of classifying the reasonable man test:
(i) Would a hypothetical reasonable man divorced from the circumstances of the accused have seen the risk; (ii) would the accused, with all his peculiarities, if *he* had acted as a reasonable man, have seen the risk.

English law has generally adopted the former test, but note *D.P.P.* v. *Camplin* (*infra*).

N.B. Take care in reading old cases; often judges use the

word "reckless" to mean a form of gross negligence, or "objective" recklessness.

4. *Blameless Inadvertence*

Neither D, nor any reasonable man, could have anticipated the harm that came about from D's actions.

For the majority of crimes, liability will be grounded whether the accused intended the result or was reckless. Negligence is usually not enough. The academic theory can seem strained when examining decisions. Note, *e.g.* Lord Hailsham's wide definition of intention in *Hyam*.

In *R.* v. *Steane* (1947) D appealed against his conviction under the Defence Regulations for "doing acts with intent to assist the enemy." Forced through torture, D agreed to make propaganda broadcasts for the Nazis. His appeal was allowed, Lord Goddard C.J. stating that D's intent was to save his family, not aid the enemy. However, D did intend to do the acts which constituted the *actus reus* (make the broadcast), knowing that such broadcasts would aid the enemy. It would have been more conceptually sound for the court to have acknowledged the existence of *mens rea*, but allowed the defence of duress to negate D's liability.

How does the Court's approach differ in *D.P.P.* v. *Chandler* (1962)?

Ulterior or Specific Intent

For some crimes there is a further requirement beyond the actus and mens—a specific intent. Thus in a murder trial, the crown must prove the physical act that killed (*actus*), that D intended the blow (*mens*) and that by that blow he intended a certain consequence, namely to cause P death or g.b.h. (specific intent). Thus generally, the *mens* relates to the act, and the specific intent to its consequences.

Recently, the term has also been applied to statutory offences requiring more than simply the intention to commit a

physical act. Thus in theft, the accused must intend that by his act he permanently deprives someone; in burglary under section 9 (1) (*a*), the prosecution must show that D entered as a trespasser intending to commit a particular offence. Students should not trouble themselves by attempting to see "both types" of specific intent as belonging to the same group, as this will only lead to confusion.

What if D drives around looking for P, intending to run him over and thereby kill him and, while looking, he realises that he has run over someone (who turns out to be P)? Throughout the time of his *actus*, D intended to kill P. He is not guilty of murder if P dies, however, for despite intending to kill (specific intent) he did not have *mens rea* in relation to the physical act of killing, *i.e.* running P over, as regards which he was only negligent.

Question: For murder, broadly speaking, the accused must kill, intend the blow and intend that it kill or cause g.b.h. For rape, the accused must have intercourse without consent, intend the intercourse, and further intend that it be without consent. Murder is a crime of specific intent, rape is not. Why not? (See "Drunkenness," *infra*.)

(c) Transferred Malice

The traditional theory that the *actus* and *mens* must coincide is not absolute. What if D shoots at X intending to kill him, but misses and kills Y? It would be ludicrous for X to escape liability, but the *mens* was in relation to X, and the *actus*, to Y. To circumvent this problem, the courts developed the doctrine of Transferred Malice, whereby the intent to harm X is transferred to Y if D injures Y. Thus a charge might read "D caused grevious bodily harm to Y with intent to injure X."

In *R.* v. *Latimer* (1886), D aimed a blow with his belt at P, intending to cause some small injury, however the belt hit and severely injured Y. D was held guilty of the unlawful wounding of Y.

If D's *mens rea* is that of a different crime to the *actus reus* he causes, he cannot be convicted. Thus in *R.* v. *Pembliton* (1874), where D threw a stone at a group of people and broke a window, his conviction was quashed. The *actus reus* was of criminal damage, but the *mens rea*, of assault.

Where the *mens rea* of one crime necessarily includes the *mens rea* of a lesser crime, the malice may be transferred. So if D shoots intending to kill P but causes grevious bodily harm to X, or a simple assault to Y, he may be convicted of that lesser offence, as anyone who shoots intending to kill obviously intends to cause g.b.h., and to assault.

N.B. Any question involving transferred malice usually requires consideration of the following:

(i) Can the malice be transferred, *i.e.* are the *actus* and *mens* of the same crime?

(ii) Was D reckless in relation to the *actus reus* actually caused? If so he may still be guilty even though the malice cannot be transferred.

(iii) Can D be liable for attempt in relation to the crime for which he has *mens rea*?

(d) Non-Coincidence of Actus and Mens in Time

What if D tries to kill P and, thinking P dead, disposes of the "body," when in fact, P was still alive and the "disposal" kills him? The problem here is that when D possesses the *mens rea* of murder, he causes only bodily harm. When he commits the *actus reus* of homicide, he has no *mens rea* as he believes he is disposing of a corpse. Should this technical non-coincidence excuse D? The leading case is *Thabo Meli* v. *R.* (1954).

D planned to kill P and attacked him, but it was the disposal of P's body which, unknown to D, was still alive, that actually killed P. The House of Lords upheld D's conviction for murder. Lord Reid stating that