CAYMAN ISLANDS LAW BULLETIN

NO.4

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Cayman Islands Government

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The Cayman Islands Law Bulletin is intended to provide an information and reporting service for attorneys and others who may need to be aware of developments in the law of the Cayman Islands.

The material entered in the Law Bulletin is not intended to be exhaustive or authoritative but should be regarded as an index and a record of material which may be of some use in legal work.

While reasonable care is taken in the preparation of material for publication in the Law Bulletin, neither the Cayman Islands Law School nor the Cayman Islands Government accepts responsibility in law for the accuracy of the contents of this issue, nor do the views expressed necessarily reflect the opinion of the Cayman Islands Government.

Citation

Cases appearing in this volume should be cited as 4 Law Bulletin with the year in which the action was commenced preceding and in round brackets. For example, A v B at page 7 is cited as (1989) 4 Law Bulletin 7.

Contributions

The Editors would like to express their thanks to Chris Vallely of Wolverhampton Polytechnic for her contribution to this edition.

An open invitation is extended for the submission of manuscripts on topics of interest to the legal community. If you would like more information please contact the Director of Legal Studies, Cayman Islands Law School, Tower Building, George Town 97999 Ext. 3540.

Edited by the Director of Legal Studies and Law Lecturers, Cayman Islands Law School.

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EDITORIAL NOTE

This is the fourth edition of the Cayman Islands Law Bulletin which will continue to be published three times a year - January, May and September.

The Law Bulletin is edited and published by the Cayman Islands Law School. The publication, which was approved by the Legal Advisory Council in October 1989, is intended to have two purposes.

First and foremost, to bridge a gap which exists in the law reporting system in use in the Cayman Islands. The need for a timely and accessible system of law reporting has long been recognised. The matter was put succinctly by Professor Peter Rowe, the first Director of Legal Studies, in a paper entitled "A Proposal for Reporting of Judgments of the Courts of the Cayman Islands" (December, 1983).

"The establishment of an efficient system of law reporting on the Islands would now appear to be imperative. Not only has the volume of criminal cases and commercial litigation increased, generating the need for an awareness of the actual decisions of the courts by legal practitioners but with the establishment of the Law School in 1982 the reporting of decisions would assist in the teaching of Cayman Law to students of the School".

The lack of law reporting was addressed with the publication in 1984 of the Cayman Islands Law Reports by Law Reports International under the editorship of Dr. Alan Milner M.A., LL.M., PH.D, Fellow of Trinity College, Oxford. That series now comprises three bound volumes (1980-83, 1984-85 and 1986-87).

Despite the presence of this excellent reporting series, it was felt that there was scope for an additional series of reports in the form of a Law Bulletin, produced locally and with a minimum of delay between the date of judgment and the report. Discussions were held with Dr. Milner who wholeheartedly endorsed the concept.

The current edition contains summaries of the majority of judgments of the Grand Court and Court of Appeal delivered in chambers and in open court during the period to October 1, 1990 to January 31, 1991. Certain judgments contained insufficient information to be usefully summarized and were therefore omitted. In chambers matters, an attempt has been made to protect the identity of the parties.

The case notes are presented as summaries. The purpose of the Law Bulletin is not to achieve a full reporting of the case but rather to provide sufficient information about the case to allow practitioners and students to determine whether the case is of use to them and allow them to locate the full text.

The second purpose of the Law Bulletin is to provide a forum in which judges, legal practitioners, lecturers and law students can express themselves on topics of interest to the legal community. In this regard, we are fortunate to have received an article co-authored by Chris Vallely of Wolverhampton Polytechnic of the United Kingdon.

Contributions for future editions would be welcomed on any topic.

We would like to thank the officers of the Judicial Department who compiled and submitted the judgments, thus enabling the summarization process to take place, and the Computer Services Department who provided assistance in the publication and binding process. We would also like to thank Attorney-at-Law Myrna Gregson for proofreading the text. Any remaining errors are the responsibility of the Editor.

Your comments and suggestions are most welcome.

Richard Finlay
Director of Legal Studies

CASE NOTES

SUMMARIES OF JUDGMENTS OF THE GRAND COURT AND COURT OF APPEAL

January 31st 1991 to May 31st 1991

CIVIL PROCEDURE

Adjournment (See Pleadings - Amendment)

Costs - Security for costs (See Companies - Action)

Fresh Evidence (See Evidence)

Interest - Application for award of interest prior to judgment

A v B

Grand Court (366/89)
Malone, CJ
January 16, 1991

Legislation:
S.62(2) of the Judicature Law
Rules of the Supreme Court (English) Order 33
Rule 23 of the Grand Court (Civil Procedure) Rules

Mr Alberga QC with Mr Turner for the plaintiff
Mr La Montagne QC with Mr Bannon for the defendant

The chronology of events leading to the present application was as follows:

1. October 20, 1989 - Filing of a writ specially indorsed with a claim for payment of liquidated sum and interest thereon as the court deems appropriate from June 1, 1984 until payment in terms of s62(2) of the Judicature Law.

2. October 23, 1989 - Writ served on the defendant.

3. November 7, 1989 - Appearance entered for the defendant.

4. December 15, 1989 - Plaintiff applied under Rule 23 of the Grand Court (Civil Procedure) Rules for leave to enter judgment for the amount specially indorsed on the ground that there was no defence to the action.

5. February 1, 190 - Defence filed following withdrawal of application above by consent. Sole defence was that the action was barred under the Limitation of Actions Law.

6. February 2, 1990 - Plaintiff filed reply to defence.

7. February 16, 1990 - By consent of the parties issue was joined and set down for trial and determination as a question of law.

8. April 4, 1990 - Judgment for the defendant.

9. December 11, 1990 - Judgment overruled by the Court of Appeal. The Plaintiff in the present action applies for an order to enter final judgment for the sum claimed with compound interest from June 1, 1984 until payment and costs: and that costs be awarded to the Plaintiff.

Held - (dismissing the application):

(1) The plaintiff's entitlement to interest prior to judgment lies in contract but the claim to interest is not pleaded in terms of the contract. The writ is indorsed with a claim to interest in terms of s.62(2) of the Judicature Law. Accordingly, the Plaintiff must satisfy the Court that:

(a) the indebted party has no serious defence to the action: or
(b) is guilty of using delaying tactics in order to postpone payment.

The plaintiff failed so to satisfy the court.

(2) Although the court has a discretion under its equitable

jurisdiction to award interest, that jurisdiction does not apply in this case as the defendant had not occupied a fiduciary position.

Reporter's note:-

The defendant was ordered to pay the plaintiff the sum due and post
judgment interest as provided by s.62(1) of the Judicature Law.

Prior to the perfection of the order, the plaintiff applied on March 18, 1991 for the order to be amended so that when judgment was entered it would ensure a right to apply for pre-judgment interest. The plaintiff relied upon Millinsted v Grosvenor House (Park Lane) Ltd [1937] 1 KB 717 in support of the application: "It is within the power of a judge at anytime before judgement is entered and perfected to alter its terms."

The application was dismissed because there had been no suggestion that the ruling in the cause made on January 16, 1991 was in error.

BB

Interpleader - Plaintiff's claim for money held by the defendant - Additional claim by personal representatives who are not a party to the action - Order for trial to resemble interpleader order.

Grand Court
Harre, J
April 19th, 1991

Mr A Jones for the plaintiff
Mr A Turner for the defendant

The plaintiff claimed to have established a fixed deposit account with the defendants and on demand for payment and accumulated interest, the defendant failed to pay. The monies are also claimed by the personal representatives of an estate seeking leave to intervene in the proceedings.

Held:

Order for trial of the issue in terms resembling an order for an interpleader summons.

RO

Pleadings - Amendment of statement of claim - Application for an adjournment - Amendment based on existing evidence

Grand Court (165/86)
Malone, CJ
March 11th, 1991

Mr Collins and Mr Grant for the plaintiff
Mr Leo-Rhynie and Mr Ritchie for the defendant

Towards the end of trial, the plaintiff applied to amend his statement of claim. The amendment sought was that $7,402.65 per week should be substituted for $575.00 per week claimed for loss of future earnings.

Counsel for the defendant objected to the amendment and asked for an adjournment if the amendment was granted.

Held: (allowing the application)

(1) The proposed amendment does not confront the defendant with a new case, as it does no more than correct a variance between the statement of claim and the evidence given at the trial. The facts on which the amendment is based are all facts that were open to cross examination by the defendant. The amendment was therefore allowed.

(2) There is no new evidence and no new ground of claim for counsel to consider. The rise in the amount of the claim cannot alter the underlying facts of the plaintiff's circumstances prior to and after the accident. The application for an adjournment is refused.

RO

Pleading - Striking out - No Cause of Action - Locus Standi (See Companies - Action - Derivative Action)

COMPANIES

Action - Derivative Action - Exception to the rule in Foss v Harbottle
- Locus Standi

Schultz v Reynolds and Newport Ltd.

Grand Court (68/91)
Malone, CJ
May 17, 1991

Cases referred to:
Foss v Harbottle (1843) 2 Hare 461
Burland v Earle [1902] AC 33
Daniels v Daniels [1978] 2 All ER 89
Baggshaw v Eastern Union Railway 68 E.R. 46
Kuwait Asia Bank v National Mutual Life 1990 3 All ER

Legislation:
s37 Companies Law

Mr R Alberga QC and Mr Clifford for the defendant/applicant
Mr P Lamontagne and Mr Bannon for the plaintiff/respondent

The plaintiff and D are beneficial owners of all the shares of the 2nd defendant, the shares being registered to CMS Co. and held by CMS Co. as nominee under an agreement which, inter alia, prevents the plaintiff from becoming a registered member or exercising voting power in relation to the shares. It is alleged that CMS Co. is controlled by A BANK.

The 1st defendant is employed by A BANK and is president of the board of directors of the second defendant. The other directors of the second defendant are also employees of A BANK. The plaintiff alleges that money due to her by D was on the advise of the 1st defendant deposited in an account operated by the second defendant with A BANK. Those funds were then transferred to D at his request.

The plaintiff alleges this constitutes a breach of fiduciary duty by the 1st defendant to the second defendant and constituted a fraud on both the plaintiff and the second defendant. The 1st defendant applied to strike out the writ of summons and the statement of claim as disclosing no cause of action.

Held: (application allowed)

(1) The striking out remedy can only be granted when the action is one that cannot succeed or is in some way an abuse of the process of the court or is unarguable.

(2) The present action is a derivative action as the plaintiff is seeking to enforce a right of action vested in or derived from the company (the second defendant). The action can only succeed if the plaintiff as beneficial owner has locus standi to bring the action and it falls within an exception to the rule in Foss v Harbottle.

(3) While the plaintiff is not a registered member or otherwise a member as defined by s37 Companies Law, Baggshaw v Eastern Union Railway may provide that registration is not an essential requirement to the bringing of an action by a beneficial owner of shares. Accordingly, it is not plain and obvious that she lacks standing.

(4) If an exception exists it is because the acts constitute a fraud against the minority and the wrong doers are in control of the company (Foss v Harbottle).

(5) The crucial test of control is whether there is legal control of the vote of the directors or the shareholders. The first defendant clearly does not have such control of the board of directors. Further A BANK does not legally control either the vote of the board of the 2nd defendant or the vote of the registered shareholder of the 2nd defendant. Kuwait Asia

Bank v National Mutual Life affirms that in performance of their duties and directors are bound to ignore the interests and wishes of their employees and that a shareholder does not, by reason of his position as shareholder, owe a duty to anyone.

(6) Further, there is no evidence of fraud since there is no evidence that the first defendant has derived any benefit or advantage from the wrongdoing (Daniels v Daniels).

RF

Action - Security for costs

A. Ltd. v B and C

Grand Court (318/90)
Malone, CJ
January 25, 1991

Cases referred to:
Trident International Freight Services Ltd. v Manchester Ship Canal Co. and Another 1990 BCL 263
Pearson and another v Nayden [1977] 3 All E.R. 531
ABC Ltd. v D (1990) 3 Law Bulletin 11

Legislation:
s.71 Companies Law

Mr Alberga for the defendant/applicant

Mr Grant for the plaintiff/respondent

The defendant applied under s71 of the Companies Law for security of costs against the plaintiff company which was in financial difficulty.

Held (application allowed):

(1) In considering whether to exercise its discretion under s71, the court should not go into the merits of the case unless it can be clearly demonstrated one way or the other that there is a high probability of success or failure. (Trident International Freight Services Ltd. v Manchester Ship Canal and another).

(2) In England, there have been two approaches to such applications. The weight of authority favours the view that there is no burden of proof one way or the other and the discretion is to be exercised having regard to all circumstances of the case (Pearson and another Mayden and another). The other view is that the jurisdiction will be exercised unless there are special circumstances which justify refusing the order. (Sir Lindsay Parkinson & Co. Ltd. v Triplan per Cairns). The former approach was adopted by the Grand Court in ABC Ltd v D and in the interest of uniformity in Cayman and between Cayman and England and Wales is adopted here.

(3) It is not appropriate in this application to go into the merits of the case as it has not been demonstrated one way or the other that there is a high probability of success or failure.

(4) While the fact that the plaintiff's want of means may have been brought about by the defendants conduct is relevant, the unexplained lapse of five years between the conduct complained of and the commencement of the action calls into question the genuineness of the action.

RF

CRIMINAL LAW

Drugs - Bearing of the quantity of a drug upon a conviction.

Regina v Kilcullen.

Grand Court (52/90)
Malone, CJ
February 18 1991

Cases referred to:
Regina v Bovesen [1982] 2 All ER 161

Legislation:
s. 158 Criminal Procedure Code Law

Mr N Hill QC for the appellant
Mr I Archie for the Crown

The appellant was convicted, following a plea of guilty, to possession of ganja. Traces of ganja had been found on the floor of a private aircraft flown by the accused.

The substance of the appeal was that:
a. the presence of the ganja seeds on the aircraft could have been the result of their having been dropped by a mechanic who had been working on the plane.
b. the reason for his entering a plea of guilty was that he had been advised to do so by counsel for the reasons: (a) that if he did not do so bail would be unlikely to be granted; and (b) that in the light of the quantity of ganja discovered it was unlikely that a custodial sentence would be imposed.
c. the quantity of ganja discovered was so small as not to justify a conviction at all.

Held (dismissing the appeal):

(1) The first contention, not having been raised before the learned magistrate, was nothing more than an "after thought contrived to support the appeal". Neither was the appellant to be believed when he claimed only to have pleaded guilty on the advice of counsel, as an educated man he would have known that such a plea would jeopardize his livelihood.

(2) The quantity of a drug could be of importance in indicating whether the accused had the necessary mens rea for possession: as the appellant had immediately recognised the seeds as ganja this element of the offence was not in doubt however. Provided the seeds were "visible, tangible & measurable" they were of a sufficient quantity to justify the conviction (R v Bovesen applied).

MD

Drugs - Presumption of Possession

Regina v Johnson

Grand Court (SCA 113/90)
Harre, J
March 1, 1991

Cases referred to:
Regina v. Douglas Gibson (SCA 30/88)
Seymour and Green v R (SCA92-3/88)
Regina v Bush (1986) CILR 62

Legislation:
s7 (1) Misuse of Drugs Law

Mr J Furniss for the appellant
Mr I Archie for the Crown

Appeal against conviction for possession of cocaine and ganja upon the ground that the court below erred in its application of the presumption contained in s.7 (1)(b) of the Misuse of Drugs Law which reads thus: 'Where it is proved beyond reasonable doubt that a person had in his possession or custody or under his control anything containing a controlled drug, it shall be presumed until the contrary is proved, that such person was in possession of such drug'.

On the facts quantities of both cocaine and ganja were found in the appellant's house. It was submitted therefore that the learned magistrate should not have applied the presumption on the basis that the house was the "thing" containing the controlled drug, but that he should have considered whether the appellant had possession, custody or control of the particular chattel on, or in, which any quantity of a controlled drug was found.

Held (dismissing the appeal):

(1) The evidence showed that some at least of the drugs were left openly in the house and not hidden in any "thing" within the house. On the totality of the evidence, the learned magistrate was right in holding that the presumption arose by reason of the presence of the controlled drugs within the appellant's house.

(2) Even in the absence of any statutory presumption, there was ample evidence on which the magistrate could have inferred the appelant's possession and guilty knowledge.

BB

Parties - Liability of secondary party

Regina v Beaver-Smith.

Grand Court (26/90)
Malone, CJ
February 25, 1991

Legislation:
s. 76 Penal Code.

Mr Sheehan for the Crown

An altercation had occurred outside the victim's house concerning the payment of a debt. The accused, together with X, had arrived at the victim's house. The evidence indicated that X had produced a weapon, either a gun or a knife, with the intention of frightening the victim. Some evidence (although this was disputed by other witnesses) was adduced alleging that the accused had passed the weapon to X, thereby making him an accomplice to the offence of possessing a firearm with intent to commit an indictable offence contrary to s76 Penal Code.

Held:

The evidence of the accused's participation in the offence was too conflicting; the Crown had not discharged their burden of proving beyond reasonable doubt that the accused had acted in concert with X. Accordingly the accused was not guilty.

MD

Words and Phrases - Penal Code Section 147(c) - Meaning to be ascribed to the terms "enclosed area" & "upon a dwelling house".

Regina v Taitt

Grand Court (178/90)
Malone, CJ
April 26, 1991

Cases referred to:
Knott v Blackburn & Another [1944] 1 All ER 11.
Regina v Gray (1965) 8 WIR.

Legislation:
147(c) Penal Code

Mr Murray for the appellant
Mr Sheehan for the respondent

The appellant was charged under s147(c) Penal Code with the offence of being "found by night without any lawful excuse in an enclosed area" after he had been discovered within the grounds of an apartment complex. He appealed against his conviction on the basis that the magistrate had erred in law in his ruling as to what amounted to an enclosed area.

Held (allowing the appeal):

(1) An "enclosed area" within s147(c) must be one enclosed by a man-made structure. The compound within which the accused had been found was not an "enclosed area" within the meaning of s147(c). Alternatively, if the honorable Chief Justice was wrong in this conclusion, and the compound was properly to be described as an "enclosed area", it still fell outside s147(c) because it had not been wholly enclosed by the work of man.

(2) Furthermore, by peering into an apartment, it could not be said that the appellant had brought himself within that part of s147 (c) which made it an offence to be found "upon a dwelling house".

MD

CRIMINAL LAW (SENTENCE)

COURT OF APPEAL JUDGEMENTS

3382/83/88	16/90	1.Conspiracy to Commit robbery 2. Robbery 3.Possession of firearm with intent	5 years Imprisonment 11 Years Imprisonment 3 Years Imprisonment(All sentences to run concurrently).
248/90/748/90	26/90	1. Theft 2. Assault Causing A.B.H.	18 months Imprisonment 6 months Imrpisonment (Sentence to un concurrently)
2497/90/2498/90 2594/90	1/9	1. Possession of Unlicensed firearm 2. Ditto 3. Ditto	6 months Imprisonment 6 months Imprisonment 9 months Imprisonment (Sentence 1 and 3 to rum concurrently
1009/90	33/90	Possession of Cocaine with intent to supply 1 Theft 2.Theft	8 Years Imprisonment & C.I.51.000 or 30 days Imprisonment in default 2 years Imprisonment 2 years Imprisonment (sentence to run concurrently)
553/90:628/90	2/91	1 Possession of Ganja with intent to supply	8 months Imprisonment
1696-99/90	40/90	2. Poss of ganja 3.Consumptionof ganja 4.Consumption of cociane	File $600.00 fine or 2 months Imprisonment in default 9 months Imprisonment (Sentence to run Consecutively)
4682-83/89	36/90	1.Attempted robbery 2.Robbery	3 years Imprisonment 2 years Imprisonment (sentence to run Concurrently) Restitution Order or stolen property

946-47/90	39/90	1 Poss of Cocaine with intent to supply	2 years Imprisonment (6 months suspended)
		2.Consumption of cocaine	6 months Impriosnment
		Poss of Cocaine with intent to supply	
946/90	27/90	1.Importation of Cocaine	3 years Imprisonemnt
220-21/90	34/90	2. Poss of Cocaine with Intent to supply	6 years Imprisonment - $100 fine or 7 days Imp. in default 2 years Imprisonment + 100.00 Fine or 7 days Imprisonment in default.

MD

Co-operative accused - Principles to be applied.

Regina v McNulty, Carmona & Fox

Grand Court (167/90)
Harre, J
March 13, 1991

Cases referred to:
Regina v Newton (1982) 74 Cr App R 388
Regina v Davies & Gorman (1978) 68 Cr App R

Mr G Hampson, Mr T Shea & Mr Tavares-Finson for the appellants
Mr I Archie for the Crown

The three appellants had sailed from Panama stopping at secluded islands off the coast of Panama for the purpose of loading large quantities of cocaine onto their vessel. The appellants broke their journey to Mexico by stopping off at Grand Cayman. Upon searching the vessel immigration officials discovered some 348 kilos of cocaine (the largest discovery of prohibited drugs in the Islands). The appellants were charged with possession of cocaine with intent to supply. The appellants pleaded guilty & were each sentenced to eleven years imprisonment. McNulty, Carmona & Fox were in addition respectively fined the sums of 15,000, 10,000 & 20,000 Cayman Dollars.

The appeal was against these sentences.

On behalf of Fox it was argued that she had no knowledge of the intended purpose of the voyage until the drugs were loaded after the trip had been commenced; accordingly it was deposed that she had no ability to extricate herself from the unlawful enterprise.

In McNulty's favour, (the leader of the three), was the fact that he had been wholly co-operative in the investigation from the first and had stated his willingness to be a Crown witness.

Held (allowing the appeal in part):

(1) The terms of eleven years of imprisonment placed upon Fox and Carmona would not be disturbed. In response to Fox's plea it was held that where an appellant attempts to adduce an extraneous fact in mitigation which does not contradict the prosecution's case, the court is not bound to accept its veracity if it relates to matters beyond the knowledge of the prosecution or the court. Fox's claim that she originally knew nothing of the purpose of the voyage was accordingly discounted. Her claim was also to be rejected for the separate reason that it lacked plausibility.

(2) The fine placed upon Fox, however, had been excessive in relation to that imposed upon the other appellants. It had seemingly been based on the assumption that she had greater means as she had not been in receipt of legal aid. This did not necessarily follow: accordingly her fine was reduced to 10,000 CI dollars.

(3) It was in the public interest that offenders of serious crimes, such as McNulty, should be clearly rewarded for their co-operation. This would signal to other offenders the advantages of being forthcoming. (R v Davies & Gorman applied.) Accordingly, McNulty's sentence of imprisonment was to be reduced from eleven to nine years & his fine to 10,000 CI dollars.

MD

Motor Vehicles - Disqualification - Meaning of special reasons justifying lesser period of disqualification.

Regina v Wilson

Grand Court (SCA 190/90)
Harre, J.
February 27, 1991

Cases referred to:
Whittall v Kirby [1946] 2 All ER at p555
Knowler v Pennison [1947] KB 488, 494

Legislation:
s.3(2) of the Motor Insurance (Third Party) Risks Law 1964

Appellant in person
Mr I Archie for the Crown

Appeal against the imposition of a 12 month period of

disqualification upon conviction of permitting a person to drive without insurance contrary to s.3(2) of the Motor Vehicle Insurance (Third Party) Risks Law 1964. The learned magistrate had found no special reasons for him to do otherwise.

Held (appeal dismissed):

(1) The nature of "special reasons" within the exception is one which constitute the offence i.e. a mitigating or extenuating circumstance, not amounting in law to a defence to the charge, yet directly connected with the commission of the offence, and one which the court ought properly to take into consideration when imposing punishment.

(2) An honest but groundless belief that a policy covered a particular use cannot amount to a special reason, but such belief held on reasonable grounds can do so. A defendant must show that he was in some way misled.

(3) In the present case the appellant was well aware that her friend's driving licence was not fully in order for the Cayman Islands. It could not therefore, have been a case of her having been wrongly advised.

BB

Suspended sentence -
Consideration of grounds of appeal - Practice of combining immediate & suspended sentences of imprisonment - When appropriate.

Regina v Bush

Grand Court (5/91)
Harre, J
February 20, 1991

Cases referred to:
Regina v Arvelio Aguiar Swaby (SCA 80/90).
Regina v Scott & Rankine (SCA 26 & 27/90).
Regina v Patricia Watson (SCA 30/90).
Regina v Nelson Moore (SCA 65/90).
Regina v Neil Prendergast (Ind 24/90).
Regina v Maria Silburn (Ind 3/90).

Mr K Collins for the appellant

T Escalante for the Crown

The appellant was convicted of various counts of theft, deception & forgery. Most of the offences related to money obtained from her employer after she had, on several occasions, forged the authorised signatory and cashed her employer's cheques for her own benefit.

The appellant was sentenced to a ten month term of imprisonment plus two sentences suspended over two years. She appealed, claiming that in view of all the circumstances the sentence imposed was excessive.

Held (dismissing the appeal):

(1) The following issues relied upon in the notice of appeal were not relevant:-

(a) The appellant's age - as the appellant was 29 years of age and could not be classified as "immature" this was not a factor which had a bearing on her sentence.

(b) The appellant's declared willingness to repay the sums obtained - this carried little weight in the light of the evidence which showed that the appellant had only paid 400 CI dollars into court of the 3000 taken.

(c) That the sentence imposed would cause great damage to the appellant's future employment prospects - as the appellant was not employed in the financial sector the conviction would not cause irretrievable harm to her future employment prospects.

(2) The practice of combining immediate & suspended sentences was wrong in principle. (R v Swaby et al applied). On the particular facts of this case however the practice was justified as it would operate as a deterrent to the accused from succumbing to similar dishonest activities in the future.

MD

Words and Phrases - Meaning of "special reasons", s.3(2) Motor Vehicle (Third Party) Risks Law, 1964 (See Criminal Law - Sentence - Motor Vehicles - Disqualification)

Young adult offender - Partly suspended sentence

Walton v R

Grand Court (158/90)
Schofield. J
May 9th 1991

Mr Hampson for the appellant
Mr Archie for the Crown

The appellant has one previous conviction for assault in 1989. For that offence he was sentenced to pay a small fine. He was eighteen years old when he committed this offence and he is now nineteen. He was found guilty of a very serious offence (possession of cocaine with intention to supply) and even though a young man a custodial sentence was appropriate. However, in the case of such a young man, particularly one who has no similar previous convictions and has not been imprisoned before, it is usually inappropriate to pass a lengthy immediate custodial sentence. This was a proper case for a partly suspended sentence.

Sentence of three years imprisonment imposed with eighteen months suspended.

PH

DAMAGES

Personal Injuries
(See Tort)

EMPLOYMENT

Employment - Entitlement to severance pay -

Labour Law
(See Statutes - Retrospection)

EVIDENCE

Conflict of evidence - Reliability of witnesses.
(See Criminal Law - Participation)

Conflict of evidence between prosecution and defence - Version of the defence not amounting to a denial of the charge - Procedure to be followed by the court (See Criminal Law - Sentence - Co-operative accused).

Credibility of the accused's evidence - Failure to raise issues before the magistrate (See Criminal Law - Drugs)

Fresh Evidence - Application to bring evidence in rebuttal of defendant's witness - Defendant's reliance on witness to prove different things at trial and in third party proceedings - Plaintiff taken by surprise.

X v Y

Grand Court (165/86)
Malone, CJ
March 11th, 1991

Legislation:
Evidence Law

Mr Collins and Mr Grant for the plaintiff

Mr Leo-Rhynie and Mr Ritchie for the defendant

The defendant pleaded that the plaintiff was a trespasser. This plea was supported by one of the defendant's witnesses. At the close of the defendant's case, the plaintiff's counsel applied to call evidence in rebuttal of the witness and in support of the plea.

The defendant relied on the witness in third party proceedings to prove that the plaintiff was an invitee.

Held (allowing the application):

(1). The judge has a discretion to allow a plaintiff to adduce rebutting evidence:
(a) in answer to evidence of the defendant in support of an issue; and
(b) when the plaintiff has been taken by surprise.

(2) It was reasonable to suppose that the plaintiff had been taken by surprise.

MD

FAMILY LAW

Children - Joint custody - Care and control to mother

M v M

Grand Court
Malone, CJ
January 9th, 1991

Mr Bannon for the petitioner
Ms Bodden for the respondent

The children who were boys aged five and a half and four at the time of the application had been living with both parents on and off since their divorce. Both parents had demonstrated a fitness to care for the boys and had a genuine attachment to them. The bitterness caused by the breakdown of the marriage was over and the court was reasonably confident that the parties possessed the capacity to act together amicably in planning the future of the children. Therefore joint custody was given to both parents.

Having regard to the age of the children and the fact that since the separation they have spent most of their time with the mother, care and control was awarded to the mother.

PH

Divorce - Adultery - Effect of living together - Proof of fact of adultery - Cross-petition - Abuse of process

Grand Court (D 122/'90)
Harre, J
March 28th, 1991

Ms E Maierhofer for the petitioner
Ms S Brooks for the respondent

The fact that the parties have lived together for six months after the respondent became aware of the alleged adultery was no bar to her cross-petition on that ground: it was no more than a factor against which the credibility of her claim that she finds it intollerable to live with the petitioner can be tested.

Where a petition is grounded on adultery, it is not necessary to prove the adultery in precise terms of time and place. In nearly every case where there is no confession the fact is inferred from circumstances which lead to it by fair inference as a necessary conclusion. The conjuction of evidence of inclination and opportunity affords prima facie evidence of the fact of adultery.

Where there is evidence based on the petition that a marriage has broken down irretrievably, it is not an abuse of the process of the court for the respondent to file a cross-petition even where this would cause substantial delay. (In this case the cross-petition would probably have to be served on a third party in outside the jurisdiction). The respondent is entitled to raise the issues in the cross-petition at the hearing. If the issues of adultery and infidelity which the cross-petition raises were allowed to go by default at this stage, then the respondent could be estopped from raising them at the hearing on the financial settlement.

PH

INJUNCTION

Injunction - Mareva Injunction

Grand Court (80/91)
Harre, J
March 11, 1991

Cases Referred to:
PCW Underwriting Agencies v Dixon [1983] 2 All ER 158
Ninemia Maritime Corp. v TraneSchaffahrts [1984] 1 All ER 398

Mr. Bannon for the plaintiff
Mr. Clifford for the defendant

The plaintiff applied for an injunction against the defendant company which carries an insurance business providing specilized insurance cover for clients outside the Cayman Islands.

Held (application dismissed):

(1) The plaintiff must show a good arguable case in order to cross the threshold of the courts jurisdiction. In addition, the evidence as a whole must be considered in deciding whether it is just and convenient to continue injunctive relief which itself required that the court conclude that the refusal of the injunction would involve a real risk that a judgment in favour of the plaintiff would remain unsatisfied. The conduct of the plaintiff is material as are the rights of third parties who may be affected by the injunction (PCW Underwriting Agencies v Dixon, Ninemia Maritime Corp.)

(2) The fact that the defendant is an insurance company raises special considerations. First, its business in Cayman is regulated by law. In addition, the rights of third parties are particularly significant. The injunction would impinge on the defendant's ability to meet claims made by clients and may have a multiplier effect on its ability to do business as it may effect the confidence of its clients.

(3) Taking these factors into account together with the inability of the plaintiff to give security in support of its undertaking in damages, the application must fail.

RF

STATUTE

Statutes - Retrospection - Labour Law

Thompson v Powery & Forbes

Grand Court (159/90)
(Appeal from Appeals Tribunal of the Labour Board)
Harre,J
February 15, 1991

Cases Referred to:
Yew Bon Tew v Ken Derann Bas Mara [1983] AC 558
Regina v St. Marv. Whitechapel (1848) 12 QB 120
Alexander v Mercouris [1979] 3 All ER 305
Master Ladies Tailors Organisation v Minister of Labour
[1950] 2 All ER 525

Legislation:
s.35 and 36 Labour Law

Mr D Murray for the appellant
Ms Dilbert as amicus curiae

The responents were employed by the appellant for periods of nine and two years respectively. Both were laid off in October 1988 and told they would be recalled in January 1989. Neither were recalled nor received payment in lieu of notice nor severance pay.

The Director of Labour concluded Powery was entitled to nine weeks and Forbes to two weeks severance pay. This was upheld by the Appeals Tribunal.

The question for the court on appeal on a point of Law under s71 was whether the provisions of the Labour Law had retroactive validity to the extent that periods of service pre-dating the law could be considered in calculating an award of severance pay under the Law. The appellant contended that only periods of employment completed after the Labour Law come into force could be considered in determining entitlement to severance pay.

Held (appeal dismissed):

(1) There is at common law the prima facie rule of construction that a statute should not be interpreted retrospectively so as to impair an existing right or obligation unless that result is unavoidable on the language used (Yew Bon Tew v Kenderaan Bas Mara).

(2) The fact that a prospective benefit is to be measured by antecedent facts does not neessarily make the provision for that benefit retrospective (Master Ladies Tailors Organization v Minister of Labour, R v St. Marv White Chapel, Alexander v Mercouris).

(3) In order for a statute to be retrospective, it is not enough that the circumstances on which its operation depend should have existed before it come into force. It must take away some vested right or impose a penalty for past acts which were not penalized when they were committed.

(4) The amendment to s.35 by the 1989 Labour (Amendment) law which expressly provided regard should be made to periods of employment predating the coming into force of the law merely expressed in more explicit terms what the law already was.

RF

TORT

Duty of care - Breach of duty of care - Contributory negligence - Breach of statutory duty

Rankine v Caribbean Utilities Co. Ltd.

Grand Court (1965/86)
Malone, CJ
May 14th. 1991

Cases referred to:
Jones v. Livox Quarries Ltd. [1952] 2 Q.B. 608

Legislation:
Electricity Law
National Electricity Safety Code.

Mr. Enos Grant instructed by Mr. Keith Collins for the plaintiff
Mr. Leo-Rhynie instructed by Mr. Graham Richie for the defendants

The defendant has by contract been granted the exclusive right under the Electricity Law to supply electricity to the public of Grand Cayman. While using an aluminum pipe on to pick breadfruit in July 1984 the plaintiff received an electric shock by reason of the pipe coming in contact with the defendant's live high tension electric wire and was severely injured. He lost his right leg from below the right knee, his right arm from below the right elbow and his left index finger. His left leg is permanently twisted and he has undergone a series of operations, on his limbs and stomach.

The plaintiff claimed that the incident was caused by the defendant's breach of duty of care under the Electricity Law and the regulations made thereunder and that the defendant was in breach of statutory duty.

The statutory duties relied on by the plaintiff were:

(i) a duty to employ at least one mains engineer (Section 11 Electricity Law).

(ii) a duty to ensure that electricity energy is not supplied to an existing installation and that the supply of such energy is not continued to such an installation unless the installation is free from electrical hazard. (Regulation 5 National Electrical safety Code).

Held:

(1) The defendants are under a duty or care to guard against the risk of injury resulting from direct or indirect contract with the wires.

(2) The foreseeability test is whether a person legitimately on the land might climb the tree to harvest its fruit. The plaintiff was such a foreseeable person.

(3) The failure to expose the wires to the sight of an individual standing beneath the tree constituted a breach of the duty of care. The failure to prevent the concealment of the wires constitutes the causal link between the loss sustained by the plaintiff and the breach by the defendant of the duty of care.

(4) A person is guilty of contributory negligence if he ought reasonably to have foreseen that if he did not act as a reasonably prudent man he might hurt himself: and in his reckonings he must take into account others being careless. per Lord Denning in Jones v Livox Quarries Ltd. [1952] 2 Q.B. 608 at p.615. The plaintiff had been so careless as:-

(a) He is an adult electrician.

(b) He was aware that utility poles ran along Edward Avenue and that they carried a high voltage wire.

(c) He had seen the utility poles and the greater probability was that he had seen the wires.

(d) He knew the aluminium pole was an excellent conductor of electricity.

(e) He must have known that the breadfruit tree was close to the defendant's wires.

(f) He was under no compulsion to climb the breadfruit tree and made the decision of his own free will.

(g) He climbed the tree without seeing the precise location of the wires although he was aware that they were close.

(h) He was electrocuted when using the pole to catch breadfruit that were over his head. The pole having hooked on to the high tension wire.

(5) The fact that the plaintiff did not look out for the wires does not relieve the defendant altogether of its negligence as in allowing the wires to be concealed it should have foreseen that the plaintiff might be careless. The defendant and the plaintiff are respectively 25% and 75% responsible.

(6) The defendant was not under a duty to the plaintiff to keep the breadfruit properly trimmed. It was at fault in not exercising the powers it has to enter premises and trim trees. Such a fault is not a breach of statutory duty and the plaintiff cannot succeed on the claim of breach of statutory duty.

(7) The plaintiff is entitled by way of special damage to $30,230.66 for his loss of earnings from the date of accident to date of judgment and by way of general damages under the head of future loss of income to $17,696.00.

(8) The plaintiff is awarded $8,750.00 for pain and suffering and loss of amenity.

(9) The plaintiff is entitled to recover $2,220.83 special damages as his expenditure on the helper from the date of accident to date of judgment and as general damages under the head of future household help $1,300.00.

(10) The plaintiff is entitled to $25,042.32 for the remaining heads of special damage.

RO

ARTICLES AND CASE COMMENTS

'NOT KNOWING WHAT YOU'RE DOING' IN THE ENGLISH CRIMINAL COURTS

by Chris Vallely

Students coming to criminal law for the first time learn that a crime is made up of elements described either as actus reus or mens rea, and that it is the duty of the prosecutor to prove all elements beyond all reasonable doubt; it is not up to the accused to excuse himself (Woolmington[1]). The accused is innocent until proved guilty, and may remain silent if he so wishes. Once the case is prima facie established against him, however, he may wish to raise a defence. This may be of the variety which accepts that the elements of the crime are proved, but which claims that there is some excuse or justification. Self-defence, for instance, accepts that the defendant (D) did commit the actus reus, with the required mens rea, but that the circumstances were such that the law permitted him to act that way. This defence acts as a complete justification (D must be acquitted). Another defence which is based upon acceptance that D did have the necessary mens rea when he did the act, but has some excuse for it, is provocation, which applies only to a charge of murder[2]. In this case, a successful plea will not result in D's acquittal, but rather in his conviction for manslaughter, the defence operating in mitigation, rather than justification.

Sometimes, however, what the accused wants to say is that he did not have the necessary mental state, or that the requirement that his acts be voluntary in order to constitute the actus reus is not satisfied. 'I didn't know what I was doing at the time' should operate as a challenge to the prosecutor to prove the elements of the crime. The law, however, has not always taken the view that such a plea is a denial of mens rea or actus reus and the 'not knowing' may result in the plea being treated as a matter of defence, putting the burden of establishing it on the accused.

The arbitrary and sometimes unworkable division of the elements of a crime into actus reus and mens rea, with defences subsequent to proof of those, is highlighted by the defendant's argument that he did not know what he was doing at the time of the alleged crime. Is this a challenge to the prosecution to prove mens rea (and actus reus, since acts must be willed or voluntary) or is D raising a defence? Theoretically, the burden lies on the prosecution to prove that D had whatever mens rea is required for guilt. Offences carry different levels of mens rea: the most serious crimes require intention or recklessness, some are satisfied by some form of negligence. There are also offences of strict liability, which carry no mens rea, and depend solely on proof of actus reus. If a person is charged with murder and argues that he did not intend to kill or do grievous bodily harm, the prosecution must bring evidence to convince the court that he did. If the facts disclose that the defendant did indeed do the act which resulted in death (D loaded the gun, pointed it at the victim and pulled the trigger; V dropped dead at his feet), one may in the right circumstances reach a tentative conclusion that D intended at least to do grievous bodily harm. If D then claims to have been unaware of what he was doing, and advances some reason (intoxication through drink or drugs, hypo/hyperglycaemia arising from diabetes, somnambulism, some abnormal mental state), then the decision as to whether the prosecution has proved his intention lies with the jury. Do they believe D's story, or at least do they have a reasonable doubt that it might be true ? In either case, must he be acquitted of murder, since that requires proof of intention ? Can he be found guilty of any crime, if it be accepted that he did not know what he was doing at the time ?

Insanity and Automatism: the effect on mens rea

The courts perceive a distinction between insanity and non-insane automatism. In both cases, D argues that he did not know what he was

doing. In some circumstances, this may be treated as an insanity plea, and in others it may not. Where it is insanity, the result is incarceration in a mental hospital for an undefined period of time, release depending on the doctors' view as to the success of treatment (though the Home Secretary has to give permission for release). Where the case is successfully argued for non-insane automatism, D gets a complete acquittal, on the ground that if the mens rea cannot be proved, D cannot be found guilty. The importance of the distinction between the two is therefore critical, and was clearly illustrated by two Assize Court decisions, in both of which the accused sought only to rely on automatism. In Charlson,[3] a loving father with a cerebral tumour hit his young son on the head with a hammer and threw him out of the window. He was charged under ss 18 & 20 Offences Against the Person Act 1861 (causing grievous bodily harm with intent, and unlawful wounding). Medical evidence showed that the tumour could cause motiveless outbursts of impulsive violence over which D would have no control. The trial judge (Barry J) directed that "if he did not know what he was doing, if his actions were purely automatic and his mind had no control over the movement of his limbs, if he was in the same position as a person in an epileptic fit and no responsibility rests on him at all, then the proper verdict is not guilty." In Kemp,[4] D was also charged with causing gbh to his wife by striking her with a hammer. He also pleaded that he did not know what he was doing at the time, and medical evidence showed that this could have been brought on by his condition of arteriosclerosis (hardening of the arteries, so that blood does not flow through properly). The trial judge, Devlin J, rejected the argument that this would found a defence of automatism, and stated that it was a plea of insanity. Subsequent courts have disapproved Charlson and preferred Kemp.

The courts have always been clear that insanity is a legal issue, not a medical one. The rules on which directions to the jury are based come from

the case of M'Naghten,[5] in which a man had delusions that he was being "persecuted by Tories". M'Naghten shot and killed Sir Robert Peel's secretary in the belief that it was Peel himself. His plea of insanity was accepted and a special verdict entered (nowadays, Not Guilty by reason of insanity). There was great public outcry about the opportunity for "guilty" people escaping the full rigours of the law (hanging in those days) by what appeared to the public as flimsy pleas that they did not know what they were doing. A court composed of eminent jurists was set to consider what the insanity defence should require. It was determined that the burden of proof lies on D to show that at the time of the commission of the alleged offence, he did not know what he was doing, or that if he did, he did not know that it was wrong; and that this inability to understand what he did was as a result of a defect of reasoning arising from a disease of the mind. The question was for the jury to determine, not for the court or doctors. (Indeed, even where the expert evidence is pretty convincing, the jury may decide to reject it - cf Sutcliffe, the "Yorkshire Ripper", actually defending the case on diminished responsibility.[6])

The key to determining whether 'not knowing what you're doing' is insanity lies in whether the defect in reasoning arises from a "disease of the mind." According to Devlin J in Kemp,[4] the mind is "the mental faculties of memory, reasoning and understanding." The mind is therefore not the same as the brain. The effect of the disease is to impair these faculties so substantially that D does not know what he is doing (or if he does, he does not know that it is wrong). In Bratty v A-G for Northern Ireland,[7] Lord Denning in the House of Lords stated that where D pleads that he did not know what he was doing, the court should consider whether public policy demands an insanity verdict, which enables the court to protect society from D by committing him to a mental institution: "any mental disorder which has manifest 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....' Lord Denning disapproved Charlson,[3] and stated that diseases such as epilepsy and cerebral tumour were diseases of the mind.

Following this reasoning, the trial judge in Quick and Paddison[8] (Bridge J) ruled that evidence showing that D, a diabetic, was suffering from hypoglycaemia (low blood sugar, brought on by taking insulin but not balancing it with food) when he attacked a patient at a mental hospital, was evidence of insanity, not of automatism. Quick changed his plea to guilty and appealed to the Court of Appeal. Lawton LJ described the problem as "this quagmire of law seldom entered nowadays save by those in desperate need of some kind of defence."

> "In our judgment the fundamental concept [of insanity] is of a malfunctioning of the mind caused by disease. A malfunctioning of transitory effect caused by the application to the body of some external factor such as violence, drugs, including anaesthetics, alcohol and hypnotic influences cannot be fairly said to be due to disease. Such malfunctioning, unlike that caused by a defect of reason from disease of the mind, will not always relieve an accused from criminal responsibility. A self-induced incapacity will not excuse (see Lipman) nor will one which could have been reasonably foreseen as a result of either doing, or omitting to do something, as, for example, taking alcohol against medical advice after using certain prescribed drugs, or failing to have regular meals whilst taking insulin.'[9]

The court determined that D's condition arose not from his diabetes (which might be termed an internal disorder or a disease of the mind, especially

where the condition is unchecked), but as a result of his using insulin. A malfunctioning of the mind was caused by an external factor, not by a disease of the mind, therefore, the jury should have been allowed the opportunity of considering the defence of automatism. On the evidence, it seemed likely that if D really had not known what he was doing at the time, he might have brought on that state himself by drinking too much and by not eating properly, subsequent to taking the insulin. Lawton LJ indicated (above) that if the jury believed that, they should not acquit him ("a self-induced incapacity will not excuse"). Referring to Quick v Sullivan,[10] Lord Diplock pointed out that non-insane automatism would lie for temporary impairment of faculties (not being self-induced by consuming drink or drugs) resulting from some external factor such as a blow on the head causing concussion or the administration of an anaesthetic for therapeutic purposes.

In a recent development, the Crown Court ruled that the defence of automatism was available to a defendant charged with robbery and actual bodily harm upon evidence that she had been raped three days before the alleged offences were committed, and was suffering from Post Traumatic Stress Disorder such that she was not acting with a conscious mind or will (Reg v T[11]). This evidence may be used to negate the mens rea requirement and is consistent with the reasoning of Lawton LJ in Quick[12]; the rape constitutes an external factor causing a malfunctioning of the mind. It is not self-induced. The effects do not have to be permanent. Presumably, once having manifested itself in violence, there would be no suggestion that it is prone to recur, and so there would be no need to find insanity to protect society (Bratty[13]). Provided the jury believe that she did not know what she was doing, and that that was the result of the external factor, she should be acquitted (in fact, the jury convicted in T).

Lawton LJ's obiter statement that self-induced automatism is no defence led to problems in later cases. The implication was that although D might not have known what he was doing at the time of the alleged crime, if he had brought on the condition by his own acts or omissions, then he was reckless, and recklessness will often suffice as the mens rea (cf Majewski[14]). The Court of Appeal held in Bailey[15] that the trial judge was wrong to rule out automatism as a defence for a diabetic who had failed to eat after taking insulin. A defendant was not to be found reckless simply because he had become hypoglycaemic. It had to be proved that he knew what the risks of not eating properly were. If it could be established that he knew that not eating would lead to aggressive and uncontrolled behaviour, then the failure to eat would be reckless and that recklessness would then be the mens rea of the crime (cf Hardie[16]).

Where a diabetic is charged with an offence requiring proof of recklessness, a hypoglycaemic state will offer the defence of automatism, which, if successful, will result in acquittal provided it is not recklessly self-induced. Not all diabetics are treated the same way, however. In Hennessy,[17] D was charged with taking a conveyance without authority. He was diabetic and argued that he did not know the nature and quality of his act, and, alluding to Lawton LJ's division of factors in Quick, that this condition had been brought on by several external factors (marital problems, depression and stress) resulting in hyperglycaemia (too much sugar in the blood from a failure to take insulin). The trial judge had ruled that this was insanity, and the Court of Appeal confirmed it. The state of not knowing what you are doing brought on by hypergycaemia is the result of an internal, not an external factor, which under Lawton LJ's classification must lead to insanity, not automatism, which is only available to hypoglycaemic diabetics.

It is now also clearly established that an epileptic who causes another person harm in the throes of a seizure, not knowing what he is doing, will be regarded as legally insane, even though there may be only a temporary absence of reasoning powers. The House of Lords in Sullivan[18] confirmed the decisions of the first instance court and the Court of Appeal in rejecting the automatism plea of the D, who, it was not contested, had no memory of kicking and injuring an elderly friend during a psychomotor epileptic seizure. In reviewing the requirements of M'Naghten,[19] Lord Diplock agreed with the definition of "the mind" given by Devlin J in Kemp,[20] and stated that if a disease impaired the mind's faculties so severely that D did not know what he was doing, or that what he was doing was wrong, it made no difference whether the cause of the impairment was organic (as in epilepsy) or functional, or whether it was permanent or transient and intermittent, so long as it subsisted at the time. D did not know what he was doing; that defect in reasoning was caused by his disease of the mind. His defence was insanity, not automatism. The effective result of this is that, unless D is charged with a particularly serious crime, he is best advised to plead guilty and take his chances on the punishment, unless he is happy to be committed to a mental institution for an indefinite period. In Sullivan's[18] case, when the trial judge ruled out automatism, the prosecution accepted D's plea to the lesser offence of assault occasioning actual bodily harm. According to Lord Denning in Bratty,[21] the purpose of ruling that such behaviour is legal insanity is so that D can be detained and society protected. That is clearly not the result in charges less serious than homicide.

Where the evidence is accepted as being proof of insanity, the prosecution has not proved mens rea, nor does D "get off." D is in a kind of limbo in which he is not convicted but is not released.

Insanity and Automatism: the effect on actus reus

In crimes in which the prosecution does not have to prove intention or subjective recklessness, automatism might be thought to have no part to play. One of the principles in establishing the actus reus of a crime, however, is that the conduct upon which it is based must be willed or voluntary. 'No act is punishable if it is done involuntarily and an involuntary act in this context...means an act which is done by the muscles without any control by the mind such as a spasm, a reflex action or a convulsion; or an act done by a person who is not conscious of what he is doing, such as an act done whilst suffering from concussion or whilst sleep-walking...' (Bratty per Lord Denning[22]). A plea of automatism is therefore not only aimed at challenging the mens rea, but is also a denial that the conduct was voluntary (so no actus reus). In Watmore v Jenkins,[23] D, a hypoglycaemic diabetic who had not induced the state by recklessness, was nonetheless found guilty of dangerous driving. D had no defence of automatism, even though the act occurred during an abnormal frame of mind. No (subjective) mental state was required for the offence, simply that there was an act of driving which could be characterised objectively as dangerous. The actus reus was willed in the sense that D still had some control over his acts. Many offences under the Road Traffic legislation do not require subjective states of mind and are satisfied by an act only. If D cannot challenge mens rea, then his only chance of an acquittal is if the conduct on which the charge is based is not voluntary in that it is completely uncontrolled by D. In Isitt[24] D was charged under the Road Traffic Act, having caused a collision and driven dangerously in order to escape the police. Psychiatric evidence sought to establish a defence of automatism on the basis of hysterical fugue: that D's subconscious mind took over so that D did not know what he was doing, rendering him unaware of legal restrictions or matters of moral concern. The psychiatrist agreed, however, that D's mind was 'working to some extent.' The trial

judge ruled that this was not automatism and the Court of Appeal agreed that he was right in refusing to put it to the jury, relying on the evidence that D's mind was at least partly working, however faultily.

The Divisional Court of the Queens Bench Division of the High Court upheld a prosecution appeal from the Magistrates Court in Broome v Perkins,[25] where a hypoglycaemic diabetic was charged with driving without due care and attention. During a journey of five or six miles, D drove erratically and collided with other vehicles. He later reported to the police that he believed he might have been involved in a road accident. Witnesses said he had appeared not to be in control of his faculties. The magistrates found that the hypoglycaemia meant that D was not conscious of his acts, which were therefore involuntary and automatic. The Divisional Court said that the magistrates should convict if there was evidence that at some stage during the driving any of his acts were voluntary: if he exercised some control by, for example, braking and veering away from other vehicles. Again, this offence does not require proof of subjective mens rea, so it would do no good to argue that hypoglycaemia resulted in having no knowledge of what one was doing. It can only be successful if it robs the conduct of the element of voluntariness. In these cases, the courts have decided that if evidence of some voluntariness can be gleaned, the mind is not failing to function at all, it is simply not functioning properly. There is therefore some control or voluntary conduct upon which to found the actus reus.

Intoxication

In some offences, the fact that a person did the act speaks of his intention to do it. No further proof (in relation to consequences) is required by the offence. An assault (and battery) is established by witnesses who testify that D did hit V in the face. The inference is that

Is it then the case that an accused who argues 'no mens rea because of intoxication' in respect of an offence requiring proof of recklessness will be found not guilty of that crime, unless the prosecution proves that he had knowledge of the risks of his acts at the time of the alleged offence ?

In an appeal to the House of Lords in Majewski[31] D was charged on three counts of assault occasioning actual bodily harm and three of assaulting a police officer in the execution of his duty. He pleaded that he did not know what he was doing at the time of the alleged crimes because of the influence of drink and drugs. The Court of Appeal certified the issue for appeal as follows: "whether a D can be properly convicted of assault, notwithstanding that, by reason of his self-induced intoxication, he did not intend to do the act alleged to constitute the assault." His convictions were upheld despite his not having intended the act constituting the assault, on the basis that recklessness was an alternative mens rea. The plea of not knowing what he was doing was treated not as a challenge to mens rea, rather as a confession of it.

It was decided as a matter of policy that a person who (voluntarily) gets himself so drunk (or so intoxicated by drugs) that he does not know what he is doing may be convicted of a crime requiring proof of recklessness. The recklessness is not in respect of knowing of a risk of harm as a consequence of the particular act on which the offence is based, but arises from the fact that he voluntarily got himself into that state whence came the actus reus. It is a sort of general recklessness: that is recklessness as regards any consequences that might arise from a condition in which D cannot control himself, rather than recklessness in respect of the particular act and consequences of the crime charged. The mere fact that D argues that he did not know what he was doing at the time because of self-induced intoxication may be sufficient to condemn him, since such a claim

is proof of recklessness, and D has convicted himself out of his own mouth. The question is whether D's guilt requires proof of subjective awareness of risk, for example, proof that D knew from his past experience that such drinking could lead to violent, uncontrollable behaviour (cf Bailey[32]).

In Majewski,[31] the charges fell under the Offences Against the Person Act, in which the test for recklessness is the Cunningham[32] test under which D should not be guilty unless he was aware of the risk of some harm resulting from his conduct. Since his state of mind at the time of the act was affected by drink, he was incapable of forseeing risks, so the time of testing for recklessness is at some earlier stage; perhaps when he had his first drink, or his second (or third, etc). Whenever it is, the test should still be one of his own foresight of risks, not that of some reasonable bystander, though D was found guilty without proof of such foresight in Majewski.

Where the crime charged requires the Caldwell[27] test for recklessness, it must be shown that D's conduct created an obvious and serious risk of causing harm or damage, to which either D gave no thought, or, having recognised it, nonetheless carried on regardless. Even where D claims intoxication made him incapable of considering risks, the Caldwell type of recklessness would still be satisfied; if reasonable people would have known of the risks (of getting so drunk) then D is guilty of the crime charged. Lord Diplock in Caldwell itself confused the issue by quoting from the judgment of Lord Elwyn-Jones LC in Majewski:[31]

> "The Lord Chancellor accepted...as correctly stating English law the provision in section 2.08(2) of the American Model Penal Code:
>
> 'When recklessness establishes an element of the offence, if the actor, due to self-induced intoxication, is unaware of a risk of which he would have been aware had he been sober, such

unawareness is immaterial.'

'So in the instant case, the fact that the respondent was unaware of the risk of endangering the lives of the residents in the hotel owing to his self-induced intoxication would be no defence if that risk would have been obvious to him if he had been sober.'[33]

The curious thing about this statement is that if D had committed the acts whilst sober, he would be found guilty of recklessness if he had created a risk which would be obvious to a reasonable person. It would not be necessary that D himself knew of the risk. However, in Hardie,[34] D's conviction for criminal damage (Caldwell-type recklessness) was quashed by the Court of Appeal on the basis of the trial judge's misdirection that self-induced intoxication (by taking Valium tablets) was no defence to a crime of recklessness. The Court of Appeal stated that the jury should have considered whether D was able to appreciate the risks caused by taking Valium, and whether taking Valium itself was a reckless act. It was not enough for recklessness simply to establish that D had taken the drug. It must be shown that he knew what the risks of taking it were.

An argument based on intoxication causing D not to know what he is doing can be construed as a case for an insanity plea, and indeed until fairly recently it was treated as such. Intoxication was originally considered as an aggravating rather than a mitigating factor. Once it began to be accepted, it was only accepted in respect of establishing insanity. Legal insanity can be temporary, and if D did not know what he was doing, and this was the result of some disease of the mind caused by drink, the plea was one of insanity. The House of Lords in Beard[35] accepted that intoxication could operate otherwise than as insanity in certain instances (ie D was so drunk as to be incapable of forming the necessary mens rea, but not where D argued that it was the drink which made him do it AG for Northen Ireland v Gallagher[36]). It was not a complete excuse, however, and

would only mitigate a crime requiring proof of specific intent (murder) to one of basic intent (manslaughter). The argument is the same as above: he did not know what he was doing (through intoxication), so P has not proved mens rea. Where the charge was manslaughter, intoxication through drugs was not accepted as a denial of mens rea nor as a defence but as evidence of recklessness (Lipman,[37] in which after taking LSD D hallucinated that he had travelled to the centre of the earth, where he fought with giant snakes. On waking from his 'trip', he discovered his girlfriend dead in bed, with eight inches of sheet stuffed into her mouth, as a result of which she had been asphyxiated).

Diminished Responsibility

Intoxication, insanity and automatism are all capable of being pleaded to any offence, although, as has been seen, intoxication is only possible where specific intent is a requirement of the offence (even if recklessness is an alternative to intent, intoxication will not avail: Caldwell[38]). Insanity is only worth pleading when the charge is very serious, since the result of a successful plea is indeterminate incarceration, and automatism, which leads to complete acquittal, is very rarely successful.

Diminished responsibility was introduced as a defence to a charge of murder only by the Homicide Act 1957 (s.2), and, if successful, reduces the conviction to manslaughter. Unlike insanity, where only a special verdict can be returned, the court has discretion in disposing of the defendant. He can receive a life term, or any other sentence, or be hospitalised under the Mental Health Act 1983. As with insanity, the burden of proving the defence rests with the accused. Based upon abnormality of mind causing substantial impairment of mental responsibility, it is much wider in scope than insanity. The abnormality can be the result of arrested or retarded

development, or any inherent causes, or induced by disease or injury. In Byrne,[39] the trial judge's natural repugnance at the defendant's acts led him to remark that "mental affliction is one thing [but] the section is not there to give protection where there is nothing else than what is vicious and depraved." D had strangled a woman and mutilated her body. Evidence showed him to be a sexual psychopath, but the trial judge ruled that this did not satisfy the requirements of the defence, demonstrating what is a common feeling: that D is somehow getting away with it if he is allowed to plead this way. The Court of Appeal substituted manslaughter for the murder conviction, though confirming the sentence. The trial judge should have left the question to the jury. Lord Parker CJ described "abnormality of mind":

> "...a state of mind so different from that of ordinary human beings that the reasonable man...would term it abnormal. It appears to us wide enough to cover the mind's activities in all its aspects, not only the perception of physical acts and matters, and the ability to form a rational judgment as to whether the act was right of wrong, but also the ability to exercise will-power to control physical acts in accordance with that rational judgment."[39]

Diminished responsibility is more acceptable to juries where there is evidence of mercy-killing. In Price,[40] a father put his severely handicapped son in the river and watched while he floated away. The trial judge told him that he would be required to "undergo treatment as a doctor may prescribe for the next few weeks or so." It is not so successful when pleaded by a jealous husband who stabs his spouse thinking she had been unfaithful (see Lawton LJ in Vinagre,[41] though the trial court accepted the defence).

Chronic alcoholism may be a basis for the defence of diminished

responsibility according to the Court of Appeal in Tandy[42]. Mrs Tandy strangled her eleven year old daughter after consuming nine-tenths of a bottle of vodka, and was charged with murder. The trial judge directed that she could use her chronic alcoholism as a defence if (1) she was suffering from an abnormality of mind, which was (2) induced by a disease (alcoholism), and that (3) the abnormality thus induced was such as substantially impaired her mental responsibility for her act of strangling her daughter. The jury rejected the defence and the Court of Appeal confirmed that the direction was appropriate. It had to be established that her drinking had injured her brain, impairing her judgment and emotional responses, or that it was such that she had no choice in whether to take the first drink of the day. If her intoxication had been such as to enable her to argue that she was incapable of forming the necessary intent to kill or do grievous bodily harm, Beard[43] would have applied and the conviction would have been for manslaughter.

Conclusion

The basic proposition that the prosecution has the burden of proving mens rea and actus reus is shown to be unfounded wherever a defendant pleads that these ingredients are not present because he did not know what he was doing through drink or drugs, or because of some illness like epilepsy, or even diabetes. What happens following such a claim depends on the law's view of the requirements of policy. Sometimes, the burden shifts to D and the claim is treated as a possible defence, which may result in acquittal, or indefinite detention, or in conviction for a less serious offence. For many crimes, recklessness will suffice as the mens rea and the courts have accepted that self-induced intoxication may be evidence of a general recklessness, provided (perhaps) D knew that there were risks from getting into that state. It is unlikely, therefore, that "I didn't know what I was doing" will be a successful plea in many cases.

FOOTNOTES

1. Woolmington v DPP [1935] AC 462
2. Homicide Act 1957 s.3
3. Charlson [1955] 1 WLR 317
4. Kemp [1956] 3 WLR 724
5. M'Naghten's Case (1843) 10 C & F 200
6. Sutcliffe The Times May 23 1981
7. Bratty v Attorney-General for Northern Ireland [1961] AC 386
8. Quick & Paddison [1973] QB 910
9. ibid at p913
10. Sullivan [1984] AC 156
11. Reg v T [1990] Crim LR 256
12. Quick and Paddison [1973] QB 910
13. Bratty v A-G for N.Ireland [1961] AC 386
14. Majewski [1977] AC 443
15. Bailey [1983] 1 WLR 760
16. Hardie [1985] 1 WLR 64
17. Hennessy [1989] 1 WLR 287
18. Sullivan [1984] AC 156
19. M'Naghten's Case (1843) 10 C & F 200
20. Kemp [1956] 3 WLR 724
21. Bratty [1961] AC 386
22. ibid. at p409
23. Watmore v Jenkins [1962] 2 QB 572
24. Isitt (1978) 67 Cr App R 44
25. Broome v Perkins (1987) 85 Cr App R 321
26. Cunningham [1957] 2 QB 396
27. Caldwell [1982] AC341
28. Grimshaw [1984] Crim LR 108

29. Soratt [1990] 1 WLR 1073

30. Satnam & Kewel (1984) 78 Cr App R 149

31. Majewski [1977] AC 443

32. Bailey [1983] 1 WLR 760

33. Caldwell [1982] AC 341 (emphasis added)

34. Hardie [1985] 1 WLR 64

35. Beard [1920] AC 479

36. Attorney-General for Northern Ireland v Gallagher [1963] AC 349

37. Lipman [1970] 1 QB 152

38. Caldwell [1982] AC 341; Lawrence [1982] AC 510

39. Byrne [1960] 2 QB 396

40. Price The Times December 22 1971

41. Vinagre (1979) 69 Cr App R 104

42. Tandy (1988) 87 Cr App R 45

43. Beard [1920] AC 479

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LAW SCHOOL REPORT

The Cayman Islands Law School was founded in 1982 following the report and recommendations of Professor Paul Fairest of Hull University. Originally housed in the Court House, it has expanded from five students and a staff of one to forty three students, a Director, four Law Lecturers and an Executive Officer and is located in modern facilities in the Tower Building, George Town.

From 1983 to 1990, students enrolled in the Attorney-at-Law programme study concurrently for the University of Liverpool LL.B. and the Attorney-at-Law qualification over a five year period while serving under articles of clerkship to members of the Legal Profession.

Commencing in September of 1991, the Law School will offer a three year full time honours degree in conjunction with the University of Liverpool. This follows receipt and consideration by it of the Fairest Report and a paper prepared by the Director after negotiations with the University of Liverpool in the summer of 1990. The LL.B. (Honours) will be awarded by the University of Liverpool to students achieving a sufficient standard of performance during the course of their studies. The LL.B. (Ordinary) will continue to be awarded as well.

Recent developments at the Law School include the following:

(a) A book authored by Law Lecturer Piers Hill entitled Criminal Procedure in the Cayman Islands is expected to be available for distribution early in 1992. Contributions toward the cost of the publication have been generously offered by the Cayman Islands Law Soceity, individual members of the Caymanian Bar Association and the Cayman Islands Government. The book may be ordered through the Law School.

(b) Lord Templeman, the Law School patron, has accepted an invitation to attend the fifth graduation ceremony to be held Monday October 14, 1991 at the Harquail Theatre. It is hoped Lord Templeman will also give a public lecture while in Cayman.

(c) Lecturers Dr Ben Brobbey, Richard Owen and Piers Hill have elected not to renew their contracts and will be returning to the United Kingdom over the summer. Recruitment of Law Lectuers was conducted earlier this year by the Director of Legal Studies in conjunction with Professor Rowe of the University of Liverpool Professor Fairest of Hull University. Joining the staff in September will be Mr Patrick O'Hagan, Barrister on leave from Queen's University, Belfast: Mr Andy Darkoh LL.M, Barrister and Mr John Epp, MCJ Barrister and Solicitor.

(d) Director of Legal Studies, Richard Finlay, has recently been named to the Editorial Committe of the Commonwealth Caribbean Commercial Law Reporter (available August,1991) and to the Banking Law Advisory Committee of the Carribbean Law Institute.

Requests for information about the Law School should be addressed to the Director of Legal Studies, 4th Floor, Tower Building, George Town, Telephone 97999 Ext. 3540.