interest against a person who, e.g., lent John money on mortgage to complete the purchase.

(iv) A contrast is provided by the decision of the House of Lords in *City of London Building Society* v *Flegg* [1987] All ER 435. In this case the property was owned by a husband and wife, Mr and Mrs Maxwell-Brown, as joint tenants. They were, therefore, trustees of land of the property and could give a good receipt for purchase money so as to override all beneficial interests of themselves and others. The building society had advanced capital money to them by way of mortgage and their receipt for that money had overriden all equitable interests including their own and that of Mr & Mrs Flegg, parents of the wife, who lived there. The building society could sell the property without regard to those interests if the loans were not repaid.

(v) See also *Hodgson* v *Marks* (1970) in Chapter 13.

(vi) In *Hypo-Mortgage Services Ltd* v *Robinson* [1997] 2 FCR 422, the Court of Appeal held that children who lived with a parent who was the legal owner of a property could not have an overriding interest protected under the LRA 1925, s 70(1)(g) by reason of actual occupation because they had no rights of their own to occupy and were present only because their parents were the occupiers.

(vii) The decision of the Court of Appeal in *Ferrishurst Ltd* v *Wallcite Ltd*, *The Times*, 8 December 1998 makes it clear that in order to rely on s 70 a person does not have to be in occupation of the whole of the land. In that case, Ferrishurst had a lease of office premises and a third party had a lease of a garage contained within the same premises. Ferrishurst had an option to acquire a lease of the whole premises when its lease of the office premises expired. Wallcite bought the freehold of the whole of the premises, there being no entry on the title register regarding the right of Ferrishurst to ask for a lease of the whole of the premises. Nevertheless, the Court of Appeal said that Ferrishurst had the right and that Wallcite must grant it the lease. So instead of becoming an unfettered freeholder, Wallcite became a landlord.

The case demonstrates how important it is to ascertain the fact of a person's occupation of land (or now part of it) when acquiring a property or dealing with the land in terms, e.g. of a security. Full and stringent enquiries should be made, and it is also desirable (if not essential) to inspect the property to ascertain all the facts.

(viii) Overriding interests may themselves be overridden. The court has a discretion under s 14 of the Trusts of Land and Appointment of Trustees Act 1996. This discretion was used by the Court of Appeal where the property was jointly owned by a husband and wife and the husband became bankrupt and the wife was in occupation. The court ordered a sale of the property where otherwise there was no prospect of the claimant being paid and the wife having a resource which would enable her to reaccommodate herself (see *Bank of Baroda* v *Dhillon* [1998] 1 FCR 489).

Mortgages of chattels: bills of sale

502 ***Koppel* v *Koppel*** [1966] 2 All ER 187

Mr Koppel, who was estranged from his wife, invited a Mrs Wide to come to his house and look after his children on a permanent basis. Mrs Wide agreed to do so provided that Mr Koppel transferred the contents of his house to her to compensate for giving up her own home and disposing of her furniture. The transfer was recorded in writing. Later Mrs Koppel sought to levy execution on the contents of the house for her unpaid maintenance which amounted to £114. In proceedings resulting from Mrs Wide's claim to the property, a county court registrar held that the written transfer of the property to Mrs Wide was void as an unregistered bill of sale.

Held – by the Court of Appeal – the contents of the house were not in Mr Koppel's 'possession or apparent possession' within s 8 of the Bills of Sale Act 1878, because:

(*a*) Mr Koppel had transferred possession to Mrs Wide under the document which was an absolute bill of sale;
(*b*) the grantor of the bill, Mr Koppel, had, therefore, neither possession nor apparent possession. He did not have apparent possession because Mrs Wide was living in the house with him and both had apparent possession of the property, not merely Mr Koppel;
(*c*) Mrs Wide was, therefore, entitled to the property.

Lien: innkeepers

503 ***Robins & Co* v *Gray*** [1895] 2 QB 501

The claimants dealt in sewing machines and employed a traveller to sell the machines on commission. The claimants' traveller put up at the defendant's inn in April 1894, and stayed there until the end of July 1894. During this time the claimants sent the traveller machines to sell in the neighbourhood. At the end of July, the traveller owed the defendant £4 for board and lodgings, and he failed to pay. The defendant detained certain of the goods sent by the claimants to their traveller, asserting that he had a lien on them for the amount of the debt due to him, although the defendant knew that the goods were the property of the claimants.

Held – the defendant was entitled to a lien on the claimants' property for the traveller's debt.

Lien: solicitors

504 ***Caldwell* v *Sumpters*** [1971] 3 All ER 892

The defendants, a firm of solicitors, were holding the title deeds to property recently sold by a former client, Mrs Caldwell, who had not paid their charges. They voluntarily released the deeds to another firm which had been instructed to take their place to complete the sale, stating that they did so on the understanding that the deeds would be held to their order until Mrs Caldwell had paid. The second firm of solicitors kept the deeds and refused to accept that understanding.

Held – by Megarry, J – Sumpters' lien was lost when they voluntarily parted with possession of the deeds and could not be retained by a one-sided reservation of the kind made. If the agreement of the second firm of solicitors had been obtained, the lien would have been preserved, as it would also if Sumpters had lost possession by trickery or other wrongdoing. The second firm was under no obligation to accept the reservation or to return the deeds.

Comment The decision of Megarry, J was reversed by the Court of Appeal (*Caldwell* v *Sumpters* [1972] 1 All ER 567), the court holding that Sumpters' lien was not lost when they parted with the deeds since:

(*a*) possession was given up on the clear and express understanding that the deeds were to be held to Sumpters' order; and
(*b*) solicitors as officers of the court could not be allowed to take advantage of this sort of situation even out of regard for any duty owed to a client.

Lien: power of court to order sale

505 ***Larner* v *Fawcett*** [1950] 2 All ER 727

The defendant owned a racehorse and made an agreement with a Mr Davis under which it was agreed that Davis would train and race the filly and receive half of any prize money she might win. Davis, unknown to the defendant, agreed to let Larner have the animal to train. Larner did so, and when his charges had reached £125, he discoverd that Fawcett was the true owner. Larner, being unable to recover the cost of training and feeding the filly from Davis, who had no funds, now applied to the court for an order for sale. Fawcett was brought in as defendant.

Held – by the Court of Appeal – Larner had a common-law lien for his charges, and although such a lien does not carry with it a power of sale, the power given in the Rules of the Supreme Court to make an order for sale was appropriate here, particularly since the filly was eating a great quantity of food. Fawcett had not made any attempt to get his property back but had clothed Davis with all the indicia of ownership. An order for sale would therefore be made unless Fawcett paid into court the amount of Larner's charges by a given date.

CRIMINAL LAW: GENERAL PRINCIPLES

Crime and civil wrongs distinguished: the burden of proof in crime

506 ***Woolmington* v *Director of Public Prosecutions*** [1935] AC 462

W had been charged with the murder of his wife. He had, on his own admission, shot her but said in his defence that the gun had gone off accidentally. The judge told the jury that so long as the prosecution had shown that the accused had caused the death malice was presumed and that the accused must prove that the killing was an accident. The jury convicted W who appealed to what was then the Court of Criminal Appeal where his conviction was upheld. However, on appeal to the House of Lords his conviction was quashed.

> Throughout the web of English Criminal Law one golden thread is always to be seen that it is the duty of the prosecution to prove the prisoner's guilt subject to what I have already said as to the defence of insanity and subject also to any statutory exceptions. If, at the end of and on the whole of the case, there is a reasonable doubt created by the evidence given by either the prosecution or the prisoner, as to whether the prisoner killed the deceased with a malicious intention, the prosecution has not made out the case and the prisoner is entitled to an acquittal. (*Per* Viscount Sankey, LC)

Nulla poena sine lege: the common law offence of conspiracy

507 ***Shaw* v *Director of Public Prosecutions*** [1961] 2 All ER 446

S published a booklet called *The Ladies Directory* which contained names and addresses of prostitutes. The entries gave telephone numbers and indicated that they were offering their services for sexual intercourse and some of them for the practice of sexual perversions. S was convicted of conspiracy to corrupt public morals and his appeal eventually reached the House of Lords. His appeal was dismissed and his conviction affirmed. However, Lord Reid, in a strong dissenting judgment, said that in his view there was

no such general offence known to the law as conspiracy to corrupt public morals and the court in convicting S of it was creating a new crime on the basis of public mischief which is the criminal law equivalent of public policy. He thought that if the courts had stopped creating new heads of public policy in, for example, the civil law of contract, then they certainly should refrain from doing so in criminal law.

The requirement of causation

508 *R* v *Towers* (1874) 12 Cox 530

T had attacked a woman by hitting her and pulling her hair. She was holding a baby of four-and-a-half months. The woman screamed loudly and the baby went black in the face. From then on it had convulsions and died some six months later. Prior to the attack the child had been healthy. T was charged with the murder of the child. He was found not guilty. There was doubt whether a child of such an age could be frightened in the way suggested. The jury took the view that the act of the accused in assaulting the woman was unconnected with the child's death.

Comment A not dissimilar situation occurred in *Haystead* v *DPP* (2000) 164 JP 396 where a woman was holding a child and the defendant punched her, causing her to drop the child so that it hit its head. He was charged with assault (effectively battery here) and was held by the High Court to have been guilty of assault. Although the assault would normally require the use of direct force against the person of the child, the defendant was guilty of an assault upon its mother and no distinction could be drawn between using the mother or a weapon to assault the child. The child's fall had resulted directly from the assault on the mother and the defendant was guilty of assault by beating. In any case, battery did not necessarily require the direct application of force at least in criminal matters. Force can be applied indirectly.

Cases that support the concept of indirect battery are few and thought by some to be wrongly decided. The concept of indirect battery is, however, supported by the decision in *DPP* v *K* (1990, Case No **540** below).

509 *R* v *Hayward* (1908) 21 Cox 692

H came home one night in a violent state of excitement. He had said previously that he was going to 'give his wife something' when she returned home. When she arrived there were sounds of quarrelling and soon afterwards the wife ran out of the house followed by H. The wife fell on to the road and H kicked her on her left arm. She died and the medical examination showed that the kick was not the cause of her death. She was in good health apart from thymus gland trouble, on which the medical evidence was that a person with such a condition might die from the combined effects of fright, strong emotion and physical exertion. H was charged with manslaughter at Maidstone Assizes and found guilty. Ridley, J said that the abnormal state of the deceased's health did not affect the question whether the prisoner knew or did not know of it, if it were proved to the satisfaction of the jury that the death was accelerated by the prisoner's illegal act.

510 *R* v *Curley* (1909) 2 Cr App R 109

C had been indicted for murder but convicted of manslaughter. He had been heard quarrelling with the woman he lived with. She had been heard shouting in her bedroom. She had said: 'Let me out', 'murder' and 'police'. C was heard to go into her room and the window was opened. The woman later jumped from it. C told a police officer: 'I ran at her to hit her. I didn't quite touch her. Out she jumped.' The court *held* the accused to be guilty. The jumping out of the window was contributed to by C's unlawful act.

511 *R* v *Smith* [1959] 2 All ER 193

The facts were that the victim of a barrack-room brawl who was stabbed twice with a bayonet was dropped twice by those trying to get him to hospital and given artificial respiration when he got there although he was wounded in the lungs so that this was not advisable. Nevertheless, these events were *held* not to break the chain of causation. However, it must be said that the events in this case, including the death of Private Creed who was the victim, all occurred within a period of some two hours.

> A man is stabbed in the back, his lung is pierced and haemorrhage results; two hours later he dies of haemorrhage from that wound; in the interval there is no time for a careful examination, and the treatment given turns in the light of subsequent knowledge to have been inappropriate and, indeed, harmful. In those circumstances no reasonable jury or court could, properly directed, in our view possibly come to any other conclusion than that the death resulted from the original wound. Accordingly the court dismisses this appeal. (*Per* Lord Parker, CJ)

Comment (i) This case seems to illustrate the usual approach of the court to these causation problems. The case of *R* v *Jordan* (1956) 40 Cr App R 152 seems to be the odd man out. In that case J had stabbed the victim but it was established that the wound was healing

satisfactorily. The victim died after being given an antibiotic to which he was allergic and over-large quantities of liquid intravenously. J's conviction for murder was quashed on appeal.

(ii) In *R* v *Malcherek* [1981] 2 All ER 422 two victims of assault were placed on life-support machines and in both cases doctors having diagnosed brain death discontinued treatment and disconnected the life-support system. It was held by the Court of Appeal that the original injuries were the continuing operating cause of death. The discontinuance of the treatment did not break the chain of causation between the initial injury and the death.

(iii) More recently in *R* v *Cheshire* [1991] 3 All ER 670, following an argument in a fish and chip shop C shot his victim in the leg and stomach, seriously wounding him. The victim died two months later following complications after surgery to assist his breathing. C was convicted of murder even though there was evidence that the leg and stomach wounds were no longer life threatening at the time of his death. The Court of Appeal in dismissing an appeal said that the acts of the accused need not be the sole or even the main cause of the death, it being sufficient that his acts contributed significantly to the death.

(iv) Again, in *R* v *Mellor (Gavin Thomas)*, *The Times*, 29 February 1996 M appealed against conviction of the murder of a 71-year-old man who had died two days after he had been admitted to hospital with facial and chest injuries caused by M. The appeal was dismissed by the Court of Appeal, the court holding that in the supervening event cases the prosecution had only to establish that the injuries inflicted by the defendant were a significant, if not the only, cause of death. It was not necessary, e.g., for the prosecution to establish that there had been no medical negligence in the treatment of the victim.

Actus reus: liability for failing to act

512 ***R* v *Instan*** [1893] 1 QB 450

Instan lived with her 73-year-old aunt. The aunt seemed to be in reasonable health until shortly before her death. During the 12 days prior to her death she had gangrene in her leg and could not look after herself or summon help. That she was in this condition was a matter known only to Instan. It appeared that she had not given her aunt any food nor had she tried to obtain medical or nursing aid. Following the death of her aunt she was accused of manslaughter and convicted. The Court for Crown Cases Reserved (as it then was) affirmed the conviction.

> The prisoner was under a moral obligation to the deceased from which arose a legal duty towards her; that legal duty the prisoner has wilfully and deliberately left unperformed, with the consequence that there has been an acceleration of the death of the deceased owing to the non-performance of that legal duty. It is unnecessary to say more than that upon the evidence this conviction was most properly arrived at. (*Per* Lord Coleridge, CJ)

Comment (i) An example of liability arising from an omission in a special relationship situation of parent and child is provided by *R* v *Gibbins and Procter* (1918) 13 Cr App R 134. In that case G was the father of a child and he was living, together with the child, with P the female second defendant. They failed to feed the child and she died. The convictions of G and P for murder were upheld by the appeal court. Of course, in the case of P it was necessary to show that she had *assumed a duty* towards G's child. It was held that she had by living with him and receiving money from him for food.

(ii) An additional illustration is provided by *R* v *Hood* [2004] 1 Cr App R (S) 431, where the accused was found guilty of the manslaughter of his wife. He was her sole carer. She suffered from diabetes and osteoporosis causing brittle bones. She broke several bones in a fall and the accused failed to summon medical assistance for some weeks. The wife died shortly after being admitted to hospital in a debilitated state. The accused's sentence was reduced from four years to 30 months on the basis of the wife's reluctance to go to hospital.

(iii) Problems can arise where persons suffering injury have, because of irreversible brain damage, gone into a persistent vegetative state. To avoid liability for failing to sustain life or bringing about death by turning off life-support apparatus, the family and health trust concerned should ask the court for a declaratory judgment of no liability at criminal or civil law. They are then protected against criminal and/or civil proceedings. This approach was used in *Airedale National Health Service Trust* v *Bland* where it was upheld by the House of Lords (see [1993] AC 789).

Euthanasia is still illegal in the UK and can result in a conviction for murder, even though there may be the most compelling compassionate grounds.

Actus reus: contractual duties

513 ***R* v *Pittwood*** (1902) 19 TLR 37

Pittwood was a gatekeeper employed by a railway company. It was his duty to keep the gate shut whenever a train was passing between 7 am and 7 pm. The gate was left open on one afternoon and a hay cart which was crossing the line was struck by a train. A man was killed and another seriously injured. The defendant was charged with manslaughter and was found guilty. Wright, J said there was gross and criminal negligence as the man was paid to keep the gate shut and protect the public. He added that a man might incur criminal liability from a duty arising out of contract.

Actus reus: previous conduct

514 ***R* v *Miller*** [1983] 1 All ER 978

The defendant, who was a vagrant squatter, fell asleep after lighting a cigarette. He woke to find his mattress smouldering. He left it as it was and went to sleep in another room. There was a fire and the defendant was charged with arson. He was found guilty and his appeal was dismissed by the House of Lords. His conviction was justified either on the basis that there was a continuous act or on the basis that the defendant owed a responsibility to try to undo the harm which he had unwittingly done. The House of Lords felt that this latter basis which is really an omission would be easier to explain to juries.

Mens rea: motive: irrelevant to guilt or innocence

515 ***Chandler* v *Director of Public Prosecutions*** [1962] 3 All ER 142

In this case the defendants impeded the operation of an airfield at Wethersfield, Essex. Their object was to demonstrate against nuclear armament.

> In the result, I am of opinion that if a person's direct purpose in approaching or entering is to cause obstruction or interference, and such obstruction or interference is found to be a prejudice to the defence dispositions of the State, an offence is thereby committed, and his indirect purposes or his motives in bringing about the obstruction or interference do not alter the nature or content of his offence. . . . Is a man guilty of an offence, it was asked, if he rushed on to an airfield intending to stop an airplane taking off because he knows that a time-bomb has been concealed on board? I should say that he is not, for the reason that his direct purpose is not to bring about an obstruction but to prevent a disaster, the obstruction that he causes being merely a means of securing that end. (*Per* Lord Radcliffe)

Mens rea: states of mind

516 ***R* v *Maloney*** [1985] 1 All ER 1025

The defendant and his stepfather had been drinking heavily at a family party. They were part of a united and happy family. In the early hours of the morning they began larking about with shotguns. There was a challenge as to who could load fastest. The defendant was able to load faster and pointed his gun at the stepfather, saying: 'You've lost'. The stepfather said: 'You wouldn't dare pull the trigger'. The defendant did just that and killed the stepfather. It appeared that he did not aim the gun but just pulled the trigger. He was later charged with murder but that was reduced to manslaughter by the House of Lords. The House of Lords felt that the circumstances did not show that the defendant had the intent to kill or cause really serious injury and nothing else would do for the crime of murder. Lord Bridge said:

> I do not believe it is necessary for the judge to do more than invite the jury to consider two questions. First, was death or really serious injury . . . a natural consequence of the defendant's voluntary act? Second, did the defendant *foresee* that consequence as being a natural consequence of his act? The jury should then be told that if they answer Yes to both questions it is a proper inference for them to draw that he intended that consequence.

Comment (i) The matter came before the House of Lords again in *R* v *Hancock* [1986] 1 All ER 641. The defendant, Hancock, and another defendant, Shankland, had thrown items including lumps of concrete from a road-bridge in order to block the road so that a taxi carrying a working miner would not be able to get through and so to some extent break the miners' strike. A lump of concrete hit the windscreen of the taxi and the driver was killed. The defendants were charged with murder and eventually appealed to the House of Lords from their conviction for that offence. Lord Scarman and the other Law Lords were critical of Lord Bridge's approach. His *Maloney* guidelines required a reference to *probability*. Lord Scarman said: 'They also require an explanation that the greater the probability of a consequence the more likely it is that the consequence was foreseen and that if that consequence was foreseen the greater the probability is that the consequence was also intended.' But he went on to stress that the jury should not be told more except that any inference of intent was for them to make on all the evidence and circumstances of the case and not merely on the judge's directions.

(ii) The matter came before the Court of Appeal again in *R* v *Nedrick* [1986] 3 All ER 1 where the defendant poured paraffin through the letter box of the house of a woman against whom he had a grudge. He set light to it and the woman's child died in the resulting fire. He was convicted of murder, the judge bringing in the *Hancock* approach, i.e. that if the defendant knew that it was *highly probable* that his act would result in serious bodily injury to someone inside the house he was guilty of murder. The defendant had admitted starting the fire but said he wanted just to frighten the woman and not to kill anyone. The Court of Appeal substituted a verdict of manslaughter and the Lord Chief Justice had to lay down guidelines as to the direction of juries in this sort of case. He said that the jury should be told that they are not

entitled to infer the necessary intent for murder unless they feel sure that death or serious bodily harm was a virtually certain result of the defendant's action (barring some unforeseen intervention) and that the defendant appreciated that fact. This is where the matter currently lies. To equate foresight with intention is now ruled out unless intent can be construed from evidence surrounding the act (see below).

(iii) In *R* v *Woollin (Stephen Leslie)*, *The Times*, 12 August 1996 W appealed to the Court of Appeal against his conviction for the murder of his three-month-old son whom he had thrown towards a pram which was against the wall. The child seemed to have hit the wall and died from injuries sustained. When summing up the judge directed the jury that they could find the necessary intent for murder if they felt that W appreciated that there was 'a substantial risk' that serious bodily harm would result to the child. W claimed that the judge should have used the expression 'virtual certainty' of serious bodily harm. The former expression related to recklessness for manslaughter and the latter to an intent for murder. Whilst the Court of Appeal agreed that, taking *only* the act of throwing the child at the pram, the direction might have been faulty, if there were surrounding circumstances and evidence of intent other than the act, a conviction for murder could be sustained. Here the defendant had admitted that he 'lost his cool' when the child started to choke upon his food and that he had shaken him in a fit of rage or frustration before throwing him at the pram.

(iv) The *Woollin* case came before the House of Lords (see *R* v *Woollin (Stephen Leslie)* [1998] 3 WLR 382). Their Lordships accepted that the trial judge, in using the expression 'a substantial risk', had blurred the distinction between intention and recklessness, and thus murder and manslaughter. Accordingly, Woollin's conviction for murder could not stand. A conviction for manslaughter was substituted.

(v) The problem the trial judge has in getting the right direction to the jury in these cases on the border of intention or criminal negligence was again illustrated in *R* v *Matthews (Darren John); R* v *Alleyne (Brian Dean)*, *The Times*, 18 February 2003. The defendants had assaulted and robbed the victim. In the assault the victim lost his glasses and having left the scene of the assault, a nightclub, he was going home and was flagging down cars when the defendants' car came up. They stopped and forced him into the car and took him to a river bridge. They threw him over the bridge into the river, although he had told them he could not swim. The victim drowned. The charge was murder and the trial judge directed the jury to find the necessary intent provided that they were satisfied that the defendants had an appreciation of the 'virtual certainty of death'. The Court of Appeal found this to be the wrong direction which should have been that the jury were 'not entitled to find the necessary intention unless they felt sure that death or serious bodily harm was a virtual certainty as a result of the defendants' actions and that the defendants appreciated that this was the case'. Nevertheless, the Court of dismissed the appeal. The judge had repeatedly made the point about the need for intent and, although the main direction was a misdirection, that misdirection was immaterial.

Recklessness: a subjective test

517 ***R* v *Cunningham*** [1957] 2 All ER 412

C was convicted of unlawfully and maliciously causing to be taken by Sarah Wade a certain noxious thing, namely, coal gas, so as to endanger her life contrary to s 23 of the Offences Against the Person Act 1861. The crime is unlawfully and maliciously administering to or causing to be administered to or taken by any person any poison or other destructive or noxious thing so as to endanger the life of such person or so as thereby to inflict upon such person any grievous bodily harm. C had gone into an empty house and torn away the gas meter in the cellar in order to take the money it contained with the intention of stealing that money. However, coal gas poured out of the pipe he had fractured and percolated into the house next door where it almost asphyxiated the occupant, Sarah Wade. C appealed and his appeal was allowed.

> We think it is incorrect to say that the word 'malicious' in a statutory offence merely means wicked. We think the judge was, in effect, telling the jury that if they were satisfied that the appellant acted wickedly – and he had clearly acted wickedly in stealing the gas meter and its contents – they ought to find that he had acted maliciously in causing the gas to be taken by Mrs Wade so as thereby to endanger her life.
>
> In our view it should have been left to the jury to decide whether, even if the appellant did not intend to injure Mrs Wade, he foresaw that the removal of the gas meter might cause injury to someone but nevertheless removed it. We are unable to say that a reasonable jury, properly directed as to the meaning of the word 'maliciously' in the context of s 23, would without doubt have convicted.
>
> In these circumstances this court has no alternative but to allow the appeal and quash the conviction. (*Per* Byrne, J)

Comment The fact that the judge is applying a subjective standard is indicated by the fact that he says, 'he (i.e. the defendant) foresaw'. This is what the jury must find if the test is to be subjective. Of course, no jury can really know what a particular defendant may or may not have foreseen.

They can only do their best in the light of answers which the defendant or other witnesses may have given to questions posed by counsel in examination-in-chief and cross-examination. It is by no means an exact science!

Recklessness: an objective test

518 *R* v *Caldwell* [1981] 1 All ER 961

Caldwell had done some work for the owner of a hotel and had a quarrel with the owner about this. He got drunk and set fire to the hotel in revenge. The fire was discovered and put out before any serious damage was done and none of the guests was injured. He was charged with criminal damage under the Criminal Damage Act 1971. It was *held* incidentally that his self-induced intoxication was no defence but on the issue of recklessness which was part of the charge, i.e. intentionally or recklessly destroying or damaging property, the House of Lords eventually dismissed his appeal. A person is reckless they said if (*a*) he does an act which in fact creates an obvious risk that property will be destroyed or damaged; and (*b*) when he does the act he either has not given any thought to the possibility of there being any such risk or has recognised that there was some risk involved and has nonetheless gone on to do it. The test is objective because a person is guilty if he has given no thought at all to the risk when in effect a reasonable person would have done so.

Comment (i) Although the above words were spoken in regard to recklessness for the statutory offence of criminal damage, it seems from the general tenor of the judgments in *Caldwell* and another decision of the House of Lords, *R* v *Lawrence* [1981] 1 All ER 974 (a case of reckless driving), that they might apply to the construction of criminal statutes generally and to recklessness at common law.

(ii) The principles laid down in *Caldwell* and *Lawrence* were applied in another case of criminal damage, i.e. *Elliott* v *C* [1983] 2 All ER 1005. C was a 14-year-old schoolgirl who was charged with criminal damage under s 1(1) of the Criminal Damage Act 1971 (destroying or damaging property without danger to life). She spent one entire night awake and wandering around. She had entered a toolshed and there poured white spirit on to a carpet and set light to it, destroying the shed. The magistrates found that she did not appreciate just how inflammable the spirit was, and having regard to her extreme state of tiredness, that she did not in fact give any real thought to the risk of fire. In consequence, the magistrate acquitted her. It was held by a Divisional Court of Queen's Bench, allowing the prosecutor's appeal, that the correct test was whether a reasonably prudent man would realise the dangers of fire in the circumstances, even though the particular accused might not appreciate them. In other words, it would appear that the test at criminal law has become an objective test of recklessness, at least where criminal damage is concerned.

(iii) The objective standard approach to recklessness was followed in *R* v *Sangha*, *The Times*, 2 February 1988 where the Court of Appeal said that the test was 'would an ordinary prudent bystander have perceived an obvious risk that property of value and life would be endangered?' Sangha was convicted of arson under s 1(2) of the Criminal Damage Act 1971 because life was endangered.

Transferred malice

519 *R* v *Latimer* (1886) 17 QBD 359

Latimer was quarrelling with A in a pub. He struck out at A with his belt. The blow glanced off A and severely injured another person, B. Latimer was found guilty of unlawful and malicious wounding. Lord Coleridge, CJ said:

> We are of opinion that this conviction must be sustained. It is common knowledge that a man who has an unlawful and malicious intent against another, and, in attempting to carry it out, injures a third person, is guilty of what the law deems malice against the person injured, because the offender is doing an unlawful act, and has what the judges call general malice, and that is enough. . . .

520 *R* v *Pembliton* (1874) LR 2 CCR 119

Pembliton was fighting outside a pub. He picked up a stone and threw it at the persons he had been fighting. It missed them but broke a window in the pub. It was held that the evidence did not support a conviction for unlawful and malicious damage under the Malicious Damage Act 1861. There was no intention to break the window.

Comment (i) He might now have been successfully charged with criminal damage if he was in fact reckless within the *Caldwell* test, or of an *attempt* to cause actual or grievous bodily harm. Nevertheless, in the terms in which he was charged the case makes its point that *mens rea* is not transferable from crime to crime.

(ii) The rule is somewhat arbitrary and appears generous to the defendant. This was admitted by the House of Lords in *Attorney-General's Reference (No 3 of 1994)* [1998] AC 245 but their Lordships nevertheless applied it ruling that the defendant's malice towards his girlfriend in stabbing her did not extend to the crime of murder of a child which, to his knowledge, she was carrying. The House of Lords acknowledged that the rule is an exception to the general principles of law.

Mens rea: must coincide with *actus reus*

521 ***Thabo Meli* v *R*** [1954] 1 All ER 373

In this case the accused persons planned to kill the victim in a hut and thereafter to roll his body over a cliff so that it would appear that he had died an accidental death. The victim was made unconscious in the hut by the attack and thinking him to be dead, the accused persons rolled him over a cliff. There was evidence that the victim was not in fact killed in the hut but that he died on account of exposure at the bottom of the cliff.

> The point of law which was raised in this case can be simply stated. It is said that two acts were necessary and were separable; first, the attack in the hut; and, secondly, the placing of the body outside afterwards. It is said that, while the first act was accompanied by *mens rea*, it was not the cause of death; but that the second act, while it was the cause of death, was not accompanied by *mens rea*; and on that ground it is said that the accused are not guilty of any crime, except perhaps culpable homicide.
>
> It appears to their Lordships impossible to divide up what was really one transaction in this way. There is no doubt that the accused set out to do all these acts in order to achieve their plan and as part of their plan; and it is much too refined a ground of judgment to say that, because they were under a misapprehension at one stage and thought that their guilty purpose had been achieved before in fact it was achieved, therefore they are to escape the penalties of the law. . . . (*Per* Lord Reid)

The appeal of the accused persons was, therefore, dismissed.

Comment It is not necessary for the acts to be part of a preconceived plan which went wrong. In *R* v *Le Brun* [1991] 3 WLR 653 a husband had an argument with his wife in the street and hit her without intending serious harm. She fell unconscious on the highway and he then tried to move her on to the pavement. Her head hit the pavement and she fractured her skull and died. He was acquitted of murder and convicted of manslaughter and his appeal against that conviction was dismissed. The unlawful application of force and the eventual act causing death were part of the same sequence of events. They did not have to be part of a preconceived plan as in *Thabo Meli*.

Mens rea: statutory offences

522 ***Sweet* v *Parsley*** [1969] 1 All ER 347

The magistrates had convicted Sweet of being concerned in the management of premises which were used for the purpose of smoking cannabis or cannabis resin, contrary to s 5(b) of the Dangerous Drugs Act 1965. The evidence showed that she had no knowledge whatever that the house was being used for the purpose of smoking cannabis or cannabis resin. She visited the premises only occasionally to collect letters and rent and though sometimes she stayed overnight, generally she did not. Section 5 of the 1965 Act provides 'if a person (*a*) being the occupier of any premises, permits those premises to be used for the purpose of smoking cannabis or cannabis resin or of dealing in cannabis or cannabis resin (whether by sale or otherwise); or (*b*) is concerned in the management of any premises used for any purposes aforesaid; he shall be guilty of an offence under the Act'. The House of Lords, after holding that in spite of the wording of the Act in terms of the 'management' offence *mens rea* must be implied, found that there was no *mens rea* in the accused in this case and that, therefore, her appeal should be allowed and her conviction quashed.

Comment (i) The offence of 'permitting' would normally require *mens rea* but the 'management' offence was regarded in this case by the magistrates as not requiring *mens rea* and they convicted Ms Sweet. However, the House of Lords decided *mens rea* must be implied. The *mens rea* may, however, be little more than 'wilful blindness' to what is going on in the premises. There was no finding that Ms Sweet had this.

(ii) The presumption of a requirement of *mens rea* in statutory offences has become stronger in more recent cases. An example is *B* v *DPP* [2000] 2 Cr App R 65. The defendant a 15-year-old boy sat next to a 13-year-old girl on a bus and requested her to give him a 'shiner'. As the judge remarked, 'This in the language of today's gilded youth apparently means not a black eye but an act of oral sex'. The girl refused. He was charged with having incited a girl under the age of 14 to commit an act of gross indecency with him contrary to s 1(1) of the Indecency with Children Act 1960. This is a strict offence and both the trial judge and the Court of Appeal ruled that it was no defence that the boy believed that the girl was over 14. However, the House of Lords followed the approach in *Sweet* v *Parsley* (above) and applied a presumption in favour of a requirement for *mens rea*. The prosecution had to prove, said their Lordships, an absence of genuine belief by the defendant that the victim was aged 14 or over. This belief which does not have to be on reasonable grounds will if genuinely held result in an acquittal.

(iii) The ruling in *B* v *DPP* (above) was applied in *R* v *K* [2001] Crim LR 993 again by the House of Lords. The defendant in this case was charged with indecent assault on a girl under 16 contrary to s 14 of the Sexual Offences Act 1956. The girl had consented. However, by reason of s 14(2) a girl under 16 cannot give a legally valid consent

although in this case she had also told the defendant that she was over 16. The House of Lords allowed the defendant's appeal and held that the defendant's mistaken belief that the girl was over 16 was a valid defence. Such a belief need not be based on 'reasonable grounds' but the more unreasonable it is the less likely it is that it will be taken as genuine. Obviously, the reasons the defendant gives for the belief will be a crucial piece of evidence for the police to establish when dealing with this type of offence.

(iv) The Sexual Offences Act 2003 has relevant provisions which should be noted (see p 698).

523 ***R* v *Tolson*** (1889) 23 QBD 168

Martha Ann Tolson, who married in September 1880, was deserted by her husband in December 1881. She made enquiries and learned from his elder brother that he had been lost at sea in a ship bound for America which sank with all hands. Believing herself to be a widow, she went quite openly through a ceremony of marriage on 10 January 1887, with Y who was fully aware of the circumstances. It was held that she could not be convicted of bigamy under s 57 of the Offences Against the Person Act 1861, even though the opening part of that section says: 'Whosoever, being married, shall marry any other person during the life of the former husband or wife . . . shall be guilty of a felony . . .'. She had no *mens rea*. The object of Parliament was not to treat the marriage of widows as an act to be if possible prevented as presumably immoral. Mrs Tolson's conduct was not immoral but perfectly natural and legitimate. A statute may relate to such subject matter and may be so framed as to make an act criminal whether there has been any intention to break the law or not. In other cases a more reasonable construction requires the implication into the statute that a guilty mind is required.

524 ***Alphacell* v *Woodward*** [1972] 2 All ER 475

A Ltd was the owner of paper-making mills. In the course of manufacture effluent passed into two tanks on the banks of a river. Pumps were used to remove the effluent from the tanks but it was inevitable that if the pumps failed, the effluent would enter the river and pollute it. As a result of foliage blocking the pump inlets, such an overflow occurred and A Ltd was charged with 'causing' polluting matter to enter the river under s 2(1) of the Rivers (Prevention of Pollution) Act 1951. It was *held* – by the House of Lords – that A Ltd was guilty of that offence even though it had not been negligent. The intervening act of a trespass or act of God would have been a defence, but there was no such trespass or act of God in this case.

Comment (i) 'Causing' is a word which does not require *mens rea*. The statute did not say 'knowingly causing'. That would have required *mens rea*.

(ii) It was *held* in *R* v *CPC (UK)*, *The Times*, 4 August 1994 that 'causing' polluting matter to enter a river contrary to s 85(1) of the Water Resources Act 1991 and s 4(1) of the Freshwater Fisheries Act 1975 was a question of fact and did not require fault or knowledge on the part of the defendant. It does however, require some *active* participation: *Attorney-General's Reference (No 1 of 1994)* [1995] 2 CLY 5135.

(iii) There is a tendency in more recent statutes to use expressions that do not require *mens rea* but contain a 'due diligence' defence, which allows the defendant to escape conviction by showing that all reasonable precautions were taken.

525 ***Cundy* v *Le Cocq*** (1884) 13 QBD 207

C, who was a licensed victualler, sold liquor to a person who was drunk though C did not know this. He was, however, convicted of unlawfully selling liquor to a drunken person contrary to s 13 of the Licensing Act 1872, which provided that: 'If any licensed person . . . sells any intoxicating liquor to a drunken person he shall be liable to a penalty . . .'. It was *held* – by Stephen, J – that knowledge of the condition of the person to whom the liquor was sold was not necessary to constitute the offence.

> Against this view we have had quoted the maxim that in every criminal offence there must be a guilty mind; but I do not think that maxim has so wide an application as it is sometimes considered to have. In old time, and as applicable to the common law or to earlier statutes, the maxim may have been of general application; but a difference has arisen owing to the greater precision of modern statutes. It is impossible now, . . . to apply the maxim generally to all statutes, and the substance of all the reported cases is that it is necessary to look at the object of each Act that is under consideration to see whether and how far knowledge is of the essence of the offence created. Here, as I have already pointed out, the object of this part of the Act is to prevent the sale of intoxicating liquor to drunken persons, and it is perfectly natural to carry that out by throwing on the publican the responsibility of determining whether the person supplied comes within that category. I think, therefore, the conviction was right and must be affirmed.

Comment Is it perhaps simply that a landlord is supposed to know when a customer is drunk? Contrast *Sherras* v *De Rutzen* [1895] 1 QB 918 where a publican was convicted of serving a constable while on duty. He thought he was off-duty and anyway had no way of knowing whether he was or not. His conviction was quashed by a Divisional Court.

526 ***Gaumont British Distributors Ltd* v *Henry*** [1939] 2 KB 717

Gaumont British was charged under s 1(a) of the Dramatic and Musical Performers' Protection Act 1925, with knowingly making a record of a musical work without the written consent of the performers. No consent had actually been given but GB said, and it was accepted, that it had never thought about the question of consent. Nevertheless GB was convicted and appealed. The appeal was allowed.

> I desire to add emphatically that no colour can be obtained from this case, or from the argument, or from any opinion which is present to my mind, that the wholesome and fundamental principle *ignorantia juris neminem excusat* (ignorance of the law is no excuse) is in any degree to be modified or departed from. . . . I should be very sorry, directly or indirectly, even to appear to add any colour to the suggestion, if it were made – as I do not think it is – that in circumstances of this kind ignorance of the law might excuse. The way in which the topic of the appellants' knowledge came in was solely with reference to the words 'knowingly makes any record without the consent in writing of the performers', and the contention was a contention of fact. According to a true view of the evidence of fact in this case it was incorrect to say that the appellants did knowingly without the consent in writing of the performers that which was done. (*Per* Lord Hewart, CJ)

527 ***R* v *Lowe*** [1973] 1 All ER 805

Lowe was charged under s 1 of the Children and Young Persons Act 1933 as being a person who had the charge of a child and wilfully neglected it in a manner likely to cause it unnecessary suffering or injury to health. L's case was that the child's critical condition arose after he had told the woman he was living with, who was the child's mother, to take the child to a doctor and that she later falsely told him that she had done so. He was convicted and appealed.

> It did not matter what he ought to have realised as the possible consequences of his failure to call a doctor; the sole question was whether his failure to do so was deliberate and thereby occasioned the results referred to in s 1(1) of the Act of 1933. We are quite satisfied that the conviction on count 2 was justified both on the law and the facts . . .'. (*Per* Phillimore, LJ)

Comment There was another count on the indictment for manslaughter but this was allowed on appeal.

528 ***Somerset* v *Wade*** [1894] 1 QB 574

Wade was charged with permitting drunkenness under s 13 of the Licensing Act 1872 which provides that if any licensed person permits drunkenness, or any violence, quarrelsome or riotous conduct to take place on his premises or sells any intoxicating liquor to any drunken person, he commits an offence. A drunken woman was actually found on Wade's premises but it was accepted that Wade did not know that she was drunk. The charge having been dismissed the prosecutor appealed. The appeal of the prosecutor failed and Wade was not convicted.

> But the word 'suffers' is not distinguishable from 'permits', which is the word used in s 13, the section now before us. In a case where the defendant does not know that the person who was on his premises was in fact drunk, he cannot be said to permit drunkenness. In the present case the justices have found that the respondent did not know that the person was drunk and there was evidence to support that finding. (*Per* Mathew, J)

Comment (i) As regards the word 'malicious', it will be recalled that in *R* v *Cunningham* (1957), *mens rea* was required for an offence which had to be committed 'maliciously'.

(ii) In the *Somerset* case Mathew, J was prepared to say that the word 'suffers' was the same as 'permits', i.e. a word requiring *mens rea* in the accused.

(iii) The distinction between this case and *Cundy* appears to be that Wade did not serve or sell liquor to the woman while she was in a drunken state and did not know she was on the premises.

Vicarious liability in crime

529 ***Griffiths* v *Studebakers Ltd*** [1924] 1 KB 102

Studebakers were holders of a limited trade licence and were charged with having used on a public road a motor car carrying more than two persons in addition to the driver, which was an offence under the Road Vehicles (Trade Licences) Regulations 1922. At the time of the alleged offence, the car was being driven by a servant of the respondents. He was in the course of his employment because he was giving a trial run to

prospective purchasers of the car but, by carrying more than two passengers, he was infringing the express orders of his employers. The employers were convicted and appealed to the Divisional Court.

> It would be fantastic to suppose that a manufacturer, whether a limited company, a firm, or an individual, would, even if he could, always show cars to prospective purchasers himself; and it would defeat the scheme of this legislation if it were open to an employer, whether a company, or a firm, or an individual, to say that although the car was being used under the limited licence in contravention of the conditions upon which it was granted: 'My hand was not the hand that drove the car.' On these facts there ought to have been a conviction of the respondents and also the driver as aider and abettor. (*Per* Lord Hewart, CJ)

Thus, the conviction of Studebakers was affirmed by the Divisional Court.

Comment Note that liability was not affected by the fact that the employee was told not to do the act.

530 *James and Son Ltd* v *Smee* [1955] 1 QB 78

Under the Motor Vehicles (Construction and Use) Regulations in force at the time the alleged offence occurred, the braking system of a vehicle or trailer used on the road had to be in efficient working order, and further anyone who used or caused or permitted to be used on the road a motor vehicle or trailer where the braking system was not in efficient working order was liable to a fine. James and Son Ltd sent out in the charge of their employee a lorry and trailer the braking system of which was in efficient working order. However, during the course of his rounds the employee had to disconnect the braking system of the trailer and forgot to connect it up again. James and Son were convicted of 'permitting to be used' the trailer in contravention of the regulation then in force. However, their appeal was allowed by the Divisional Court.

> In other words, it is said that in committing the offence of the user in contravention of the regulations he at the same time made his master guilty of the offence of permitting such user. In our opinion this contention is highly artificial and divorced from reality. We prefer the view that before the company can be held guilty of permitting a user in contravention of the regulations it must be proved that some person for whose criminal acts the company is responsible permitted as opposed to committed the offence. There was no such evidence in the present case. (*Per* Parker, J)

531 *Vane* v *Yiannopoullos* [1965] AC 486

Section 22(1) of the Licensing Act 1961, which was relevant in this case provided, 'If – (*a*) the holder of a Justices' on-licence knowingly sells or supplies intoxicating liquor to persons to whom he is not permitted by the conditions of the licence to sell or supply it . . . he shall be guilty of an offence'. Y was the licensee of a restaurant and had been granted a Justices' on-licence subject to a condition that intoxicating liquor was to be sold only to those who ordered meals. He employed a waitress and he instructed her to serve drinks only to customers who ordered meals but on one occasion whilst Y was in another part of the restaurant the waitress did serve drinks to two youths who had not in fact ordered a meal. Y did not know of that sale. He was charged with knowingly selling intoxicating liquor on the premises to persons to whom he was not permitted to sell contrary to s 22(1)(a) of the Act. The magistrates dismissed the information and the prosecutor appealed eventually to the House of Lords. The appeal of the prosecutor was dismissed and there was therefore no conviction of Y.

> So far, however, as the present case is concerned, I feel no doubt that the decision of the Divisional Court was right. There was clearly no ['knowledge'] in the strict sense proved against the licensee: I agree also with the Lord Chief Justice that there was no sufficient evidence of such ['delegation'] on his part of his powers, duties and responsibilities to render him liable on that ground. I would therefore without hesitation dismiss the appeal. (*Per* Lord Evershed)

Comment Note that Y was on the premises when the drinks were served. Delegation was not, therefore, complete, as it must be.

532 *Ferguson* v *Weaving* [1951] 1 All ER 412

Section 4 of the Licensing Act 1921, which was relevant in this case, made it an offence for any person, except during permitted hours, to consume intoxicating liquor on any licensed premises. In a large public house of which W was the manager customers were found consuming liquor outside the permitted hours and were convicted of an offence under the section. The evidence did not show that W knew that the liquor was being consumed. It had in fact been supplied to customers by waiters employed by her who had neglected to collect the glasses in time. A charge against W of aiding and abetting the customers' offence was dismissed and the prosecutor appealed. The appeal was dismissed. 'There can be no doubt