

Stuff to think about – Crim revision, HT 2010

a) Cunningham v more objective recklessness: R v G unreservedly good? Better more objective? (recall that Cunningham has an objective limb, too: risk must be unreasonable, and V must realise it) Does Parker open the door for some objectivity...? Do you favour Duff's proposed form of recklessness as 'practical indifference' (someone who doesn't foresee risks out of sheer lack of concern for others)? What are the pros and cons? Compare areas of the law with subjective and with more objective standards (eg lack of reasonable belief in sex, dishonesty in property offences, dangerousness in constructive ms, gross negligence ms...), also in defences ('provocation', defences to criminal damage, self-defence, duress...)

b) The principle of correspondence arguably includes:

– Correspondence in TIME (concurrency or contemporaneity (excep.: Fagan, Thabo Meli, prior fault...))

– Correspondence in SCOPE (MR matches AR) (excep.: strict and constructive liab., negligence, ulterior intent...)

– Correspondence in SUBJECT/OBJECT (excep.: transferred MR, AG Ref 3 of 1994...)

(and the pros/cons)

c) Intoxicated D or V: compare treatment when D is intoxicated (Majewski, when basic int. and vol. intox.) and when V is intoxicated (Bree...). Should the treatment be similar or different? (Consider that D causes harm, while V doesn't...)

d) Consent of V in different areas of the law: sexual offences (consent always negates liability), assaults (consent negates liability for common assault/battery, but not for ABH or more, unless exceptions), theft (after Gomez and Hinks, consent doesn't negate liability), criminal damage, murder (never consent)... pros/cons?

e) Pockets of strict liability or at least constructive liability in core offences: murder (intent GBH), constructive ms (the dangerousness & the consequence), gross negl. ms (no subjective MR at all), s47 (consequence), s20 ('some' harm), sexual offences (lack of reasonable belief in V's consent; and strict liability re V's age), complicity ('the anomaly': you can be labelled 'murderer' by just being reckless)... Contrast to the rather subjective tests of dishonesty, MR in inchoate liability, fraud... (in general, any ulterior intent is very subjective!). Consider also the presumption of MR in statutory interpretation (Sweet&Parsley)... pros/cons?

In general:

- strict/constructive liability: AR beyond MR
- ulterior intent: MR beyond AR

f) The factual and the legal: consider factual v legal consent in sexual offences (factual = 'agreement'), factual v legal causation (factual = 'but for')...

g) Belief and mistakes: honest belief (Morgan [the default for mistakes], self-defence, Jaggard...) v reasonable belief (sexual offences, duress, Majewski...). Notice how defences vary on this front: for duress, only reasonable mistake goes; for self-defence, even unreasonable mistake goes; whereas for necessity, test is purely objective: only if

there really was a threat. Are these differences justified? (eg note Ashworth's argument that for self-defence only reasonable mistake should go, as otherwise the law violates art. 2 ECHR)

h) Moral luck: should we punish people for bad luck? Examples: strict liability, constructive liability, complicity (D only liable if P commits offence)... do consequences matter more than states of mind? Is it not unfair? Is it not against autonomy, fair warning and the rule of law?

i) Prior fault: it pops up at numerous junctures, eg Majewski ('constitute' recklessness based on voluntary intoxication), 'single complex transaction' (MR before AR: Thabo Meli, etc.), automatism (not a defence if self-induced and reasonably foreseeable: Quick; else you may be convicted of an earlier offence, eg you didn't stop driving when you began to feel drowsy: Kay v Butterworth), self-induced intoxication for the purpose of committing an offence always carries liability (Gallagher), duress re: association with known criminals (Hasan), omissions re: creation of danger (Miller)... of course, prior fault breaks the principle of contemporaneity (an aspect of the p. of correspondence), but it potentially does so in the name of autonomy?

j) The reasonable person: how many reasonable persons are there in the criminal law? do their 'circumstances' matter? Compare 'provocation', duress ('sober person of reasonable firmness'), gross neglig. ms (breach of duty), belief in consent to sex (reasonable 'in the circumstances'... does it cater for learning disabilities?), harassment (very objective: Colohan), self-defence (in judging proportionality: but account is taken of the dire circumstances: s76(7) of CJA 2008)...

k) Defence of medical necessity: not generally recognized by the Courts, except in Re A (Lords Brooke and Walker) and Re F (sterilization of mentally disabled), but apparently underlying several decisions which the Courts have justified by stretching other concepts instead of openly recognizing a defence of medical necessity: eg Bland [aka Airdale] (the far-fetched argument that it was an omission and no breach of duty to act given the patient's best interests), Gillick (pretending there wasn't intent, when there clearly was), Dr. Adams and Dr. Moor (treating the doctor's good motive as negating causation!)... Do you think the law should come out in the open about a defence of medical necessity?

l) How culpability judgements affect not only MR (as they should) but also several aspects of the AR (!): consider causation (medical negligence hardly ever breaks the chain, probably because the Courts judge that D's act was culpable and the doctor's act not), omissions (Bland [Airdale], Miller)... is this mixing of MR (culpability) with AR satisfactory? Makes the law more flexible, or confuses concepts?

m) Causation and the 'last voluntary act': two questions: 1) Is that really the test? Empress Cars (through reduced to its facts by Kennedy), the surprising impunity of doctors (Smith, Cheshire, Malcherek...)... 2) Is that a good test? Strong individualism (no consideration for D's background or social circumstances: 'society made me so'), too rigid if it doesn't allow us to distinguish between people's motives (compare criminal and doctor)... Alternative principles: wrongful act (explains why we don't punish doctors, but confuses causation with MR), principle of welfare (allows us to take into account D's circumstances, background... but where do you draw the line?)