

Inchoate Offences

Incitement

Invicta Plastics v Clare [1976] (what is incitement)

Defines incitement to include urging, spurring on by advice, encouragement and persuasion, pressuring and persuading – *Race Relations Board v Applin*.

In considering, the whole of the facts (here, the advertisement) have to be taken into account. The device was capable of being used to break the law and the ads have passively, if not actively, incited people to do so.

Goldman [2001 CA] (special usage of incitement)

E advertised porn for sale in Amsterdam. D wrote to them requesting underage porn, including a cheque.

This was sufficient incitement and reinforces the scope that a person who pays criminals to do criminal acts is criminally liable for incitement.

R v Coventry Magistrate's Court [2004 CA] (reverse incitement)

A person, through the agency of a computer can incite another. Here, L offered to supply child-porn to purchasers. The purchaser D, entered his credit card details into the computer and by doing so, inspired L on the other side to commit the crime of supplying child-porn.

This decision has been criticised since it might undermine the clear acknowledgement that there must be 'another' to be the incitee. To what extent he must be proved will be a difficult question for the courts.

Conspiracy

Churchill v Walton [1967 HL] (conspiracy needs no 'intent')

Criminal conspiracy consists in an agreement to do an unlawful act without reference to the knowledge on the part of D of its illegality.

There is a subtle difference, however, that an agreement can be to something legal, like sell diesel, but not to sell in excess of the quota, which would be illegal. The agreement to sell should not, per se, amount to criminal conspiracy.

Yip Chiu Cheung [1995 PC] (undercover officers)

An officer can still be a co-conspirator if he knew and agreed to conduct amounting to a crime though he might not be prosecuted.

It is the intention to carry out actions constituting a crime that forms the necessary mens rea for the offence of conspiracy.

Somchai Liangsirprasert [1991 PC] (on jurisdiction)

A conspiracy in country A to harm country B is indictable in country B if the conspirators are captured.

This is so even if no act of the conspiracy occurs here.

Cheung Sing Chi [2004 CA] (conspiracy to defraud)

The common law offence of conspiracy to defraud is not mutually exclusive of the statutory offence, and does not require all co-conspirators to take some active role in the activities amounting to an offence. Liability attaches to D's assent and encouragement of the criminal design.

Attempt

Chan Kwong [1987] CA (extent of act to constitute attempt *maybe old)

For an act to constitute an attempt, D must have done an act which was one of a series of acts which would, if not interrupted, have achieved some criminal purpose – a test based on *Davey v Lee*.

Gullefer [1990] CA (extent of act to constitute attempt *revised)

This case applied the words of the statute to the offence – something more than merely preparatory to the commission of the offence. It begins when merely preparatory acts come to an end and the D embarks upon the crime proper. When that occurs depends on the facts of the case.

Yu Fung Hi [1996] CA (specific intent required)

It is required to prove specific criminal intent in an attempt to commit an offence. Mere recklessness is insufficient in a charge of attempted arson. Note that this should be distinguished from the likes of AGs Ref 3/1992 below because here, the recklessness relates to the actual substantive offence and not a circumstance (e.g. recklessness as to whether death would occur), hence the result.

Lei Sou Wa [1996] CA (strict offence, strict attempt)

For strict offences, the rule remains for attempts: no proof of knowledge (of a crime) is required for attempts of strict offences.

Kan Chung Hung [2001] CFI (strict offence, strict attempt)

Affirms *Lei Sou Wa* in saying: the strict liability of the substantive offence is thus preserved in the attempt to commit that offence.

AGs Ref 3/1992 CA (recklessness allowed for secondary circumstances)

Attempted aggravated arson – recklessness as to whether life would be endangered.

Offence of aggravated arson requires: intent/recklessness to damage property, and intent/recklessness whether lives would be endangered.

Caldwell recklessness prevalent here.

Mere recklessness as to whether property would be damaged is insufficient.

Attempts relate to the physical activity, not the circumstances. Thus in *Khan*, it was sufficient that D intended to penetrate and was reckless as to consent for a conviction of attempted rape (the remaining state of mind required for the offence).

Analogously, in aggravated criminal damage/arson, D must first have intended to damage property. Recklessness is insufficient. Then D must have either intended to endanger life or be reckless as to whether lives would be endangered.

Ip Shui Kwan [2003] CFI (attempted infanticide (voluntary manslaughter))

Court accepted guilty plea to charge of attempted infanticide even though manslaughter in general cannot be attempted. Infanticide requires a woman, by wilful act or omission to cause the death of her child.

Secondary Responsibility (crime done)

Aiding Abetting Counselling Procuring

Wheelhouse [1994] CA (procuring actus reus of offence)

D convicted for procuring the actus reus of the offence, affirming the *Millward Principle* in which D had caused the employee to take the vehicle out onto the road in a defective condition.

Criticism: the controversial *Millward Principle* should not be invoked unless the crime is one incapable of being committed by an innocent agent like rape, bigamy or a driving offence.

AGs Ref 1/1975 CA

D had secretly laced his friend (P's) drink with alcohol. P drove off with excess alcohol and convicted of a road traffic ordinance. D convicted of aiding and abetting P's offence.

Procuring an offence requires a causal link between D's actions and P's commission of the offence.

DPP v Blakely & Sutton [1991] (inadvertent recklessness ≠ procuring)

Can the offence of procuring be committed by someone who brought it about reckless as to whether it be committed or not? Inadvertent recklessness is insufficient in this regard. Whether Cunningham recklessness suffices is an open question though this case suggested that it ought to be.

Calhaem [1985] CA (counselling a murder)

The ordinary meaning of counselling is to advise or solicit. There is no implication that there should be any causal connection between the counselling and the offence. Unlike incitement, the actual offence must have been committed by the person counselled. The act done must have been within the scope of the counselling and not accidentally, e.g. as in a car accident or riot.

D hired P to kill V. P had not intended to kill V but did so when V caused him to panic. There was no accident and the killing was done within the scope of the counselling.

JF Alford Transport [1997] CA (aiding and abetting crime through omission)

If D had known or ought to have known that their drivers were illegally falsifying records and had taken no steps to correct that conduct, it would be open for the jury to infer that D had been positively encouraging the illegal acts. It is necessary to prove that D had intended to do the acts which he knew to be capable of assisting or encouraging the commission of the crime, but D need not intend a crime to be committed. Then P must actually have been aware of the encouragement?

Maxwell [1978] HL (contemplated range of offences)

This case expanded Bainbridge by saying that if D contemplated that P may commit a range of offences, he will be liable for anything that P does within that range if D assists P in any way towards the commission of those.

DPP v K and B [1997] (procuring actus reus through doli incapax)

A finding of *doli incapax* in P does not vitiate the conviction of D as procurer. D may still be convicted on the grounds of having procured the actus reus of the offence.

Keane v SA Police [1997] Australia Sup. Court (aiding breach of protection)

Distinguished *Tyrell* on the basis that a girl under the age of consent cannot be guilty of aiding and abetting the commission of sex with her since the ordinance was passed to protect consenting girls. In this case, the ordinance concerned is the Domestic Violence Act, which was incited to be breached by D, a woman under its 'protection'. It was said that the Act was not aimed at protecting people from themselves, but from unwanted conduct causing apprehension and fear. The mechanism for protection is the restraining order, which does not require either party's consent and the absolute nature of the order is an aid to enforcement. Crucial police resources should not be wasted to enforce restraining orders the protected do not condone.

Joint Enterprise

Powell and English [1999] HL (use of different types of weapons)

In a joint enterprise, the culpability of D lies in his participation in the venture while at the same time contemplating a possible incident of a crime. That crime may be more serious than that agreed to be the enterprise.

Though foreseeability is not mens rea for murder for the principal, it remains so for secondary parties. It is a matter of policy.

Also, the type of act contemplated is important – if a weapon used by P is different to, but as dangerous as, the weapon contemplated by D, D should not escape liability for murder because of the insubstantial difference.

The court also considered using a weapon differently from that contemplated by D – kneecapping vs. throat-slitting, concluding that D, though foreseeing GBH, should not be guilty of murder.

Uddin [1999] CA (sudden deviation from joint enterprise)

Where several persons join in to attack V with combined intent to inflict GBH, they shall all be jointly liable for murder unless the death arises from conduct solely caused by one participant of a *different type* contemplated by others.

What a different type is depends on the dangerousness (propensity to cause death) of the weapon. Of course, if others are attacking with weapons equally likely to cause fatal injury, they will be liable for murder. If death was caused by one party and it cannot be established who caused it, they cannot be charged with murder, but can be charged with wounding and the various offences that can be termed unforeseen consequences.

Pun Ganga Chandra [2001] CA (continuation of attack after unexpected knife)

Principal must have been guilty of murder. D, the secondary party, must have subjectively realised there was a 'real risk' that P might commit murder.

As for the use of weapons, D would be liable for murder if he continued to attack, notwithstanding that he believed there was a real risk that the weapon would continue to be used. Therefore, if the killers ran away and D continued kicking V once or twice, he should not be convicted of murder.

This scenario was posited by Keith JA, who considered a misdirection not to have it considered before the jury. The majority dissented since the facts did not support such a scenario.

Bryce [2004] CA (withdrawal and intent in JE)

D had grudgingly took P to a place near to V (not as near as he was told) to avoid P killing V, but P shot V nonetheless. The court held that D foresaw the event as a real risk and nonetheless lent his assistance. The fact that D did not intend the crime to be committed does not avail him.

The fact that D absented himself on the day of the murder did not amount to an unequivocal communication of his withdrawal from the scheme contemplated at the time he gave his assistance. effective withdrawal involves: warning the victim and telling the police.

In a case of aiding a principal, the prosecution must prove:

- (a) an act done by D which in fact assisted the later commission of the offence;
- (b) that D did the act deliberately, realising that it was capable of assisting the offence;
- (c) that at the time, D contemplated the commission of the offence by P; and
- (d) at the time, D intended to assist P in what he was doing.

Sze Kwan Lung [2004] CFA

Conviction D for murder even though P is not so convicted – in *Hui Chi Ming*, the Privy council held that it was possible to convict D of murder even if P was earlier convicted of manslaughter only. Also, once a common purpose to commit the offence is proved, there is no need to look further for evidence of assisting and encouraging.

Incapability of being Responsible

Insanity

Automatism

Hill v Baxter [1958]

In a plea of automatism, mere assertion is not enough. Medical or scientific evidence is preferred. Drowsiness or sleep is no excuse since the driver can stop knowing he is tired. A blow from a stone or a bee attack that effects a total loss of control may be sufficient.

Quick and Paddison [1973] CA (hypoglycaemia is externally caused)

Case of hypoglycaemia and basic intent offence. Distinguished from hyperglycaemia in that this condition is once caused by an external cause of insulin injection and so cannot be a disease of mind. Whether automatism self-induced left open.

Bailey (John) [1983] CA (hypoglycaemia)

Self induced automatism no defence to crimes of basic intent, but may negative specific intent.

Quick distinguished, since this case was concerned with an offence of specific intent, not basic intent. If D knew that not taking food after injection of insulin would result in violent or unpredictable behaviour, he may be reckless and be convicted of a basic intent offence, but this may negative intention for specific intent offences.

Hennessy [1989] CA (hyperglycaemia)

Held that hyperglycaemia is a disease which affects the mind, so is a disease of the mind fit for insanity. D's external factors of depression and marital troubles did not, in law, contribute to a state of automatism.

D had not been eating or taking his insulin, he turned with hyperglycaemia and stole a car.

M'Naghten's Case [1843] HL

"Every man is presumed to be sane until the contrary is proved on balance by D. it must be proved that at the time of the offence, D was labouring under a defect of reason, from disease of the mind, as not to know the nature and quality of the act he was doing; or if he did, that he did not know what he was doing was wrong."

Kemp [1957] (determining disease of mind)

A disease of the mind is not a disease of the brain and the condition may be temporary or permanent, curable or incurable. Arteriosclerosis held a disease of the mind.

Bratty v AG N. Ireland [1963] HL (a disease of mind may be caused by body)

The defendant killed a girl during a mental blackout due to psychomotor epilepsy, a disease of the nervous system, which might have prevented him from knowing the nature and quality of his act.

Loss of memory after the act is no defence. Irresistible impulse not involuntary conduct since he knew what he was doing.

Lord Denning stated obiter: "It seems to me that any mental disorder which has manifested itself in violence and is prone to recur is a disease of the mind. At any rate it is the sort of disease for which a person should be detained in hospital rather than be given an unqualified acquittal."

Sullivan [1984] HL (determining disease of mind)

D suffered from epilepsy. With reluctance, Lord Diplock held he was insane.

Burgess [1991] CA (sleepwalking = disease of mind, cf. Parks.)

D was sleepwalking. The court held that although sleep was a normal condition, sleepwalking was not a normal condition. It affected the mind, was internal, so could be termed as a disease of the mind. It had manifested itself in violence and might recur.

Windle [1952] CA

There was some doubt as to whether D suffered from any defect of reason, but that is not the question. The question was whether D knew what he was doing was wrong. The court held that what 'wrong' meant was legally wrong, and not any other kind of wrong, e.g. morally wrong.

Excuses

Partial Defences - Murder to Manslaughter

Provocation

Luc Thiet Thuan [1997] PC (characteristics attributable to reasonable man)

D was insulted by his ex-girlfriend. D had an organic brain problem. Could this be attributed to the reasonable man? The court found that a reasonable man must have the power of self control expected of a reasonable person. The proper distinction is that individual peculiarities that bear on the gravity of the provocation should be taken into account, whereas those bearing on the accused's level of self control should not. There is no basis upon which mental infirmity on the part of the defendant which has the effect of reducing his powers of self control below that expected of an ordinary person can be attributed to the objective test.

Smith (Morgan) [2001] HL (overruled by AG v Holley)

For provocation, (i) the jury must think that D may have been provoked so suddenly to lose all reason and self-control; (ii) this is a factual question and all relevant evidence is admissible whether it regards the ability to control emotions or the gravity of the provocation; (iii) the jury should then form a view as to the gravity of the provocation; (iv) finally, the jury can decide, having regard to the provocation and the gravity of the provocation, whether a person having powers of ordinary self control would have done what D did.

Chung Kei Tung [2004] CA (HK case on provocation)

Court did not feel able to accept that the legislature could have intended the reasonable man to be someone who possesses psychiatric or psychological characteristics which are generally the attributes of a person who is not reasonable. Of course, such evidence remains admissible to determine whether D actually lost self defence and also the gravity of the offence.

Diminished Responsibility

Byrne [1960] CA (statutory interpretation)

Abnormality of mind: perception of physical acts and matters, ability to form rational judgement as to whether an act is right or wrong, ability to exercise willpower to control physical acts in accordance with that rational judgement.

Impairment of mental responsibility: considering the extent to which D's mind is answerable for his physical acts which must include a consideration of the extent of his ability to exercise willpower to control his physical acts.

Arrested or retarded development of mind, inherent causes or induced by disease or injury: to be determined on expert evidence.

Substantial impairment: question for the jury.

Sanderson [1993] CA (substance abuse)

Expert A said D had a condition of paranoid psychosis was present in the appellant's mind, irrespective of his drug abuse – an internal cause, however magnified by cocaine addiction.

Expert B said that D's paranoia was due to his cocaine addiction, not really an inherent cause.

Tandy [1988] CA (whether alcoholism is disease)

Jury is to disregard effect of alcohol or drugs on D, since they are not inherent causes; unless the alcoholism is a disease (chronic alcoholism) where the drinking becomes involuntary in the sense that D can no longer resist the impulse to drink. However, if D *did* drink and the abnormality of mind was attributed to the drink and not the alcoholism, D has no defence.

Dietschmann [2003] (alcohol)

The question of alcoholism is whether D would have killed without the alcohol. Whether that underlying internal cause substantially impaired D's mental responsibility.

John Tsui Chu Tin [2001] CA

Tang Kin Kwong [2005] CA

Duress

By Threats

Graham [1982] CA (root)

Was D or may he have been impelled to act because as a result of what he reasonably believed T to have said or done, he had good cause to fear that if he did not act, T would kill him or cause him GBH?

Has the prosecution made the jury sure that a sober person of reasonable firmness, sharing the characteristics of the defendant would not have responded to whatever said or done by taking part in the criminal act?

Cole [1994] CA (necessity and nomination of crime)

Nomination of crime: crime must be directly connected to the suggested peril.

Necessity: objective dangers threatening D or others may be a duress of circumstances. This defence is only available, if, objectively, D can be said to be acting reasonably and proportionately in order to avoid a threat of death or serious injury.

Then the jury may consider whether D was impelled to act as he did because as a result of what he reasonably believed to be the situation, he had good cause to fear that death or GBH may occur; and may a sober person of reasonable firmness, sharing the characteristics of the accused, have responded to that situation by acting as the accused acted?

Martin (David) [2000] CA (reasonable mistakes)

OVERRULED by *Hasan*.

Bowen [1997] CA (principles pertaining to the reasonable man)

The mere fact that the defendant is more pliable, vulnerable, timid or susceptible to threats than a normal person is not a characteristic legitimate to invest in the reasonable person for the purpose of considering the objective test.

D may be in a category of persons whom the jury may think less able to resist pressure than people not in that category – age, sex, pregnancy, serious physical disability, recognised mental illnesses.

Characteristics relevant in provocation may not be relevant in duress, e.g. homosexuality may go to the gravity of an offence, but can't possibly be a basis for duress.

Self-induced characteristics cannot be relevant.

Hasan [2005] HL (roundup on duress by threats)

Duress not defence to a charge of murder, nor secondary offences.

The threat relied on must be of death or GBH.

Threat must be directed against D or someone close to him.

Duress only available when criminal conduct was directly caused by the threats relied upon.

Duress may only be a defence if there was no evasive action D could reasonably have been expected to take.

D may not rely on duress to which he has voluntarily laid himself open.

By Circumstances

Pommell [1995] CA ()

A person who takes possession of a gun in circumstances where he has the defence of duress by circumstances must desist from committing the crime as soon as he reasonably can.

Justified Conduct

Necessity

Dudley and Stephens [1884] ()

Re A (conjoined twins) [2001] CA

Self Defence

Beckford [1988] PC ()

In self-defence, D is entitled to act on his mistaken beliefs be they reasonable or not, as long as D exercises reasonable force with respect to those beliefs.