6 Coincidence of *actus reus* and *mens rea*

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Introduction

So far we have learned that criminal liability requires actus reus and mens rea. Actus reus is the external element in the crime package; mens rea is the internal element – that which the prosecution has to show was going on in the defendant’s mind. We need to understand something further about these elements, namely that in relation to any given crime, actus reus and mens rea should, in principle, coincide.

There are two facets to this premise. The first is that actus reus and mens rea should coincide in point of time; that is, liability should depend upon proof that the defendant had the relevant mental attitude at the moment of doing the acts which form the actus reus of a criminal offence. This is known as temporal coincidence. The second facet is that offence definitions should match any relevant conduct, consequence or circumstance with an exactly matching mental state on the part of the defendant. This is known as the correspondence principle. Without such correspondence, it is thought, the defendant will be punished for the wrong harm.
6.1 Temporal coincidence

Temporal coincidence is an easy concept to grasp, a less easy concept to apply. Here are some examples falling on either side of the liability fence.

ILLUSTRATION 6.1

D takes V's wallet, intending to steal from it. A few seconds later he changes his mind and puts the wallet back. Is he guilty of theft?

The commonsense answer is no. D momentarily had the mens rea for theft but since he decided to put the wallet back there was no actus reus. This is not the legal answer. To discover this we need to apply the lawyer's method. This requires us to consider the definition of theft. Here is a simplified version:

- A person is guilty of theft if they take property belonging to another intending not to return it. Actus reus and mens rea, thus, coincided in point of time.

This definition tells us that the offence is made out, since at the time D took the property it was his intention not to return it. Actus reus and mens rea, thus, coincided in point of time.

We have already come across a few cases where this principle was at issue. One is Ahmad (1986) Crim LR 739, where the landlord was charged with harassing his tenant with intent to make him give up occupation. The landlord was not guilty of this crime because he had formed the intention only after he had committed the acts (removing windows) relied upon as acts of harassment. See Wilson, Chapter 4.5.D.2 'Omissions: the common law approach'.

ACTIVITY 6.1

Read Wilson, Section 8.1 'Introduction' and answer the following question.

D is a contract killer, with a contract to kill V. He drives to V's house with his gun. On the way there D is involved in an accident when a pedestrian unexpectedly runs out in front of his car. The pedestrian is killed. D gets out of his car to discover the victim is V. D rubs his hands, pleased that he has been saved some effort. Is D guilty of murder?

6.1.1 Avoiding the coincidence requirement

If act and mind do not coincide in time this is not always fatal to a successful prosecution. This is because it may be possible to ignore the initial act and graft liability on to a subsequent omission. This is what happened in Miller (1983) (see Chapter 3, Activity 3.8 of this subject guide). The act which caused the fire in this case was unaccompanied by mens rea, since D was asleep at the time. Mens rea was formed only after the act was complete, when D woke up and realised his bed was on fire. This will normally mean that D would escape liability for criminal damage. The House of Lords ruled, however, that the actus reus could be based upon D's omission to put out the fire, which omission was accompanied by mens rea (recklessness). Actus reus and mens rea coincided, therefore, at the moment of D's deciding not to put the fire out because here the actus reus was D's omission. The crime was constituted by his reckless (mens rea) omission in breach of duty (actus reus).

Another way in which the coincidence requirement has been avoided is by reference to the continuing act doctrine. In Fagan v MPC [1969] 1 QB 439 there appeared to be a classic example of a case where the mens rea and actus reus did not coincide, since mens rea was formed only after the harm-causing act had been performed. D had innocently parked his car on a police officer's foot, which he realised only after he had turned the engine off. At that moment he decided not to remove the car. D was convicted at first instance of assaulting a police officer in the execution of his duty. He argued that there had been no assault since the act of assault took place without mens rea, and when he formed mens rea there was no accompanying act. It was central to his argument that assault required an act and could not be committed by omission. The Queen's Bench Division agreed that assault required an act and could not be committed by omission. Nevertheless, it affirmed the conviction.
**Activity 6.2**

a. Read Wilson, Section 8.1.A.1 ‘Qualifications to the requirement of temporal coincidence’, Section (b) ‘Continuing acts’. How did the court justify affirming the conviction when it agreed that assault could not be committed by omission?

b. Read the case of *Director of Public Prosecutions v Santana-Bermudez* [2003] EWHC 2908 (Admin) and consider what the act was which constituted the assault in this case. Or was the conduct of S a culpable omission under the Miller principle (and so inconsistent with Fagan)?

### 6.1.2 The supposed corpse cases

The principles in *Miller* and *Fagan* constitute two qualifications to the rule that actus reus and mens rea should coincide in point of time. But they are not exceptions: they are ways of avoiding its application. The supposed corpse cases, however, are an exception to the rule. These are cases where the defendant has attacked the victim and, wrongly concluding the victim is dead, disposed of the body, which disposal is the actual cause of death.

The first case in which this complex scenario surfaced, *Meli v The Queen* [1954] 1 WLR 228, was a case involving a preconceived plan to kill the victim. Their plan was to lure V to a hut in a deserted spot, beat him to death and then roll him over a cliff to fake an accident. The plan nearly worked perfectly. The defendants lured V successfully to the spot, beat him up and then, having concluded that V was dead, they rolled him over the cliff. Actually he was not dead at the time. He died as a result of exposure from being left at the foot of the cliff. The defendants were charged with murder. They argued that the act which caused death (the disposal of the supposed corpse) was unaccompanied by mens rea since at that time they thought death had already occurred, and so actus reus and mens rea did not coincide. Not surprisingly the Privy Council rejected this argument.

In *Church* [1966] 1 QB 59, where there was no preconceived plan, a different explanation was given which centred on the chain of causation. D panicked when, having struck V, she fell down, apparently dead. D threw the supposed corpse in the river, and V died of drowning. D was charged and convicted of manslaughter but argued that actus reus and mens rea did not coincide. The Queen’s Bench Division disagreed, recommending that homicide is the appropriate verdict if the appellant’s ‘behaviour from the moment he first struck her to the moment when he threw her into the river’ could be regarded ‘as a series of acts designed to cause death or grievous bodily harm’. If that was how the jury ‘regarded the accused’s behaviour, it mattered not whether he believed her to be alive or dead when he threw her in the river’ (Edmund-Davies J).

Put simply, D had the mens rea for manslaughter when he first struck V. V died following a series of further acts on D’s part, none of which broke the chain of causation.

This causation account was elaborated upon in *Le Brun* [1992] QB 61. The defendant struck his wife in the course of an argument outside their front door. She fell down, struck her head and lapsed into unconsciousness. She died as a result of injuries sustained when D dragged her from the road into the house to avoid detection. In response to the argument that mens rea and actus reus did not coincide, Lord Lane CJ for the Court of Appeal said:

> It appears to their Lordships impossible to divide up what was really one transaction in this way. There is no doubt that the accused set out to do all these acts in order to achieve their plan and as parts of their plan; and it is much too refined a ground of judgement to say that, because they were under a misapprehension at one stage and thought that their guilty purpose had been achieved before in fact it was achieved, therefore they are to escape the penalties of the law. (Lord Reid)
Activity 6.3

Read Wilson, Sections 8.1.A ‘Temporal coincidence’, and 5.5.8.1 ‘The general framework for imputing cause’ and answer the following question.

Lord Lane CJ says in Le Brun ‘It cannot be said that the actions of the appellant in dragging the victim away with the intention of evading liability broke the chain which linked the initial blow with the death’. If, as he also states, the ‘problem is (only) one of causation’ why should it matter what the appellant’s intentions were in dragging the victim away? What intentions would break the chain of causation and why?

6.2 Correspondence principle

Simply put, the correspondence principle requires a corresponding mental element for each aspect of the actus reus; that is, conduct, circumstance and consequence. The principle derives from the broader ethical principle that conviction and punishment be deserved. If a person can be punished for doing X without a mental element corresponding to X, then the punishment is undeserved and unfair.

Illustration 6.2

A person is guilty of theft if they dishonestly appropriate property belonging to another with the intention of permanently depriving the other of it. The actus reus of theft is appropriating property belonging to another. The correspondence principle, as a minimum, requires that:

a. A intends to appropriate the property. So if the property is secreted in her bag without her knowing, the correspondence principle requires an acquittal

b. A intends to appropriate property belonging to another. This requires her to know or believe that the property she is appropriating belongs to someone else. So if A takes an umbrella from a stand believing it is her own or has been abandoned, the correspondence principle demands an acquittal.

Activity 6.4

If it is an offence for a person to have sexual intercourse with a person lacking mental capacity, what (corresponding) mens rea does the correspondence principle require?

The correspondence principle is an ethical or normative principle rather than a descriptive principle. In practice, a good many crimes can be committed without a perfect match between actus reus and mens rea. Indeed, the majority of crimes of violence bear an actus reus without a corresponding mental attitude. Murder is a prime example.

Activity 6.5

Read Wilson, Section 8.1.B.1 ‘Qualifications to the requirement of definitional concurrence’, Section (b) ‘Definitional non-correspondence’ and answer the following questions.

a. Which important offences breach the correspondence principle?

b. How does Horder justify these breaches in his article ‘Transferred malice and the remoteness of unexpected outcomes’ [2006] Crim LR 383?
6.3 Transferred malice: a qualification to the correspondence principle

No breach of the correspondence principle occurs if the defendant commits the formal actus reus of an offence with the relevant mens rea for that offence, but the subject matter of that actus reus was other than that intended or foreseen by the defendant.

ILLUSTRATION 6.3

D, intending to shoot B dead, misses B and kills C who he did not know to be in the vicinity.

D is still guilty of murder. He has the mens rea for murder and he has committed the actus reus of murder. The criminal law permits the mens rea in relation to B to be joined to the actus reus committed against C. This qualification is known as the doctrine of transferred malice. So in Latimer (1886) 17 QBD 359 D swung a belt at X in a pub, which missed X and hit V, standing behind him. D was found guilty of assault against V although he neither intended to hit V nor even knew V was there. In each case the malice/intention D entertained with respect to the intended victim transfers to the actus reus of the crime committed against the real victim.

The principle applies only with respect to crimes of the same family. In Pembliton (1874) D threw a stone at X in the course of a fight with X and Y. It missed X and broke a window. D was indicted for criminal damage. The Court for Crown Cases Reserved said that the intention to harm X (a crime against the person) was not sufficient to support a conviction for causing criminal damage to V’s property (a crime against property). Lord Blackburn said that D could be guilty of criminal damage only if he intended or foresaw damage to the window. Since that had not been argued by the prosecution the conviction was quashed.

Activity 6.6

Read Wilson, Section 8.1.B ‘Definitional concurrence’ and answer the following questions.

a. A fires a gun at B, intending to kill him. The bullet misses B and rebounds off the wall, injuring C. Can A be charged with wounding with intent?

b. A fires a gun at B, who is in a car. The bullet hits the car door and rebounds, killing C’s dog who is on the pavement. Is A guilty of causing criminal damage to the dog?

Am I ready to move on?

Are you ready to move on to the next chapter? You are if – without referring to the subject guide or Wilson – you can answer the following questions.

1. State and explain the temporal coincidence rule.

2. Give two ways in which the temporal coincidence rule can be avoided.

3. Explain the legal position relating to the supposed corpse cases.

4. State and explain the correspondence principle.

5. Give two examples of how the correspondence principle is not always adhered to.

6. Explain the doctrine of transferred malice.

7. Explain why the doctrine of transferred malice is a qualification of the correspondence principle.

Make sure you test your knowledge of this chapter though the online multiple choice questions available at www.mylawchamber.co.uk