

Video transcript

Video Tutorial (f): Coincidence and transferred *mens rea* (chp 4)

Hello, in this video we're going to look at coincidence. Coincidence both in terms of time so the fact that all the elements of an offense must coincide at one point in time for that offense to be committed; and also coincidence in terms of object or more commonly referred to in relation to transferred malice. So if I intend to hit one person and accidentally hit another or if I intend to steal one object and accidentally steal another or whatever it might be - to what extent the criminal law allows my *mens rea* my intention to be transferred from the thing I was trying to hit or trying to steal to the thing that I actually hit or actually stole in order to find liability.

Now, these issues are quite fiddly they are quite complex at times but in the vast majority of cases they simply don't apply or they don't apply in the sense that they need explicit discussion. And so this is why within the textbook we separated them within Chapter 4 and looked at them as an interaction between *actus reus* and *mens rea*. But it's useful just to give a brief overview within this video as well. So first of all in terms of coincidence of time, and I think this is one of the most important ones where often students get the wrong idea and feel that they've discussed *actus reus* they've discussed *mens rea* and then they have a separate discussion about coincidence, even if the coincidence, if everything happened at the same time is very obvious, they still feel like they need to have one or two sentences just to make that very very clear to their reader. And the point I want to make here is that actually in the vast majority of cases that's unnecessary and that your application of the coincidence principal should be clear within your analysis of both *actus reus* and *mens rea* as they go along.

So let me explain this to you in a bit more detail. Let's say within analysis of any crime you should always start by the applying *actus reus* first. You never apply *mens rea* first. The reason for that is because when you look at the *actus reus* you place in the crime in terms of space and in terms of time. When you are analyzing where for example Sally kicked John you're looking at when that kick happened; that place of the offense or the potential offense at that moment in time and within that geographical location if you're then thinking about jurisdiction etc afterwards. So having placed the crime having looked at the *actus reus* and identified it a particular point in time, when you go on to then explore the *mens rea* i.e. 'what is the *mens rea* required of the crime and did the defendant have that *mens rea*?'; you're not asking in a general sense so did they ever have that state of mind in their lives but rather you're asking a much more specific question which is did they have that *mens rea* at the point they completed the conduct within the *actus reus* of the offense. Now, that is a question of coincidence you don't have to use the terminology of coincidence but simply by making it clear when you're applying the law within your problem question that you're asking the question about *mens rea* specifically at that point in time you're satisfying that requirement of coincidence you're satisfying just inherently within the discussion.

Now when you're asking if the defendant had the *mens rea* at that point in time there are three potential answers. The first one is, yes, they did have the *mens rea* and at that particular time. In that case, wonderful, you've found liability and you

can go on to look at potential defences. The second answer might be, no, they didn't have the *mens rea* at that time and actually they've never had the *mens rea* required for the offense and your answer there is 'therefore it looks like there's no liability' unless of course you might get into the constructing liability in relation to intoxication automatism, prior fault automatism but we'll leave that to one side. Your basic answer is 'no *mens rea*, no liability'. The third option and this is the only time explicit discussion of coincidence is required is where your answer is: 'No, they didn't have *mens rea* at that specific point in time but it does look like they had the *mens rea* required for the offense at a different point within the factual scenario, either before they committed the *actus reus* or after they committed the *actus reus*'. Now, in this scenario you need to say 'okay, there looks like there's a problem here for a lack of coincidence but there are ways in which the court had tried to reinterpret the conduct requirement within the offense in order to avoid those problems, in order to find coincidence'.

So you would look, for example, is there an alternative conduct element that we could use. If we were focusing on an action for example, is there maybe a later omission that we could use where there would be coincidence with the *mens rea* at that later point? Or, are there multiple actions and we could focus on a different action to find coincidence at that point? Or, indeed as we see from the case law, is there a way we could reinterpret the defendant's action and stretch it? Either by saying it's a continuing act or by saying there's a series of acts which we can link together. But basically we're looking for ways to expand or relocate the conduct of the offense in order to find coincidence with the *mens rea*. But this is the only time you need to explicitly engage with that case law. If the answer is yes, there is coincidence then we simply have liability. If the answer is no, there's no *mens rea* at any point then the answer is there's no liability. It's only that third option where you need to explicitly engage with the case law. There is *mens rea* but it doesn't seem to coincide.

Moving on to the other one I mentioned, this is more coincidence in terms of object or more commonly referred to as transferred malice or transferred *mens rea*. And here again the important point to remember is you only need to explicitly engage with this case law if the point comes up within your problem question, if there's a reason to do so in terms of controversy within your problem facts. So let's say for example, a classic scenario where you might imagine transferred *mens rea* would be where there's a pub fight, I swing for one person, Ted, who I want to punch, but I miss, and I hit Paul standing next to him. Now, in this scenario we got the *actus reus* of an offense against the person, I have hit Paul, but my *mens rea* isn't focusing on Paul, I didn't intend to hit Paul, I intended to hit Ted. So in that sense it looks like there's a lack of coincidence of object, I hit one thing but I intended to hit the other.

Now, before we start discussing transferred *mens rea* and solving the problem that way, it's also worth thinking that actually most offenses against the person don't require an intention they simply require recklessness i.e. foreseeing a risk going on to run that risk. So our first question you can ask is - although I didn't intend to hit Paul, when I was flailing around in my pub fight, did I at least foresee a risk that I might hit Paul, or that I might miss and hit him, or I might ricochet and hit him, or I

might harm him in some way. If the answer to that question is 'yes' and I did foresee a risk, then we don't need transferred malice, we can simply say 'I have hit Paul and I foresaw a risk that I was going to do so', and that in itself is likely to be enough for many of the offenses against the person such as Section 47 and Section 20. It's only if we can say that I don't have any *mens rea* in relation to Paul that we might then look for transferred malice and say 'okay, actually, through this doctrine of transferred malice the courts have developed a way for me to transfer my *mens rea* from one defendant to another'. But in the vast majority of cases actually we don't need it and these kind of more creative legal fictions within law should tend to be seen as a last resort, only use them only discuss them explicitly if it is actually necessary to do so.

Thanks