Chapter 11

Thinking Point 11.1

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| Has D committed fraud by false representation under s2 Fraud Act 2006 in the following scenario?  An auction house sells a painting by Picasso, believing it to be genuine. It turns out to be a forgery. Do they have MR for s2? |

* AR: False representation
* MR: Knowledge that the representation is false, dishonesty and intention to make a gain/loss/risk loss to another.
* Any auction house will always harbour a suspicion about the authenticity of art. They will therefore know that their representation might be false. But in the absence of dishonesty, assessed objectively (Ivey) they will lack MR.

Thinking Point 11.2

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| D applies for foreign travel insurance for a forthcoming holiday and deliberately fails to disclose a recent operation involving major surgery. Whilst on holiday, her condition deteriorates, and she requires expensive medical treatment. She submits a claim for this under the insurance policy.  Has she committed fraud under s3? |

* Yes. Any type of insurance contract is one of ‘utmost good faith’ and D will have both a contractual and also a criminal duty to disclose relevant information.
* The presence of dishonesty and intent to make a gain/cause loss/expose another to risk of loss will secure conviction under s1.
* Dishonesty is assessed objectively.

Thinking Point 11.3

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| Has D committed fraud under s4?   1. D, a Citizen’s Advice Bureau adviser, professing to offer free advice and assistance, obtains compensation of £5000 on behalf of an elderly client for whom she had taken legal proceedings. The adviser retains £1000 for her efforts without disclosing the fact to the client. 2. D, the manager of a building society, is in dispute with her employer. She refuses to carry out her contractual duties and spends every day dealing with her own investments whilst at work. One day, she fails to notice a robbery taking place at the counter. The society loses a substantial amount of money. |

* The adviser occupies a position in which he is expected to safeguard, or not to act against, the financial interests of another person, and dishonestly abuses that position with an intention to make a gain/cause loss to another.
* Fraud seems to have been committed under s4 and thus D commits an offence under s1.
* As above except that this is an omission, covered under s4(2). She occupies an office in which she is expected to safeguard the financial interests of another person (i.e.: employers/staff/customers) and dishonestly abuses that position.

Thinking Point 11.4

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| Has D obtained services dishonestly contrary to s11 Fraud Act 2006?  1.D enters a football ground through a hole in a fence to watch a game without buying a ticket.  2. D books two tickets to a music concert over the internet using his mother’s credit card without her consent.  3. D buys the cheapest underground ticket that covers only part of his journey. At his destination, he leaves the station by jumping over the barrier. |

1.) Under s11, a person obtains services if:

1. • The service is to be paid for
2. • D knows that payment is expected
3. • D does a dishonest act
4. • Intending to avoid payment either in full or in part at the time of the obtaining.

D is clearly guilty unless for some unexplained reason D lacks MR which is unlikely.

2.) The issue here would be whether D was dishonest. Under the Ghosh test, D may have had a genuine belief that his/her mother would not mind. Now, this will be irrelevant as the prosecution will not have to prove that he was aware that it was dishonest. All will depend on whether the court finds that his actions are dishonest according to the standards of reasonable and honest people. In Ivey, the court acknowledged that the operation of this objective test will necessarily involve an assessment of the defendant’s beliefs before applying the objective test.

3.) S11(1)(b) says that D must obtain the service without any payment having been made or without payment having been made in full and

1. • that s/he knows that payment is expected and
2. • that he intends to avoid paying either in full or in part at the time of the obtaining.

D has failed to pay the full price intentionally and by a dishonest act. Guilty.

Thinking Point 11.5

Do you think that the above case should fall into the ambit of fraud?

* The definition of fraud is now very wide and in theory could encompass this kind of situation. However, criminal investigation was not deemed to be appropriate in this case unless new evidence comes to light.

Thinking Point 11.6

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| Does D commit the offence of ‘making off without payment’ under s3(1) Theft Act 1978?  D goes to a self-service petrol station five times and serves himself telling the attendant to charge the account of a former employer which he is no longer entitled to do. |

* These were the facts of Coady [1996] Crim LR 518 in which D successfully appealed against a conviction of obtaining property by deception under s15 Theft Act 1968 on the ground that the representation was not operative because it did not precede the obtaining.
* The Court of Appeal agreed that D had become the owner of the property before the false representation was made and therefore committed no offence.
* This could now be an offence under either s2 Fraud Act 2006 (no link between the statement and the obtaining being necessary) or making off without payment under s3. All elements of the AR/MR must be proved.

Thinking Point 11.7

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| 1. Is the Clear test subjective or objective?  2. Do you consider that an ordinary person would be intimidated by the following demands for money:  • Otherwise you will be killed?  • Otherwise your daughter will be kidnapped?  • Otherwise I shall slash your tyres?  • Otherwise I shall tell your husband about your adulterous affair?  • Otherwise I will go to the press about your criminal record?  3. D threatens V that if he does not pay him £1000 by the end of the week he will beat V up. V is part of a criminal gang and is not concerned. Has D blackmailed V? |

1.Objective.

2. It is all a question of fact in the circumstances. Menaces includes violence but is also wider as causing apprehension or influencing someone to give into the demand. Therefore, all could be included.

3. Since blackmail is committed as soon as the demand is made, and the test of menaces is objective, V’s indifference is irrelevant.

Thinking Point 11.8

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| Section 21(1)(a) states that a demand will not be unwarranted where D has a belief:  a. that he has reasonable grounds for making the demand; AND  b. that the use of menaces is a proper means of reinforcing the demand.  Does s21(1) impose a subjective or objective test? |

* Section 21(1) imposes a subjective test (D has a belief).

Thinking Point 11.9

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| D threatens V, a local councillor, that unless V repays a £5000 debt D will go to a local newspaper with scandalous, but true, details of V’s sexual past. In each case below, decide whether D is likely to be believed by a jury that:  (a) he has a belief in reasonable grounds for making the demand AND  (b) that menaces are a proper means of reinforcing it.  • D is a solicitor with a good reputation;  • D is banker;  • D is unemployed and desperate for money;  • D has a low IQ.  • V was involved with D in his sexual past and feels abused.  You might wonder whether a demand that a debt be repaid amounts to an unwarranted threat. The case of Parkes below says that it can. In each case, it will be a question of fact for the jury. |

There is no right answer. A demand may be warranted depending on D’s own view of it. This may vary. Would an objective test be fairer?

Thinking Point 11.10

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| Consider whether the following examples are with a view to gain or intent to cause loss:  1. D, an employer, threatens V, an employee, that:  a. she will lose her job unless she has sexual intercourse with him;  b. she will lose her holiday pay unless she has sexual intercourse with him;  c. she should have sexual intercourse with him.  2. D threatens V with harm unless he:  a. repays £100 debt by the end of next week.  b. returns his CD player in three days’ time. |

1 a. S34(2)(a) (ii)

b. s34(2)(a) (ii)

c. Not money or property.

2. a.s34(2)(a) (i)

b. as 2a.

Thinking Point 11.11

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| Has D damaged property belonging to another?  1. D sprayed graffiti over the wall of the local town hall which cost £1000 to clean off.  2. In an argument, D threw a bucket of water on to the wooden floor of his neighbour’s kitchen. |

1. Yes: Roe v Kingerlee [1986] Crim LR 735. Damage is a question of fact, ie: common sense. It need not be permanent.
2. Possibly - Fiak [2005] but in that case the police cell was rendered unusable for a period of time. It will be a question of fact. If the floor absorbs the water it will clearly be damaged.

Thinking Point 11.12

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| D drives to his friend’s house to settle a dispute. He angrily swerves to a halt on the drive, colliding with his friend’s pet dog. He runs over the dog, killing it. Has he damaged property belonging to another? |

Yes – animals, even wild animals which have been tamed or reduced into possession, are included in s10.

Thinking Point 11.13

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| D agrees to sell his car to a friend (V). He gives him the keys and allows him to take the car on condition that V pays the price in the next few weeks. One week later, D demands the money. V promises to pay next month and refuses to return the car. D sees the car outside V’s house one night. He immobilises it by removing the battery leads. Has D committed criminal damage? |

* S10(2)(a) permits the offence where D damages his/her own property which is in another’s custody or control.
* The car is in the custody or control of V despite belonging to D. Recall the case of Turner (No 2) [1971] 55 Cr App R 336 under s5 TA 1968.

Thinking Point 11.14

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| Does D have a defence of lawful excuse in the following?  1. D is visiting the home of a wealthy friend. A fire breaks out in the lounge caused by a cigarette. D rips some heavy and very expensive curtains from their rails and throws them on the fire so as to dampen it down and prevent it from spreading. The curtains are damaged.  2. D is having a drink one night in a pub. A drunken stranger approaches and threatens to punch him on the nose. D hits him over the head with his stool, breaking it.  3. D scrawls anti-war graffiti on the pavement outside the Houses of Parliament in the belief that this is necessary for the protection of innocent lives and property in Iraq. |

**1.**

* AR: damage/destruction of property belonging to another without lawful excuse
* The curtains are property (s10(1)) belonging to another (s10(2)) which have been damaged.
* D may have a lawful excuse of honest belief in the need to act so as to immediately protect property belonging to another (s5(2)(b). D must honestly believe that the property was in immediate need of protection (subjective); and that the means of protection adopted were reasonable having regard to all the circumstances (objective).
* This would seem to be the case although it is a question of fact for the jury on the evidence of all the circumstances.
* Alternatively, D might claim an honest belief that the owner would have consented to the damage under s5(2)(a) in order to avert a worse harm. There is no requirement of reasonableness.
* D could plead self-defence: his belief in the need for force to repel an imminent attack must be honest although need not be reasonable. In addition, the force used must be reasonable on the facts as D believed them to be.
* AR: Damage - If it will cost money to remove the graffiti, there has been damage, albeit temporary. Property belonging to another – this is satisfied.
* Lawful excuse – If it is D’s belief is that his acts are necessary to protect property in Iraq, it will be held that this is not sufficiently immediate: Hill, Ashford & Smith, Ayliffe.

Thinking Point 11.15

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| Does D have the MR for criminal damage? Use this exercise to revise basic categories of  MR.  D throws his wife’s valued oriental vase across a room which smashes against the wall. His  state of mind is as follows:  a. He wanted to smash the vase to annoy his wife.  b. He did not want to destroy it but knew that it would certainly be damaged.  c. He thought it would probably be damaged.  d. He thought there was a small risk of damage.  e. He did not care whether it was damaged or not.  f. The risk of damage never entered his mind because he was drunk/too angry.  g. The risk of damage never entered his mind because he suffered from an episodic mental illness. |

1. Direct intent
2. Oblique intent
3. Cunningham recklessness
4. Cunningham recklessness
5. Cunningham recklessness
6. Cunningham recklessness after R v G
7. No MR at all provided he was genuinely unaware/lacking in foresight of the risk of damage.

Thinking Point 11.16

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| Have the following committed criminal damage being intentional or reckless as to  endangerment of life?  1. A gang of people throw a hail of bricks through the window of a man and his family intending to frighten the occupiers. The family are unhurt.  2. Two teenagers drop a concrete block over a railway bridge on to a train for a joke. It smashes a window, but no-one is hurt.  3. D throws bricks from his car at passing police cars. One smashes the windscreen and covers the driver with broken glass. |

* 1/ 2. No. Although damage was intentional or reckless, there was no intention or subjective recklessness to endanger life by ‘the damage’ which the various defendants caused.
* 3 - D must have known that he risked the lives of the occupants of a moving car by throwing a brick through the windscreen. This is the case of Warwick [1995] 2 All ER 97.