

RMM LAW COLLEGE SAHARSA

JURISPRUDENCE

Part I

Paper -1

Topic- Concept of Liability

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Date:- 01/02/21



Kinds of Acts

Acts are of various kinds:

1. **Positive and negative acts:** When the wrongdoer does an act which he should not do or in other words, he is prohibited by law not to do, it is a positive act. When the wrongdoer does not do an act which he should do, in other words, which he is directed by law to do, it is a negative act. Act includes positive as well as negative act. The Indian Penal Code section 32 says In every part of this code, except where a contrary intention appears from the context, words which refer to acts done extend also to illegal omissions.

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2. **Voluntary and involuntary acts:** If the act is a willed act, it is called a voluntary act, but if the act is not a willed act, it is an involuntary act. The penal liability is only for voluntary acts.
3. **Internal and external acts:** Internal act means the act of mind and external act means the act of body. An external act generally implies an internal act also but an internal act is not always translated into an external act. The term 'act' is commonly used for external act, but it should not be taken to be restricted to it alone. Internal act is a very important condition in determining the penal liability.
4. **Intentional and unintentional acts:** Intentional act means an act which is foreseen and is desired by the doer of the act. Unintentional act is that act which is not so foreseen or desired, or in other words, it is not a result of any determination. Generally, by act we mean intentional act, but intention is not always necessary condition of penal liability, and therefore, it is not an essential element in those acts where it is not a condition of liability. These divisions of act are not exclusive, and sometimes an act may fall into various classes. For example, an act may be positive, external and intentional at the same time without any conflict.

The wrongful acts are divided into two classes:

1. Acts which causes some harm, and it is only on this ground that they are considered wrong.

2. Acts which are considered as wrong due to their mischievous tendencies. In these acts, proof of actual harm is not necessary for liability.
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Damage and liability

In the first class of the wrongful acts, no cause of action arises without some actual damage but in the second class of acts, the proof of the damage is not necessary, the act alone makes the doer liable. Generally, though not necessarily, the civil liability arises on the actual damage. But as crime is a wrong against the society in general, so not only the act but the mischievous tendencies also are considered wrongful and they are punishable.

Therefore, in criminal law attempt and in some cases, preparation also subjects a person to criminal liability. In the first class of cases, actual damage does not include every kind of damage. A damage though caused by an act of a man, is not always wrongful.Â Damnum sine injuriaÂ (a damage without injury or wrongful act) does not make a person liable.

It means that though damage has been caused, it does not amount to a wrongful act. Such cases are of two kinds:

1. The cases where though some damage is caused to an individual nevertheless it is a gain to the society at large, for example, a competition in trade causes damage to some of the traders, but as it is a gain to the society, therefore, the trader whose competition causes damage is not liable.
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2. The cases where though some harm is caused, it is so trivial that it is the policy of the law not to take action against the doer.

Mens Rea

Salmond's view: Mens rea means guilty mind. It is the second condition of penal liability. Mens rea is defined as 'the mental element necessary to constitute criminal liability'. In making a person criminally liable, an enquiry into his mental attitude is made. Criminal intention, malice, negligence, heedlessness, and rashness, etc. all are included in mens rea. Salmond says that mens rea included only two distinct mental attitudes of the doer towards the deed:

a. Intention

b. Recklessness.

It means that a man is liable only for those wrongful acts which he does either willfully or recklessly. Sometimes, inadvertent negligence is also punishable. Therefore, unless an act is done with any of these three mental attitudes, the doer is not liable.

External conduct as the basis of the liability

Different legal systems have recognised, in different ways, this mens rea as the condition of penal liability. There are degrees of mens rea and in some cases, the punishment is determined on the basis of the degree of mens rea. In German law, theoretically, various forms of mens rea are recognised and they are distinguished from each other. Historically, mens rea has its origin in the idea of blameworthiness of the wrongdoer for the wrongful act.

But as the aim of the law is to serve more an external purpose than to enquire into the blameworthiness, the mens rea is determined, more or less, on the basis of external conduct. Therefore, the act is judged not from the mind of the wrongdoer but the mind of the wrongdoer is judged from the act. The law presumes that every man is of the average understanding and judges his act from that standard.

What is an average or reasonable man, more or less, depends upon the idea of the judge of an average man. If the accused is below the average, the burden to prove it lies on him. Therefore, in modern times, mens rea does not mean enquiry into the mental attitude of the wrongdoer from a subjective point of view, but it simply means that the mens rea is judged from the conduct by applying an objective standard.

Holmes makes out the same point when he says

It is not intended to deny that criminal liability, as well as civil is founded on blameworthiness. Such a denial would shock the moral sense of any civilized community; or, to put it in another way, a law which punished conduct which would not be blameworthy in the average member of the community would be too severe for that community to bear. It is only intended to point out that, when we are dealing with the part of the law which aims more directly than any other at establishing standards of conduct, we should expect there more than elsewhere, to find that the tests of the liability are external, and independent of the degree of evil in the particular person's motives or intentions. The conclusion follows directly from the nature of the standards to which conformity is required.

These are not only external, but they are of general application. They do not merely require that every man should get as near as he can to the best conduct possible for him. They require him at his own peril to come up to a certain height. They take no account of incapacities, unless the weakness is so marked as to fall into well known exceptions such as infancy or madness. They assume that every man is as able as every other to behave as they command. If they fall on any one class harder than on another, it is on the weakest. For it is precisely to those who are most likely to err by temperament, ignorance, or folly, that the threats of the law are the most dangerous.

Mens rea under eclipse

The mens rea has no longer remained the condition of penal liability in its original sense and it has been replaced by standards which the law has established. Apart from this change, there are other factors also which have contributed in relegating the importance of mens rea as a condition of a penal liability. Mens rea or the degree of subjective guilt varies in different classes of offences.

For example, against a charge of kidnapping a girl under the age of 18, an honest and reasonable belief of the accused that the girl was over 18 is no defence. In modern times, the law has tended to establish **absolute liability**. A number of new offences have been created, and are being created every year by the law in every society to ensure the smooth running of the community life under the growing complicated social organization. The rules governing and regulating traffic, electricity and water supply, etc., are the rules of this kind. In the offences of these kinds for holding a person liable, no mens rea is required. But for these offences, there is slight fine and they involve no moral stigma.

Mens rea in Indian Penal law

In Indian criminal law, the scope of general application of the conditions of mens rea is very limited. It is due to many reasons. Here the criminal law is all codified and the offences are carefully defined. If mens rea is a necessary condition for a particular offence, it is included in the very definition of the offence and it is a part of it. There are certain offences which have been defined without any references to mens rea or intention. In these offences, mens rea is not a condition for a penal liability.

These offences are of a grave nature and the act itself is very dangerous, therefore, the law does not go to make an inquiry into the mental attitude of the wrongdoer. Such offences are the offences against the State, counterfeiting coins, etc.

Lastly, there is a chapter in the Indian Penal Code, 'General Exceptions'. It prescribes all those circumstances in which mens rea is negative and hence there is no liability. Thus mens

rea in India, is a condition of penal liability only to the extent it is codified. However, it works as a general principle of criminal law and is applied in matters of interpretation.

From the point of view of the mens rea, wrongs may be divided in three classes:

1. Where mens rea amounts to intention or knowledge. The wrongs in which the mens rea is of this degree are intentional wrongs, or wrongs committed recklessly, or there is culpable negligence.
2. **Negligence:** In these wrongs carelessness amounts to mens rea.
3. **Absolute or strict liability:** In cases of absolute or strict liability mens rea is not a necessary condition of liability.

Intention

Intention is defined as the purpose or design with which an act is done. It is the foreknowledge of the act, coupled with the desire of it, such foreknowledge and desire being the cause of the act, in as much as they fulfill themselves through the operation of the will. An act is intentional if, and so far as it exists in idea before it exists in fact, the idea realizing itself in the fact because of the desire by which it is accompanied.

Holmes says that there are two elements of intention:

1. Foresight that certain consequences will follow from an act.
2. The wish for those consequences working as a motive which includes the act.

A criminal intention means an intent to do an act whose natural and probable ultimate consequences are criminal. Thus, when we speak that a wrong is intentional, it means that the intention is extended to all the three elements of the wrong (origin, circumstances and consequences). **Intention** must be distinguished from the other similar terms.

Intention and Expectation

Intention and expectation are two different things, and the one does not necessarily involve the other, one may intend a result though he may not expect it. Intention is the foresight of a desired issue, howsoever improbable, not the foresight of an undesired issue, howsoever probable. For example, if I am firing in a direction in which there is a man, a mile away from me, I may intend to hit him although I do not expect so. Similarly, I may expect thing without intending it. A surgeon who is going to perform a dangerous operation might expect the death of the patient, although he never intends it.

Mens rea, or the intention is inferred from the act. It is on the principle that every man knows the consequences of his conduct or act. Therefore, the law will not go to enquire as to whether the particular consequence was intended by the doer of the act or not. If the consequence is foreseen as the certain result of the doer's conduct, it shall be taken (by law) as intended. Thus, intention has a two-fold meaning.