Smith, Hogan, & Ormerod's Criminal Law, 15th Edition

Some significant cases since the 15th edition (August 2020)

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Chapter 2: The elements of a crime: *actus reus*

Causation - P 71

The discussion of causation at p71 includes consideration of the case of ***Girdler*** on when third party interventions that are not free, deliberate and informed will be reasonably foreseeable and hence not break the chain of causation.

The question that the Court of Appeal sought to address in ***Girdler*** was how a jury is to be directed about the reasonable foreseeability of a third party intervention. In that case Hooper LJ stated [at 43] that the jury could be told:

> "….in circumstances like the present where the immediate cause of death is a second collision, that if they were sure that the defendant drove dangerously and were sure that his dangerous driving was more than a slight or trifling link to the death(s) then: the defendant will have caused the death(s) only if you are sure that it could sensibly have been anticipated that a fatal collision might occur in the circumstances in which the second collision did occur.
>
> The judge should identify the relevant circumstances and remind the jury of the prosecution and defence cases. If it is thought necessary it could be made clear to the jury that they are not concerned with what the defendant foresaw."

That question has been addressed in ***R v A* [2020] EWCA Crim 407.** The defendant was charged with causing death by dangerous driving and causing serious injury by dangerous driving. The defendant had been out one evening with some friends and was the designated driver. She stopped the car on the hard shoulder of the motorway at 04.30 because her drunken passengers were irritating her. She opened the car door and did not activate hazard lights nor were any other lights visible on the car.

One driver in the inside lane of the motorway had to swerve to avoid the door. He sounded the horn and the car door was then closed. Subsequently, X who was driving a truck in the outside lane of the motorway was seen to swerve across the other lanes and into the hard shoulder. The truck struck the defendant's car. It was assumed X had fallen asleep. One of the defendant's passengers died as a result of the collision. The defendant and another passenger suffered serious injury.

The trial judge acceded to a submission of no case and stopped the trial. The test the judge applied was to ask whether a properly directed jury could conclude that it was reasonably

foreseeable that a third party (X) - at 4.30am on a Saturday morning when the traffic was very light - would be so distracted by tiredness or some other prevailing condition that he would suddenly at high speed career across all three lanes of the motorway and into the hard shoulder, coming to his senses too late to avoid colliding with defendant's car.

The prosecution appealed. The Court of Appeal upheld that appeal and ordered a retrial. The Court held that the trial judge had adopted too specific a test. Citing the 15th edition, the Court of Appeal held that it would not be necessary for the jury to be sure that the particular circumstances of the collision or "the exact form" of the subsequent act was reasonably foreseeable.

Chapter 9: Mental conditions, intoxication and mistake

Intoxication - P 331

At p 331 there is a discussion of the circumstances in which a Defendant may rely upon his intoxication as an excuse. Intoxication is only capable of providing an excuse, subject to the other rules discussed in that chapter, where it is to such a degree that that defendant does not form the mens rea. That is not a question of whether D was capable of forming mens rea but whether he did form mens rea. See ***Sheehan*** [1975] 2 All ER 960. In *Sheehan* the Court of Appeal stated, "… in cases where drunkenness and its possible effect on the defendant's mens rea is in issue, we think that the proper direction to a jury is, first, to warn them that the mere fact that the defendant's mind was affected by drink so that he acted in a way in which he would not have done had he been sober does not assist him at all, provided that the necessary intention was there. A drunken intent is nevertheless an intent. Secondly, and subject to this, the jury should merely be instructed to have regard to all the evidence, including that relating to drink, to draw such inferences as they think proper from the evidence, and on that basis to ask themselves whether they feel sure that at the material time the defendant had the requisite intent".

The Court of Appeal has recently addressed this question in two separate cases.

In ***R v Campeanu* [2020] EWCA Crim 362** D was convicted of murder and child destruction after stabbing his pregnant girlfriend. He accepted that he was responsible for inflicting the fatal stab wounds, but sought to rely on self-defence. The judge declined to give a *Sheehan* direction on intoxication, because that there was no evidential basis for such a direction. The Court of Appeal held that before a jury is given a *Sheehan* direction (to decide whether D may have lacked mens rea owing to the extreme level of intoxication) there must be sufficient evidence of the defendant claiming not to have formed the requisite intention due to his state of intoxication. The mere fact of intoxication is insufficient.

In ***R v Mohamadi* [2020] EWCA Crim 327,** D was a 16 year old boy convicted of rape. His three co-defendants had taken a young woman to a flat and raped her. D said that he had been very drunk and could not remember encountering the victim or the events that followed. D's DNA was found on portable articles found in the room where the rape took place. The judge declined to give a *Sheehan* direction (might D have lacked the mens rea of intending to assist or encourage the rapes given his severely intoxicated state).
The Court of Appeal accepted that it would have been preferable for the judge to have given such a direction and specifically advised the jury that, if they were sure that the defendant had been present when the rapes occurred but did not take any active part, they should, when asking themselves whether he had by his presence intentionally assisted, encouraged or caused others to commit rape, have had regard to all the evidence, including that relating to drink, and convict only if they were sure that the required intent was present.
On the facts the court concluded that the failure to give that direction did not render the conviction unsafe.

A *Sheehan* direction is only required where there is sufficient evidence to suggest that the defendant was not only intoxicated, but that his intoxication may have impaired his ability to form the requisite intent. In cases such as this, the jury should be reminded that they can only convict the defendant if they are sure that he formed the necessary intent, having regard to all the evidence, including the fact of his being intoxicated.

Chapter 10: General defences

Self defence p 387

The application of the self defence plea in so called "householder" cases is analysed at p 387.

It seemed clear from the drafting of s 43 of the Crime and Courts Act 2013 that D might rely on the defence only where he was in a relevant building other than as a trespasser and that he believed that the person against whom he used force (which D claims was in self defence) was a trespasser in that building. The Court Martial Appeal Court has now confirmed that interpretation in ***R v Cheeseman* [2019] EWCA Crim 149**

It is not a question of whether the person injured by D was in fact a trespasser, but whether D believed that person to be a trespasser.

In *Cheeseman*, the defendant, a corporal, stabbed and injured another serviceman in the room he occupied in his army accommodation. He was charged with attempted murder. He denied an intention to kill and also pleaded self-defence. In respect of self-defence, the Judge Advocate General ruled that the so-called "householder defence" was only available in cases where the person who was injured was an intruder, as opposed to someone who had entered

premises lawfully and then become an intruder. The Board convicted the defendant of wounding with intent, and acquitted him of attempted murder.

he defendant appealed his conviction on the basis that the Judge Advocate General was wrong to rule that the householder defence is unavailable in cases where the victim initially entered the dwelling lawfully.
The Court Martial Appeal Court held that the language of the statute was clear – the question is whether, at the time of the incident, the defendant *believed* the other person to be in the dwelling as a trespasser. The defence is not directly concerned with the question whether someone was or was not a trespasser, but rather the defendant's belief.

Chapter 13: Voluntary manslaughter

Diminished responsibility and intoxication p 562

At p 562 there is a discussion of the 4 different circumstances in which intoxication may be relevant to a potential plea of diminished responsibility.

The Court of Appeal addressed these categories explicitly in *R v Foy* [2020] EWCA Crim 270

D was convicted of murder. D had stabbed a stranger in the street when experiencing a psychotic episode. D had consumed large quantities of alcohol and cocaine. At trial D relied exclusively on a claim of lack of murderous intent. Defence psychiatrist's reports did not support diminished responsibility. D appealed relying on fresh psychiatric evidence. The Court of Appeal dismissed the appeal, refusing to admit fresh psychiatric evidence under Criminal Appeal Act 1968 s.23.

D did not suffer from alcohol or intoxicant dependency syndrome or from paranoid schizophrenia. Applying *R. v Dowds* [2012] EWCA Crim 281. D suffered from an "abnormal personality structure"; that is not a recognised medical condition for this purpose. The court concluded that looking at the proposed evidence and the evidence of D's voluntarily ingested alcohol and cocaine, there is no basis for saying that D suffered an abnormality of mental functioning arising from a recognised medical condition which *substantially* impaired the appellant's ability in the relevant respects and which provided an *explanation* (in the sense of the statute) for his acts.

The Court also provided a valuable summary of the approach to intoxication and diminished responsibility:

70. Where the killing occurs when the defendant is in a state of acute voluntary intoxication, even if that voluntary intoxication results in a psychotic episode, then there is no recognised medical condition available to found a defence of diminished

responsibility: see *Dowds* [2012] EWCA Crim 281 [2012] 1 Cr App R 34; *Lindo* [2016] EWCA Crim 1940. This is so whether the intoxicant is alcohol or drugs or a combination of each.

71. Where, however, the consumption of the intoxicant is as a result of an addiction such as alcohol dependency syndrome, then, depending on the circumstances, there may be a recognised medical condition giving rise to an abnormality of mental functioning which can found the defence of diminished responsibility: *Dowds* (cited above); *Stewart* [2009] EWCA Crim 593, [2009] 2 Cr App R 30.

72. What is the position, however, where there is an abnormality of mental functioning arising from a combination of voluntary intoxication and of the existence of a recognised medical condition? What is the position, where the voluntary intoxication and the concurrent recognised medical condition are both substantially and causally operative in impairing the defendant's ability and explaining the defendant's act?

The court noted that the law has not ruled that the defence is unavailable in such cases, acknowledging that that would have been a principled approach based on *DPP v Majewski* [1977] AC 443).

74. That, however, is not the course which the law has taken in cases of diminished responsibility. In *Dietschmann* [2003] UKHL 10, [2003] 2 Cr App R 4, the House of Lords considered this very issue, in the context of the defence being raised under the provisions of the Homicide Act 1957 in its original form. It was decided that, for the defence to be available, the abnormality of mind did not need to be the sole cause of the defendant's acts in doing the killing: even if the defendant, in that case, would not have killed had he not taken alcohol, the causative effect of the drink did not necessarily prevent an abnormality of mind from substantially impairing the mental responsibility for the fatal acts. A corresponding approach was subsequently taken by the Court of Appeal in cases such as *Stewart* (cited above).

75. Those were cases under the former legislation. But it has been decided that a corresponding approach is also to be taken under the current legislation. The relevant authority is that of a constitution of this court in *Kay and Joyce* [2017] EWCA Crim 647, [2017] 2 Cr App R 16. …" per Davis LJ

Chapter 14: Involuntary manslaughter

Gross Negligence Manslaughter p 589

At p 589 the discussion of Gross Negligence Manslaughter focuses on requirement that there was a serious and obvious risk of death.
The Court of Appeal in *R v Kuddus* [2019] EWCA Crim 837 made explicit that there must be a serious and obvious risk of death in fact, as well as that that risk must be reasonably foreseeable.
A 15-year-old girl had died after suffering a severe allergic reaction to food ordered from the takeaway D owned. D, who also worked as a chef at the restaurant the takeaway operated from, had pleaded guilty to health and safety and food safety regulatory offences. The previous owner of the takeaway, R, who was the restaurant manager, was convicted on the same three counts.
When ordering food online V's friend had entered the words "nuts, prawns" on the comments section of a webpage because V had what was believed to be a mild allergy to those ingredients. When an order was placed, the restaurant received a printout. V's order was seen by R but there was no evidence that it was passed on to D. Food was provided which contained peanut proteins. V died in hospital two days later.
The judge directed the jury on reasonable foreseeability of the relevant risk, but rejected a defence submission that the jury should first be asked to consider whether there had been a serious and obvious risk of death to V.
The Court of Appeal held that there was no requirement to prove a serious and obvious risk of death *for the specific victim*; the question was whether the breach had given rise to a serious and obvious risk of death to the class of persons to whom D owed a duty.
D had not been notified about the terms of the order. If a reasonable person, possessed of the knowledge available to the defendant, would have foreseen only a chance that the risk of death might arise, that would not justify a conviction for gross negligence manslaughter. In the instant case the appellant knew nothing of the declared allergy. In those circumstances, the conviction for gross negligence manslaughter could not stand.

Chapter 16: Non-fatal offences against the person

Consent p 672

One of the circumstances in which apparent consent may be negated is where the defendant has deceived the complainant as to his identity. At p 672 the argument is advanced that in some contexts the question of "identity" should include qualifications of the defendant where they are so inextricably bound up with the activity in question.

In ***R v Melin*** **[2019] EWCA Crim 557** D had administered Botox injections for cosmetic purposes to two women, both of whom suffered serious injury after their second injections. D was not medically qualified. Neither woman had met D before he administered the first injections. Both claimed that D told them, at different stages of the process, that he was medically qualified when he administered the injections. Both said that they would not have allowed D to administer the injections had they known he was not medically qualified. The Crown's case was that the appellant had lied about his qualifications and that the women only consented in the belief that he was medically qualified.

The Court of Appeal held that as a matter of common law, only deception as to identity or as to the nature of the act are capable of negating consent. The Court accepted that it would be undesirable for all deceptions to negate consent, no matter how trivial. The Court also accepted that there will be circumstances where a person's identity was inextricably linked to his professional status. Therefore, a person's being a doctor, where that was integral to his identity, could vitiate consent.

The court distinguished *Richardson* [1999] Q.B. 444 on the basis that the treatment in this case was given by someone impersonating a doctor, whereas in *Richardson* the defendant was a qualified dentist but had been suspended.

In respect of the first woman however the court held that there was insufficient evidence for the case to be left to the jury. The appellant had made no representations as to his medical qualifications before the woman attended her first treatment, so she was willing to undergo the treatment before any representations were made about his qualifications. In respect of the second woman, the representations were made before her first treatment and the injury she suffered was caused by the second treatment i.e. after the defendant had falsely asserted that he was medically qualified.

Administering noxious substances p 713

One element of the offences under ss 23 and 24 of the Offences Against the Person Act 1861 is that there is a "noxious substance" being administered, caused to be administered, or caused to be taken.

The Court of Appeal has recently confirmed that urine and faeces can constitute noxious substances.

In ***R v Veysey*** **[2019] EWCA Crim 1332** D was a serving prisoner who threw urine and faeces at a prison officer. He was charged with unlawfully and maliciously administering a noxious substance, contrary to section 24 of the Offences Against the Person Act 1861. It was submitted that, as a matter of law, urine is not capable of being a noxious thing. The essence of D's submission was that a substance cannot be a noxious thing unless it has the capacity to cause some impairment or harm to a person's faculties or functioning, whether because of its intrinsic quality or because of the quantity in which it was administered.

The Court of Appeal held that where a substance is administered in a manner and a quantity which is in fact harmful, and the requisite intent is proved, then the offence will be made out even though the same substance in a lesser quantity, or administered in a different manner, may not have been harmful. The court concluded that, where an issue arises as to whether a

substance is a noxious thing for the purpose of section 24 of the 1861 Act, it will be for the judge to rule as a matter of law whether the substance concerned, in the quantity and manner in which it is shown by the evidence to have been administered, could properly be found by the jury to be injurious, hurtful, harmful or unwholesome. If it can be properly so regarded, it will be a matter for the jury whether they are satisfied that it was a noxious thing within that definition.

Chapter 17: Sexual offences

Consent and Deception p 758 and following

In ***R v Lawrance* [2020] EWCA Crim 971** D had lied to V, whom he met on an online dating site. He had assured V that he had had a vasectomy to convince her to have unprotected sex with him. The next morning, Lawrance texted V to say he was still fertile. V became pregnant and underwent a termination. Lawrance was charged with, and convicted of, rape by the trial court, but appealed his conviction.
The Court of Appeal quashed his conviction, holding that "a lie about fertility is different from a lie about whether a condom is being worn during sex, different from engaging in intercourse not intending to withdraw having promised to do so and different from engaging in sexual activity having misrepresented one's gender."

In *Assange v Swedish Prosecution Authority* [2011] EWHC 2849 (Admin) , the Court had held that the offence of rape could arise where D deceived V by surreptitiously removing or tearing a condom, knowing that V would consent to intercourse only if he used a condom.

In *R (F) v. DPP* [2013] EWHC 945 (Admin) D had promised to withdraw before ejaculation but then deliberately failed to do so and ejaculated in his victim. The Divisional Court in that case held that such conduct could constitute rape.

In *Lawrance*, the Lord Chief Justice stated that in this case:

> "Unlike the woman in *Assange*, or in *R(F)*, the complainant agreed to sexual intercourse with the appellant without imposing any physical restrictions. She agreed both to penetration of her vagina and to ejaculation without the protection of a condom. In so doing she was deceived about the nature or quality of the ejaculate and therefore of the risks and possible consequences of unprotected intercourse. The deception was one which related not to the physical performance of the sexual act but to risks or consequences associated with it. We should add that the question of consent could not be affected by whether pregnancy followed or not; and neither could it be affected by the gender of the person who was guilty of deceit. On the prosecution case, a woman who lied about her fertility in circumstances where the man would not otherwise have consented to sexual intercourse would be in the same position, albeit guilty of a different sexual offence."

For critical comment see Ormerod "Rape and Deception (again)" [2020] Crim LR (October).

Chapter 18: Theft

Dishonesty p 871

In *R v Barton and Booth* [2020] EWCA Crim 575 a specially constituted 5 member Court of Appeal (including the LCJ, PQBD and VPCACD) addressed the question whether the decision of the Supreme Court in *Ivey v Genting Casinos* [2017] UKSC 67 had abolished the *R v Ghosh* [1982] QB 1053 test for dishonesty.

The Court concluded that *Ghosh* no longer represents the correct approach to dishonesty in criminal trials.

In *R v Barton and Booth* the Court confirmed that the test to be applied in relation to dishonesty is

> "(a) what was the defendant's actual state of knowledge or belief as to the facts; and (b) was his conduct dishonest by the standards of ordinary decent people?" [para 84]

There are numerous issues about the application of *Ivey* that need to be worked through in future cases. For an analysis see Ormerod and Laird's chapter in the Supreme Court Yearbook which was referred to by the CACD in *Barton*. For the immediate practical implications of the decision in Barton, see Ormerod and Laird's article in Archbold Review (2020) issue 6.

Aside from the practical application of the criminal law test of dishonesty, the case is of interest for the unusual approach to stare decisis taken by the CACD. The *obiter* statement of the Supreme Court in a civil case is followed in preference to the decision of the Court of Appeal in *Ghosh* that had stood relatively unchallenged for 35 years. The Lord Chief Justice pronounced:

> "We conclude that where the Supreme Court itself directs that an otherwise binding decision of the Court of Appeal should no longer be followed and proposes an alternative test that it says must be adopted, the Court of Appeal is bound to follow what amounts to a direction from the Supreme Court even though it is strictly *obiter"*[104].