

Late one Saturday night Chris, who is a fanatical Manchester United supporter, is walking home, when he sees a stone on the pavement in front of him. Pretending that he is Ryan Giggs and with only the goal keeper to beat, Chris lets fly at the stone with his trusty left foot. The stone strikes Dan, who is walking his dog, on the shin. Chris says he didn't see Dan because it was very dark and he didn't think anyone was around, and also because he had been to a party, had a lot to drink, and was very tired. Chris also says that at the time he was 'a bit out of his head' because he had been smoking cannabis.

It is my role to legally advise Dan. He has suffered pain from this injury which has resulted in him being absent from work for the past month. It is my decision to look at the course of action, whether to seek to get Chris prosecuted or make a claim through the civil court for damages and ultimately loss of earnings.

When deciding on any case where a criminal offence has been committed in English Law it is essential that it is conclusively proven - beyond reasonable doubt. The prosecution must firstly prove that the accused had mens rea, a guilty mind as the general rule is the offence must be voluntary.

Although this was clearly an accident. The defence would look towards intention. Did Chris intentionally kick the stone with purpose to injure Dan? If he had indeed indirectly intended to cause pain to someone but not necessarily Dan, then Chris could still be charged with assault. What needs to be questioned is whether Chris's behaviour was correct. We must therefore look at this from the point of whether a reasonable man would have acted this way. The defendant would not be liable if the event was unforeseeable but he could be still found guilty if the act he committed was reasonably foreseen and not of proper behaviour. If, as a rational man, Chris had realised the result of his actions, he would unlikely have kicked the stone in the first place. If he had used foresight and was aware of the danger to others from his actions. Then he would be more accessible to the overall consequences.

At the most this was an act of recklessness but as the offence which occurred was inadvertent it would be considered a Caldwell type of recklessness as it was objective as opposed to subjective. Chris merely failed to consider an obvious risk but the act was not malicious. In court the jury should be directed that they are not entitled to find the necessary intention, unless they feel sure that the offence was a virtual certainty (barring some unforeseen intervention) as a result of the defendant's actions and that the defendant appreciated that such was the case. Chris was intoxicated and his mind would obviously been distorted. The potent mix of alcohol and cannabis would have been a lethal cocktail resulting in the poor vision which he experienced. The general rule in common law is that a voluntary act is required before a liability for a crime can be established in terms of the actus reus as it is also required for the defendant to be conscious of his acts otherwise there is no intent, therefore no mens rea. This is deemed as automatism. A distinction has to be drawn between being drunk and being intoxicated. A drunken man may commit acts whilst under the influence of drink or drugs that he would never commit whilst sober, but he will not be able to raise the defence of intoxication if he is nevertheless, still capable of forming the necessary mens rea for the crime with which he is charged. It was stressed in *R v Sheehan and Moore* [1975] 1 WLR 739, that "a drunken intent is nevertheless an intent". An intoxicated defendant is one who is shown to have been incapable of forming the necessary mens rea due to the effect of drink or drugs. In *R v Stubbs* (1989) 88 Cr App R 53, it was stated that the intoxication needed to be "very extreme". If a person consciously and deliberately takes drugs not on medical prescription, but in order to escape from reality, to "go on a trip" or to become hallucinated, he cannot plead his self-induced disability as a defence to a basic intent crime. The burden rests on the defendant to provide some evidence of intoxication which can be put before the jury; the onus will then be on the prosecution to establish beyond all reasonable doubt, that despite such evidence, the defendant still had the necessary mens rea. In *R v Pordage* [1975] Crim LR 575, Where the drunken defendant made threats to kill whilst already in custody and was subsequently re-arrested. The court held that the key question to be asked was, taking into account the defendant's intoxicated state, did he form the necessary specific

intent? Where a specific intent is an essential element in the offence, evidence of a state of drunkenness rendering the accused incapable of forming such an intent should be taken into consideration in order to determine whether he had in fact formed the intent necessary to constitute the particular crime. If he was so drunk that he was incapable of forming the intent required he could not be convicted of a crime which was committed only if the intent was proved. What has to be considered is that over a third of violent crimes in this country are committed by drunks. It would be therefore, unorthodox to try and use intoxication as a defence when it is more likely to go against you.

As this act was purely accidental, it would be unlikely for the Police or indeed the Crown Prosecution Service to prosecute. The ultimate decision would be to advise Dan to seek damages through the Civil Courts or through a private prosecution. Chris was negligent and should rightfully be sued. Criminal negligence is a term derived from a state of mind which is careless, inattentive, neglectful, wilfully blind, or reckless; it is the mens rea part of a crime which, if occurring simultaneously with the actus reus and gives rise to criminal liability. The level of wilful blindness which has occurred here, where Chris intentionally avoids confronting a situation that no reasonable man would ever allow to occur. In these cases the actus reus or bad act never occurs then there is no crime as both elements are necessary under the criminal common law to sustain a guilty conviction.

Under civil law, negligence is an ingredient of many non-intentional torts or wrongs that one suffers because of the nonfeasance, misfeasance or malfeasance of another. Negligence is classified as a form of extra-contractual responsibility called a Quasi-delict which gives rise to criminal liability. Under Civil law a party is to be considered negligent if he or she failed to exercise the level of care that a reasonable person, possessed of the same knowledge, would have exercised under the same circumstances. It is necessary to show first that a person had a duty to exercise care in a given situation, and that he breached that duty. In order to prove negligence, it is not necessary to prove harm, but in order for a cause of action to rest in tort, harm must be proven. Hence, it would be meaningless to sue someone for negligence if no harm resulted. Conversely, it is not enough that a harm was done. In order for the harm to be compensable in a negligence lawsuit, the defendant must be shown to have been negligent, and it must be demonstrated that his negligence was the proximate cause of the harm felt by the plaintiff, Dan.. The law holds that any reasonable person would, if able, follow the law.

Consequently, as a matter of law, a person may be declared by a court liable as a matter of law 'negligence per se' if it is proven that he or she broke the law. For example, someone injuring another in an auto accident may be found negligent per se in a civil suit arising from the accident if he was convicted in criminal court of driving while intoxicated at the time of the accident. Dan may feel that he deserves to be financially benefited from the accident, partly due to the loss of earnings of the month he has been absent. He may feel that he "deserves" an award all out of proportion to his actual misfortune, because of the severe nature of the defendant's carelessness. Damages are usually awarded depending on the injury sustained. The Criminal Injury Compensation Authority was established to administer statutory compensation for victims of violence in the UK. To qualify for an award you must have suffered a physical or mental injury which caused you to visit a doctor at least twice and from which you did not recover for at least 6 weeks. For a damaged shin, Dan would be looking to receive in the region of £1000. To determine a negligence lawsuit the question to be asked is: Would a reasonable person in a similar situation have done the same thing as the person being sued? To come to that conclusion both objective and subjective standards need to be considered. The objective standard of breach of duty only considers a hypothetical person and what her or his reasonable behaviour might be. The subjective standard considers the actual person being sued and if she or he thinks they acted reasonably in the matter at hand.

This is the advice which would be strongly recommended to Dan and it would be expected that this would route he would take.. Morally this case should not, and 50 years ago, would not have gone to court. Unfortunately, the rise in the 'compensation culture' which has engulfed the UK have changed our perception on what is now considered an 'accident'. The main losers being the insurance customers who face hiked up costs to pay for these claims. This is a difficult case to advise on as the onus on blame is often exaggerated but overall this is the most obvious

conclusion.

**References**

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Christopher Ryan & Gary Scanlan, 1993, Success Without Tears: Criminal Law (3rd) Blackstone Press.