THE ELEMENTS OF CRIME

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APART from those offences that are defined to exclude such considerations,[1] the commission of a crime is normally understood to involve the presence of *mens rea* on the part of the actor. And the corresponding maxim *actus non facit reum nisi mens sit rea* is a well established one.

A crime is thus taken, standardly at least, to be comprised of two main elements: the actus *reus* or guilty act, comprising all the physical or material ingredients of the crime; and the *mens rea* or guilty mind, comprising all the mental ones. Within this traditional dichotomy, the *actus reus* is seen as an event occurring in space and time and, as such, open to observation and verification. Although brought about by the actor and hence ascribable to him it is not in any sense part of him. The element of *mens rea*, however, while also accepted as existing in space and time, is not observable and is, hence, unverifiable. And, although it must be imputed to the actor, it is internal to him and thus an aspect of him.

On the above account, then, a crime consists in two separate elements linked through the actor – a guilty act perpetrated by him and a guilty mind with respect to it on his part. This account is, however, too simplistic by far and highly misleading in consequence.

In the first place it may well be the existence of a guilty mind on the part of the actor that renders an otherwise innocent act of his a guilty one. In fact the whole import of the maxim *actus non facit reum nisi mens sit rea* is to the effect that it is, in whole or in part, the presence of *mens rea* that qualifies an *actus* as *reus*.

Gordon recognises as much when he writes 'strictly speaking it is improper to call any situation an *actus reus* unless it was created with *mens rea*', although he rather detracts from this recognition by adding 'but it is possible and convenient to treat mens rea as different from any other defeasing factor. The term "actus reus" can then be used for situations that would be crimi-

[1] Strict liability offences as created by statute, prominent in e.g. road traffic and food and drugs legislation.

nal were they accompanied by mens rea; a term is necessary for all the objective or external ingredients of a crime and "actus reus" is the obvious one to use'.[2]

Such a resolution of the problem is not, however, altogether satisfactory. One may define homicide as the destruction of a self-existent human life. Homicide, then, clearly qualifies as an *actus.* But not all homicide is necessarily criminal – it may well not be so where casual or coerced or justifiable.[3] Thus the destruction of a self-existent human life may not be an *actus reus*; rather, the *actus reus* 'homicide' is the destruction of self-existent human life in a particular kind of way – a way typically characterised by *mens rea.*[4]

Thus the forbidden or guilty act and the guilty mind do not exist side by side. Instead, the forbidden act involves the presence of a guilty mind on the part of the actor among the elements by which it is defined. Accordingly, it becomes apparent that the term *actus reus* does not merely serve to identify the physical or material, objective or external ingredients of a crime but rather comprises the totality of the elements involved. The *actus reus* and the *reum* or crime are one.

Various objections, however, may be raised to this equation. First, it leaves us without any term for the physical or material, objective or external ingredients of a crime, taken in isolation from the mental ones. But it will be contended below that such analytic isolation is anyway undesirable.

Secondly, it may be argued that to equate the *actus reus* and the crime is to leave us without means of distinguishing between a crime as a category of forbidden human behaviour and some particular manifestation of it: that the term crime should be reserved for the category and the term *actus reus* for the individual occurrence.

It is, of course, obvious that each actual instance of, say, 'homicide' will differ in terms of person, time, place method etc. from any other. But so equally, does each individual example of a table or chair differ, in some measure at least, from any other. And we do not feel any need to use different terms for designating

[2] Gerald H. Gordon, *The Criminal Law of Scotland,* (Edinburgh, 1967) p. 60.

[3] By accident or mischance, under force or duress, in the furtherance of public justice or out of necessity or in self-defence.

[4] Or, on the kind of account given by H.L.A. Hart in 'Legal Responsibility and Excuses' in *Punishment and Responsibility: Essays in the Philosophy of Law* (Oxford, 1968), pp. 28-53, in a way characterised by absence of the excusing conditions that negate *mens rea.*

tables and chairs as class concepts and actual examples of tables and chairs. Further the term *actus reus* is preferred for analysis since it gives some indication of the factors to be analysed and lacks the emotional connotations of 'a crime'.

Thirdly, the equation of the *actus reus* and the crime may be said to ignore the fact that some, although relatively few, crimes are constituted by omissions rather than acts. 'Failing to observe a traffic sign' might be cited as an instance of such. It has sometimes been argued that no real problem is involved here and that the distinction between acts and omissions is a false one, since in all cases statements about omissions can be reframed in positive terms. Even if this is so, the approach seems an unnecessarily laborious one and liable to introduce distortions. And, although the discussion below concentrates on acts, it is hoped that the analysis given will be accepted as equally viable where omissions are concerned. If so, the alleged defect in the equation may be remedied simply enough either by subsuming omissions under the class of acts or, probably more properly, by equating instead an *actus vel omissus reus* and a crime.

But, whether or not the main equation is accepted, enough should have been said to show that *actus reus* is not a simple concept. Nor, as investigation will demonstrate, is *mens rea*. The present intention is to consider more closely what elements are involved in the concepts of *actus* and *mens rea* and to point to the ways in which these may combine to form an *actus reus*.

Actus

If one accepts, temporarily, the explanation given of the *actus* as the physical or material, objective or external, ingredients of a crime, it may be seen to be divisible into three parts. These are (a) the action, (b) the material circumstances of the action and (c) the consequences or results of the action-in-material-circumstances.

By action here is meant simply a muscular movement.[5] It is at this juncture that the only difference between an analysis of acts and an analysis of omissions occurs. In the case of omissions there is a corresponding lack of muscular movement – there is an inaction. But this inaction occurs in material circumstances and may be followed by consequences in precisely the same way as an action.

By material circumstances are meant those practical contexts

[5] Contrary e.g. to H.L.A. Hart, 'Acts of Will and Responsibility', *loc. cit.*, pp. 90-112.

within which the action takes place. Thus the movement which may be termed 'crooking a finger' takes on a different character according as the finger is already around the trigger of a gun or is being held up to a friend. In the first case, the activity becomes that of shooting, in the second case that of beckoning.

By the consequences or results of the action-in-material circumstances are meant those events we treat as causally connected with it, such as the bullet entering the person at whom the gun was pointed or the approach of the friend beckoned to. However not all crimes include any consequences of the action-in-material-circumstances as part of their definition. Theft[6] and indecent exposure[7] are clear examples of what may be termed conduct, as opposed to result, crimes.[8] And the relationship between circumstances and consequences is rather more complex than it initially seems.

First, the dividing line between a circumstance and a consequence is not always an easy one to draw. For example, the fact of the bullet leaving the gun may be seen as a consequence of the trigger being pulled. But it may equally be seen as a circumstance precedent to someone being hit by that bullet. And the latter event may itself become a circumstance precedent to the death of the person hit.

Result crimes are usually defined by what is regarded as the end point in some causal chain[9] and all events prior to this are treated as circumstances precedent to it. Nonetheless it is possible, and sometimes necessary, to make a distinction between the immediate and the consequential circumstances of an action – as, for instance, between the immediate circumstance of the finger being crooked round the trigger of a gun which is loaded and the consequential circumstance of a bullet leaving the muzzle. For the point or points in the causal chain at which the various questions relating to *mens rea* are asked may be effective in determining the nature of the *actus reus* committed or, indeed, whether the accused person is guilty of any crime at all.[10]

[6] Commonly defined as 'the dishonest taking of the goods of another'. See Gordon, *op. cit.*, pp. 401-2, 406.

[7] Exposure of those parts of the person usually concealed to a particular person or persons in a public place or to a person not consenting as a gesture of sexual invitation or gratification on the part of the accused. See Gordon, *op. cit.*, pp. 848-9.

[8] Cf. the distinction made by Gordon, *op. cit.*, p. 61.

[9] Cf. the distinction in English law between grievous bodily harm and murder.

[10] See, for example, the case of *Chandler v. D.P.P.* [1964] A.C. 763.

Secondly, human behaviour never occurs in isolation. How we describe the behaviour of X, what we consider to be his *actus* at any given time, may depend largely on our purpose in describing it. Thus it is possible to make the following statements, all of them true, at one and the same time: 'X is changing gear', 'X is driving', 'X is driving a foreign car', 'X is going into town' and 'X is going shopping'. Further, if we ask the question 'why?' in relation to all these statements in turn, we may obtain the following answers. 'Because he is slowing down for a red light', 'Because he is in a hurry', 'Because he prefers foreign cars', 'Because he wants to do some shopping' and 'Because there is no food in the house'.

Thus, no matter what behaviour we choose to isolate as an *actus*, it will always have circumstances and consequences beyond itself.[11] There are thus certain practical and theoretical difficulties in determining what, within certain causally related events, is to be accounted an *actus* for the purpose of allocating it to some particular category of *actus reus*.

For example, where consequences are concerned, when is the death of the person injured too remote from the injury received for it to be appropriate to find the gunman guilty of murder? What should happen when some *novus actus interveniens* alters the course of events – as for example a bungled operation 'causing' the death of a person otherwise not seriously injured? Where has an *actus reus* been committed if the *actus* is 'split', the initial action occurring in one jurisdiction and the consequences in another.[12] And such questions are further complicated by the introduction of matters relating to *mens rea* – for instance, how far should the *mens rea* of the accused in relation to the forseeable consequences of his action be projected onto the unforseeable ones?

Further, while an *actus* is usually conceived as having a defined starting point, namely the muscular movement initiating the consequences, the situation is rarely as simple as this. Some judgment has to be made as to what it is that sets off the causal chain. And the movement selected may be more or less remote from the consequences or, it may be not one movement but several. A clear example of this is that of the motorist who, though unconscious at the time of crashing, is nonetheless convicted of a

[11] As Salmond points out, an act has no natural boundaries, *Jurisprudence* (11th edn.) pp. 401-2.

[12] As for instance where a shot is fired across a border or poison is sent from one country to another and death or injury results.

driving offence – his *actus* being taken to have begun at the time of his overconsumption of alcohol.

And, even though an *actus* may be taken to have certain physical movements as its starting point, these movements themselves are the product of some cause. The question thus arises as to the extent, if any, that factors determining the action should be regarded as part of the *actus*. And, as an examination of the elements of *mens rea* will show, the law does not treat them as totally irrelevant to it.

Especially in a system which relies heavily on precedent, any particular category of *actus reus* is liable to constant modification by reference to the forms of *actus* that are treated as falling within it. But the physical, material or external aspects of the actus *reus* are not as 'objective' as they might at first seem. For the delimination of the *actus*, in terms of initial cause and final consequence, is clearly an evaluative process, conditioned largely by the purpose for which it is done.[13]

But while matters of the above kind are cause-related, questions of causality come into more direct account in establishing the coherence of the *actus* as delimited – in justifying the linking of the action-in-immediate-circumstance, the consequential circumstances and the consequences. And causal judgments, having their basis in induction, can never be certain but only more or less probable. Thus the greater the number of consequential circumstances that intervene between the action in immediate circumstances (the initial cause) and the final consequences, the less reliable the judgments made.[14]

Thus the concept of an *actus*, even insofar as it can be analysed in isolation from any mental elements, is not an altogether straight-forward one. And it becomes even less so once questions of *mens rea* are admitted.

Mens Rea

To *mens rea* questions of (a) voluntariness and (b) intention, recklessness and negligence are usually regarded as appropriate. And matters of motive are sometimes also brought into account.

It has, however, been argued that the elements of *mens rea* are not open to any positive explanation. For example, H.L.A. Hart has written '... what is meant by the mental element in criminal

[13] H.L.A. Hart & A.M. Honoré, *Causation in the Law* (Oxford, 1959), Chap. II.

[14] And the connections established by the law may well be tenuous ones – e.g. *R. v. Jarmain* [1946] K.B. 74.

liability (*mens rea*) is only to be understood by considering certain defences or exceptions, such as Mistake of Fact, Accident, Coercion, Duress, Provocation, Insanity, Infancy, most of which have come to be admitted in most crimes, and in some cases exclude liability altogether, and in others merely 'reduce' it. The fact that these are admitted as defences or exceptions constitutes the cash value of the maxim 'actus non ...'[15]

And, he continues, 'in pursuit of the will-o'-the-wisp of a general formula, legal theorists have sought to impose a spurious unity ... upon these heterogeneous defences or exceptions, suggesting that they are admitted as merely evidence of the absence of some single element ('intention') or in more recent theory, two elements ('foresight' and 'voluntariness') universally required as necessary conditions of criminal responsibility'.[16]

Hart admits that it is *possible* to represent the admission of such defences as showing the existence of a mental element or elements but argues that in order to determine what they are and 'how their presence and absence are established it is necessary to refer back to the various defences; and then these general words assume merely the status of convenient but sometimes misleading summaries expressing the absence of all the various conditions referring to the agent's knowledge or will which eliminate or reduce responsibility'.[17]

Hart's argument is not without force and it is substantiated in some measure by the operation of the legal process, in the United Kingdom at least. For, while in relation to the '*actus*' it is for the prosecution to prove its case beyond reasonable doubt, the onus shifts where *mens rea* is concerned. It becomes for the accused to show, if only on the balance of probabilities, that he acted while insane or by mistake or in self-defence. If he is successful in this then the existence of *mens rea* is negated and he is not open to conviction for the crime.

Hart's analysis does provide a valuable caveat against attempting to impose a spurious unity of the kind he rejects. It is clearly unsatisfactory to build a positive and unified concept of *mens rea* on the basis of a heterogeneous collection of instances of its absence. It appears equally unsatisfactory, however, to have no greater grasp of *mens rea* than that which may be obtained by setting out a list of excusing conditions.

[15] 'The Ascription of Responsibility and Rights' *Proceedings of the Aristotelian Society*, XLIX (1949), pp. 171-94.
[16] *ibis.*
[17] *ibid.*

In fact, Hart's analysis ignores the implications of the very variety of the defences to which he points. For it is not only convenient but sometimes imperative to classify such defences, to the end of showing the level at which they operate in relation to the *actus*. And, within these limits, the defences can be seen as an expression, albeit in negative form, of positive theses about what is involved in human behaviour.

There exists, for example, a common – although perhaps untenable[18] – thesis about human beings to the effect that they are possessed of free will – that they are capable of exercising choice in and control over what they do. But even those most convinced of the thesis admit that there are circumstances in which this does not apply. Normally behaviour is voluntary but exceptionally it is involuntary and in such event it is inappropriate[19] to praise or blame the 'agent' for what has occurred.

The precise conditions under which behaviour is accepted to be involuntary are subject to considerable variation. In some legal systems they are limited to instances where the agent is unconscious or in some other automatic state – to cases where it might acceptably be argued that he was not really 'an agent' or 'acting' at all. But other systems also admit behaviour to be involuntary where it occurs under coercion – whether it be occasioned by direct physical force or some subtler means.

What such conditions of involuntariness have in common, however, is the idea that the exercise of choice and control by the agent has been vitiated. And the question is raised whether matters of voluntariness do properly belong to the realm of *mens rea*. For, in the cases of unconsciousness and automatism at least, it can be argued that they do not simply disqualify the *actus* from being *reus* but rather preclude the constitution of an *actus* at all.[20] In such cases the behaviour is traced to certain physiological causes,[21] and questions about the insights and attitudes of the accused are thereby excluded. Certain extreme cases apart,[22] the same does not apply where coercion and duress are concerned.

[18] If the claims of determinists are to be believed.

[19] Whether because pointless or unjust.

[20] It can thus be argued that involuntariness is a proper defence where strict liability offences are concerned. Cf. *Hill v. Baxter* [1958] 1 Q.B. 277.

[21] The courts are reluctant to admit automatism as a defence unless it can be traced to such. See the remarks of Viscount Kilmuir in *Bratty v. Attorney General for Northern Ireland* [1963] A.C. 386.

[22] e.g. hypnotism, direct physical force.

Here there is an *actus*, albeit a reluctant one, but the coercion or duress may preclude it from being *reus*.[23]

These two types of case where behaviour may be treated as involuntary have a common genesis in the view that certain causal factors may operate on human beings so as to render nugatory any choice or control on their part. Yet the cases differ in terms of the nature of the causal factors involved and as to the degree to which these factors are regarded as determining behaviour.

Yet, even though the factors of the second type may be seen as negating *mens rea*, they are clearly not internal to the 'psyche' of the accused. It is the existence of the coercion or duress, and not the fear or other emotions engendered by it, that exculpates. Thus, on a return to the analysis of an *actus* as an action-in-circumstances etc., coercion and duress can be seen as ranking amongst the material circumstances that surround the action. And to claim that it is lack of *mens rea* here that precludes the *actus* from being *reus* is only to justify the inclusion of coercion and duress as excluding conditions – it is not to explain how the concept operates in logical and practical terms.

To the mental state of the actor questions about motive and intention are, however, properly appropriate. But the criminal law treats the motives of an accused person as largely irrelevant. While they may be used to explain his *actus* and even to diminish his liability to punishment, they do not affect its nature. At least, this is the theory. However, to date no really satisfactory account of motives has been given and a similarly satisfactory account of their operation in the criminal law must be dependent on such.

Although no attempt at such a philosophical account will be made here, it would seem appropriate to mention a few of the senses in which 'motive' may be used. For example, 'motive' may characterise the dominant emotion attendant upon the action – pity, fear, anger; or a character trait of the actor – greed, vanity; or the type of satisfaction the *actus* is expected to yield – money, revenge.

For the most part, the law is not concerned with motive in any of these senses. A fraud is still a fraud whether perpetuated as a practical joke or for pecuniary advantage.[24] And words such as 'wilfully' or 'maliciously' in an indictment are treated as meaning simply intentionally or recklessly. Equally 'corruptly', in one

[23] Or in some systems merely diminish liability to punishment.
[24] Gordon, *op. cit.*, p. 559.

English case[25] was held to mean 'deliberately offering a person money with intent that he should enter a corrupt bargain' and the Court of Criminal Appeal held that the accused's motive – that of actually exposing corruption – was irrelevant. And, in *Chandler v. D.P.P.*,[26] where the accused were charged with conspiring to enter an aircraft base for a purpose prejudicial to the interests of the state, their motive, that of bringing about nuclear disarmament, was ruled out of account.[27]

A case in which matters of motive were, arguably, treated as relevant, however, was that of *R. vs. Steane.*[28] Steane was charged under the Defence Regulations with doing an act likely to assist the enemy with intent to assist the enemy. The act concerned was that of broadcasting for the Germans, under the threat that his wife and children would be taken to a concentration camp if he did not. Steane was acquitted on appeal on the basis that, since he was acting under subjection, he could not be presumed to have intended to assist the enemy, even though this was a natural and probable consequence of his broadcasting.

This decision has been strongly criticised. Glanville Williams[29] has argued that the case should properly have been decided on the basis of duress. And Gerald Gordon has written that it 'involves a departure not merely from the rule that a man is presumed to intend the natural consequences of his acts, if such a rule exists, but from the generally accepted view that intention and motive are separate, that the law is interested only in intention in ascribing responsibility, and that a man must be taken to intend the certain consequences of his actings, whether or not he desires them, and for whatever reason he embarks on them'.[30]

Were the test meant to be an entirely objective one, however, the second part of the charge would be redundant. And while it is indeed proper to keep separate the concepts of intention and motive, it might be argued that the decision can be justified on two separate grounds. First, that the word 'intent' was inappropriately used in this context and that the reference was to motive, taken in the sense of the type of satisfaction that the *actus* was expected

[25] *R. v. Smith* [1960] 2 Q.B. 423. However, see *Campbell v. H.M. Adv.* 1941 J.C. 86 and the doubts expressed by Gordon (*op. cit.* pp. 947-8) as to whether the same decision as in Smith would be reached in Scotland.

[26] [1964] A.C. 763.

[27] Their purpose was treated as that of obstructing aircraft.

[28] [1947] 1 K.B. 997.

[29] Glanville L. Williams, *Criminal Law: The General Part* 2nd edn. (London, 1961) p. 41.

[30] Gordon, *op. cit.*, p. 389.

to yield. More plausibly, perhaps, it could be maintained that a matter of intention was indeed involved, but that if any subjective account of intention is to be given it must be heavily dependent on inference from motives. And, the motive in Steane's case being alternatively describable as fear for his family or the protection of his family, an intention to assist the enemy could not be inferred from it.

Nor are motives solely relevant in respect of the consequences of an action. For example exposure of 'those parts of the person that are usually concealed' is only criminal where, *inter alia*, 'the exposure is made to a particular person or persons in such a way as to indicate an improper motive on the part of the accused, that is to say, where the exposure is a form of sexual gesture or invitation, and is something from which the exposer derives gratification, something which is for him a sexual act'.[31]

And there are instances where motives are taken into account in a more general fashion. As Gordon writes 'Where a crime has been committed in the absence of circumstances indicating a corrupt and malignant disposition or wickedness, or, as it is often called, malice, then, even although it has been intentionally committed, and so is *reus* according to modern ideas of *mens rea*, the court will almost certainly take the absence of malice into account in passing sentence'.[32] Further, the jury may actually reduce the charge of murder to one of culpable homicide on this basis, if indeed the prosecution has not already limited itself to the latter indictment.

Thus motives, in the possible senses of the term taken here, may qualify behaviour in such a way that it either falls within the scope of one *actus reus* rather than another or else does not fall within the scope of an *actus reus* at all. Yet the role accorded to motives by the law is both an inconsistent and an incoherent one – and is probably dictated more by policy considerations in individual cases than by any other factors. If, however, as seems likely, motive explanations are a species of causal explanations, then some pattern might be made to emerge by linking them with causal factors that are accepted as precluding the constitution of an *actus reus* or mitigating liability for it. Thus, as already happens with coercion, duress and provocation, one would look to the objective state of affairs that engenders the motive rather than to the motive itself.

Such an approach would not, though, fully illuminate the role

[31] Gordon, *op. cit.* p. 848. See *M'Kenzie v. Whyte* (1864) 4 Irving 570.
[32] Gordon, *op. cit.* p. 195.

played by motive in relation to intention. To appreciate why this is so, it is necessary to look more closely at the concept of intention. And such a procedure reveals that, in terms of *mens rea* at least, intention is to be understood in at least two senses.

The first sense of intention is equivalent to knowingly, awarely, deliberately. This involves knowledge and awareness of the action and its immediate circumstances and foresight of the consequential circumstances and consequences. It is in fact difficult to conceive of an action (in the sense of muscular movement) of which the actor is unaware unless that movement is anyway already classed as involuntary,[33] although it is possible that such may occur. However, there are clearly numerous instances where people are unaware, or else not fully aware, of the circumstances surrounding their actions. And there are also numerous instances where people, although well enough aware of the circumstances of their actions, do not have any foresight of the natural and probable consequences of that action-in-circumstances.

For the most part, if it can be established that a person was unaware of the circumstances of his action, he will not be said to have acted intentionally in this first sense. Thus someone who, by genuine mistake, puts poisonous crystals instead of sugar into a cup of tea cannot be said to have intended to poison the tea. And, obviously, someone who is unaware of the true circumstances of his action cannot have foresight of its consequences and thus cannot be held to intend them. However, the law, for practical reasons, tends to rather more objective tests than these, operating on the basis of the patentness of the circumstances[34] and the forseeability of the consequences to the ordinary, if somewhat mythical, reasonable man.

It is at this level of intention that questions concerning the sanity of the accused are mainly treated as relevant. This is pointed to by the M'Naghten Rules which obtained in England from 1843[35] until the Homicide Act of 1957. They read in part: 'To establish a defence on the ground of insanity it must be clearly proved that, at the time of committing the act, the accused was labouring under such a defect of reason, from disease of the mind, as not to know the nature and quality of the act he was doing, or,

[33] Reflex actions also falling into this category according to the criteria discussed earlier.

[34] The law, in Scotland at least, does not expect knowledge of latent defects, such as a weak heart or an 'eggshell' skull.

[35] *R. v. M'Naghten* (1843) 10 Ch. & F. 200. The rules, in whole or in part, have also been incorporated into the law of a number of other systems.

if he did know it, that he did not know he was doing what was wrong'.[36]

The M'Naghten rules, however, were never fully adopted into Scots law, being regarded as unduly restrictive. And it is, in fact, difficult to make any clear statement as to how insanity is defined in Scotland for legal purposes. It is regarded as appropriate to ask, though, whether the accused was capable of a normal understanding of the facts, a sound assessment of their significance and a sane appreciation of right and wrong.[37] Whether a person is adjudged insane will be dependent on the extent to which his or her reason is regarded as alienated in any or all of these respects.

The alternative to asking such questions at the level of intention is to adopt what is known as the causal approach. This involves a decision by the jury as to whether the accused was suffering from 'a mental disease, and whether the killing of his wife was the product of such disease'.[38] As Gordon points out[39] this approach gives rise to the considerable, but not necessarily insurmountable, problems that occur whereby causal judgments are concerned. Whether its greater flexibility nonetheless renders it preferable to the 'intentional approach' is a moot point.

It must, however, be admitted that testing insanity in terms of intention only is insufficient. For an accused person may be fully aware of the nature and quality of his act, but nevertheless be incapable of controlling his part in it. And, in such instances, the questions to be asked are clearly causal ones. Yet arguments as to their precise status are often somewhat confused.

In *Attorney-General for South Australia v. Brown*[40] it was argued that the defence of irresistible impulse 'introduces a volitional exemption from liability which (unlike the cognitive rules of *mens rea*) is wholly unknown to the law'. This statement appears somewhat odd in view of the traditional equation of volition and voluntariness and the extent to which the law excludes involuntary 'acts' from its scope or limits liability for them. The confusion probably arises from the fact that, on this traditional view, the 'actor's' behaviour is regarded as involuntary because the element of volition is lacking – while with irresistible impulse it is,

[36] Part of Rule 3 as set out by Gordon (*op. cit.* at p. 307) and as expressed by the judges in the House of Lords.

[37] As opposed to mere capacity to formulate ideas of these.

[38] An American (New Hampshire) case: *State v. Pike* 49 N.H. 399, per Doe, J.

[39] Gordon, *op. cit.* p. 315.

[40] [1960] A.C. 432.

rather, there to an overwhelming extent. But if, as suggested earlier, voluntariness is to be properly understood in terms of the operation of causal factors that render nugatory any possibility of choice or control on the part of the accused, this objection falls.

The other problem relating to irresistible impulse is raised by Gordon as follows 'Motive is always regarded as irrelevant to responsibility[41] – it does not matter whether A steals out of greed or to save his starving baby – and irresistible impulse is a defence that the motive of the crime was the desire to commit the crime'. But he continues 'It should be obvious, however, that where this desire is the result of insanity the question of motive does not really enter at all unless insanity is to be described as a motive. And if it is said that the motive was insanity it should be obvious that the accused was not responsible since, so to speak, "Twas not Hamlet wronged you, but his madness"'.[42]

And, in fact, this appears to be the basis of operation of the concept in most, if not all, the legal systems that recognise it. Irresistible impulse, like automatism, is not a category per se – it must be linked to 'a disease which renders the accused incapable of acting according to his knowledge of the wrongness of the act'.[43] Thus mental disease, in relation both to automatism and irresistible impulse, ranks along with physical disease or injury, coercion, duress and provocation amongst the causal factors that may be treated as rendering conduct involuntary.

Another point, however, arises from *Attorney-General for South Australia v. Brown*, and that is the claim that the rules of *mens rea* are cognitive. This is clearly so in relation to the sense of intention discussed to date. But there is a second sense in which it may be relevant to the legal process. And this relates to the consequences of the action-in-circumstances. It is argued that for an *actus* as a whole to have been intentional the accused must not only have been aware of the nature of his action-in-circumstances and had foresight of its consequences, he must also have intended these consequences.

There has been considerable philosophical argument as to what is meant by intention in this second sense. It has been variously explained in terms of desire for and expectation of the consequences. But one may desire certain events to occur without thereby intending them to do so. However much I may desire good weather tomorrow, I cannot intend the sun to shine. Nor, even though from

[41] This assertion has been disputed earlier in the present text.
[42] Gordon, *op. cit.* p. 311, as also the previous extra.
[43] Gordon, *op. cit.* p. 310.

the weather forecast I may expect good weather tomorrow, I cannot be said to intend that it should happen.

Without going into any detailed analysis of intention in this second sense, it is suggested that it cannot properly be explained in isolation from intention in the first sense; so also that it cannot properly be explained in isolation from the action or inaction deemed to be the cause of the consequences. Thus, tentatively, the consequences of an action are intended insofar as the action is performed (in knowledge of the circumstances and foresight of the possible consequences) with the purpose of bringing about those particular consequences and no others. (And it would seem that motives must form at least part of the basis of the inference and imputation of such purpose).

The main defect of this attempted definition is that it may be far too narrow for legal purposes. For example, if someone throws a bomb into a crowded railway compartment and succeeds in his aim of hitting the Crown Prince of Ruritania, he will be guilty of murder – but only of the Crown Prince. Since the death of any other members of the party was a possible but not purposed consequence of his action, his crime in their case is merely that of culpable homicide.

For reasons such as this, the law does not normally embrace such a subjective view of intention but rather deems a man to intend the certain or virtually certain consequences of his actions. This does, however, distort the concept of intention and it is probably more satisfactory to adopt the Scots solution and to extend the scope of type of *mens rea* relevant to murder, viz: 'Murder is constituted by any wilful act causing the destruction of life, whether intended to kill, or displaying such wicked recklessness as to imply a disposition depraved enough to be regardless of consequences ...'[44]

By recklessness is to be understood the presence of intention in the first sense of the term – namely awareness of the circumstances and foresight of the consequences – with an action perpetrated in disregard of the latter. The degree of recklessness involved is to be judged by reference to the blameworthiness of the accused and this in turn is affected by the nature of the consequences that actually occurred and the likelihood of their having done so.

There are obvious disadvantages in requiring a distinction to be made between different types of recklessness, particularly as

[44] J.H.A. Macdonald, *A Practical Treatise on the Criminal Law of Scotland* (Edinburgh, 1867) 5th edn. 1948 p. 89.

evaluative criteria are involved and no hard and fast line can be drawn between the two. But some distinction must be made if a corresponding classification into murder and culpable homicide is to be maintained. And the problems involved in the opposite approach of stretching the concept of intention are even greater.

For some time in England, following the case of *D. P. P. v. Smith*,[45] a person was deemed to intend not merely the certain or virtually certain consequences of his action but also the natural and probable ones. But such an approach leaves little or no scope for the concept of recklessness, besides judging the accused by a more objective standard than is always warranted.

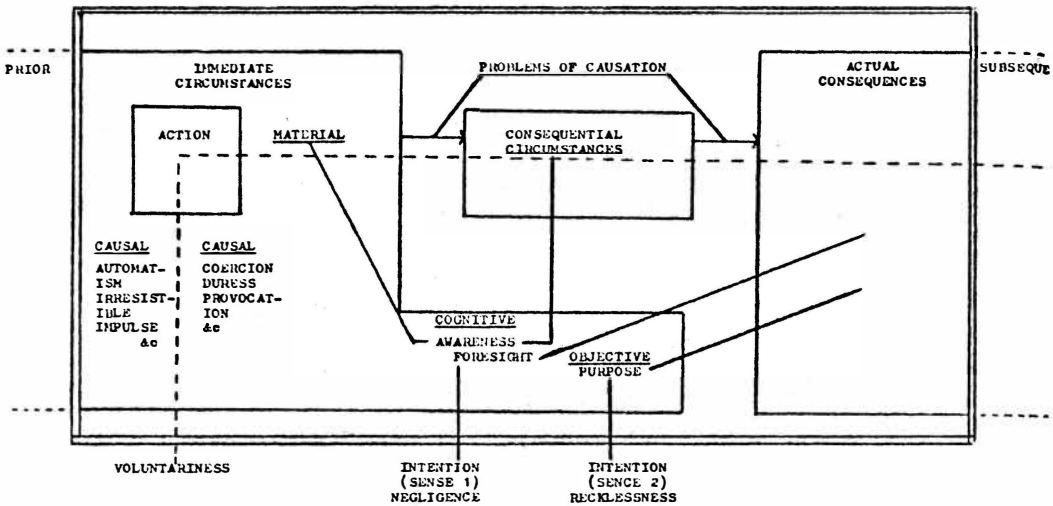
It should be added, though, that the concept of recklessness is not always well defined. Theoretically it involves a subjective test – a judgment about the actual state of mind of the accused: to the effect that awareness and foresight are present but purpose is lacking. And to this, in Scots law, may be added an objective test – an assessment of the culpability of the accused, based on what a reasonable man would do, given such awareness and foresight.

Negligence, by comparison, theoretically involves either lack of awareness or lack of foresight or both, with culpability for such where a reasonable man would have known or foreseen – again a subjective and an objective test. But in practice the subjective basis of both recklessness and negligence is often ignored. Given that intention in the second sense is not alleged, questions about intention in the first sense are ignored. Instead, the behaviour of the accused is judged by reference to the standard of the reasonable man and the line between recklessness and negligence is drawn by reference to the grossness of the aberration from this standard.

Given all the foregoing it does seem clear that a crime does not consist in a simple conjunction of *actus rea* and *mens rea*, as traditional theory would suggest. And the actual complexity of the situation can be demonstrated, although not exhaustively,[46] in the following diagrammatic fashion:

[45] [1961] A.C. 290, until reversed by the Criminal Justice Act, 1967, s. 8.

[46] e.g. the diagram ignores any role played by motive and oversimplifies certain relationships. For example provocation requires awareness of prior and perhaps immediate circumstances and duress foresight of consequences, though not necessarily ones part of the actus reus.



Thus, although the maxim *actus non facit reum nisi mens rea* indicates the proper path, it is far from giving a comprehensive map of the route.