

theft or with obtaining by deception.³⁰ The decision of the House of Lords in *Gomez* is an attempt to cut the Gordian knot by a substantial merger of the two kinds of crime.³¹ Not only does this fly in the face of the Committee Report that preceded the Theft Act 1968, but it overlooks the fact that a principled and workable distinction can be drawn between the two crimes that avoids the historic difficulties. Both theft and obtaining by deception involve what Lord Roskill once called 'an adverse interference with or usurpation of' another's rights. But only theft involves appropriation, and appropriation is essentially an *involuntary* transfer, a taking, whereas transfers of property obtained by deception are, by their nature, *voluntary*: they are givings. It is this conceptual basis for the distinction between theft and obtaining by deception that expresses the *moral* distinction between the crimes that has now been largely obliterated in law by *Gomez*.

Theft and Fair Labelling

*C.M.V. Clarkson**

The House of Lords in *DPP v Gomez*¹ has largely² collapsed the distinction between theft and obtaining property by deception by holding that an authorised act can amount to an appropriation. Lord Keith (with whom three other Lords agreed) makes no argument for this extraordinary conclusion other than to say that *Lawrence*³ is a 'clear decision' which has 'stood for 12 years' and that 'there is no question of it now being right to depart from it.'⁴ Stephen Shute and Jeremy Horder have rightly urged that there is a clear moral distinction between the two offences, but their proposed basis for demarcation — that it should rest on the difference between 'involuntary' and 'voluntary' transfers of property — is, while clearly preferable to anything the House of Lords has been able to offer, nevertheless defective.⁵

Criminal offences should accurately describe the prohibited conduct as far as possible. English law has chosen to reject the plea⁶ for a single offence of homicide. Even those arguing for the abolition of the mandatory life sentence for murder would retain the separate offences of murder and manslaughter.⁷ Similarly, arguments for abandoning the distinction between rape and indecent assault and replacing them with a broad offence of sexual assault have been resisted.⁸ The reasons for

30 Glanville Williams, *Textbook of Criminal Law* (London: Stevens, 2nd ed, 1983), at p 804 points to the importance of having such guidance. In fact, the considerations that he discusses reinforce the case for keeping theft and obtaining property by deception largely as separate offences.

31 A path down which Glazebrook suggests the law should venture even further: see n 25 *ante*.

*Reader in Law, University of Bristol.

1 [1992] 3 WLR 1067.

2 Lord Browne-Wilkinson pointed out that the categories of land that cannot be stolen (s 4(2)) can be obtained by deception as the other subsections of s 4, apart from s 4(1), do not apply to s 15 (s 34(1)).

3 [1972] AC 626.

4 At p 1080.

5 (1993) 56 MLR 548. The facts and decision in *Gomez* are well outlined in their note and will not be repeated here.

6 Lord Kilbrandon in *Hyam v DPP* [1975] AC 55, at 98.

7 House of Lords, *Report of the Select Committee on Murder and Life Imprisonment* (Session 1988–89), HL Paper 78-I, 1989.

8 Criminal Law Revision Committee, Fifteenth Report, *Sexual Offences* (1984) Cmnd 9213.

this are clear. Offences should be structured, labelled and punished to reflect the extent of wrongdoing and/or harm involved.⁹ Criminal offences are categorised for symbolic reasons. It is to communicate the differing degrees of rejection or unacceptability of different types of conduct. Such symbolic messages are not conveyed by the creation of broad morally uninformative labels such as 'unlawful homicide.' Further, such broadly defined offences increase the discretionary powers of the law enforcement agencies and the judges in sentencing, and infringe what Ashworth has called 'the principle of maximum certainty.'¹⁰ Increased efforts to control or structure such discretionary powers would be thwarted by the introduction of over-broad substantive offences.

Turning to the property offences, all of which share the same concern, namely, the protection of a variety of interests in property, English law has sought to maintain clear distinctions between the various offences in an effort to mark the different wrongs and harms involved therein. For example, robbery, burglary and handling stolen goods are clearly differentiated for obvious reasons.¹¹ The various offences of deception are perhaps most clearly related to theft. In both theft and obtaining property by deception, the owner has lost property to another — but it is the method of losing such property that marks the moral distinction between the two.

Crimes are generally described in terms of their paradigms. We can all think of instances of offences that come within an offence's definition but fall outside the paradigm. For example, it can be burglary to go behind a shop counter with the intention of stealing therefrom. Such an exception in no way alters the paradigm of burglary, which involves the idea of an invasion of the security and sanctity of the home which can cause special psychological harm: distress, alarm and insecurity. In conformity with this model, the Criminal Justice Act 1991, section 26, distinguishes between burglaries of buildings which are 'dwellings' (maximum punishment of 14 years' imprisonment) and all other burglaries (maximum punishment of 10 years' imprisonment).

The paradigmatic theft involves a surreptitious or forcible taking, while deception offences involve a confrontation and a participation by the victim in the loss of the property.¹² With theft, the owner is generally helpless against such a taking. If interrupted there is a risk of violence. With the typical obtaining, the victim has a real opportunity to prevent the commission of the crime. With greater alertness he or she might not have been deceived. He or she has agreed to part with the property. In our society, where mutual transactions based on trust are valued and encouraged, the wrong of *deceiving* another into parting with property is a distinctive wrong — quite different in quality from the paradigmatic theft. Shute and Horder are right to conclude that whereas 'the thief makes war on a social practice from the outside, the deceiver is the traitor within.'¹³

How is the law to reflect this clear moral distinction?¹⁴ Shute and Horder suggest a distinction based on 'voluntariness.' The victim of deception parts with property

9 Andrew Ashworth, *Principles of Criminal Law* (Oxford: Clarendon Press, 1991) pp 71–73; Glanville Williams, 'Convictions and Fair Labelling' [1983] CLJ 85.

10 *ibid* pp 64–66.

11 C.M.V. Clarkson, *Understanding Criminal Law* (London: Fontana Press, 1987) pp 161–162.

12 In an earlier note ((1992) 55 MLR 265) I described this as the defendant 'facing the victim openly.' Shute and Horder point out that many frauds are perpetrated by letter, telephone or computer. This is obviously true — but in such cases there is still a dealing with, a negotiation between deceiver and victim which is represented in its paradigm by an open confrontation.

13 *Ante* n 5, at p 553.

14 cf P.R. Glazebrook, 'Thief or Swindler: Who Cares?' [1991] CLJ 389, who argues that there is no moral distinction between the two offences on the ground that the thief and the deceiver are both

'voluntarily' in the sense that the property has been 'given'; the victim of theft, on the other hand, parts with property 'involuntarily' — it has been 'taken.' This, however, takes us no further than the often suggested criterion of consent with its concomitant problem of distinguishing 'real' from merely 'apparent' consent. Shute and Horder say that in robbery where someone is threatened into handing over property that 'it is clear that the property is given to the robber, and is hence voluntary.'¹⁵ This example exposes the inadequacy of the concept of 'voluntariness' for this purpose. Just as no one could seriously maintain there was real consent, so too there is surely no 'voluntary' transfer or 'giving' of property. The conduct is at the very least 'morally involuntary.'¹⁶

There are further problems with their proposed test. For which offence will there be liability in cases of price-switching?¹⁷ Is this an involuntary transfer of property (or a right in the property) and hence theft? The property, at the lower price, has hardly been 'given' to the price-switcher. This was theft even under *Morris*. But is theft really an accurate description of such wrongdoing? Surely such a person is engaged in practising a deception. If it succeeds the charge should be section 15; if it fails it should be attempted section 15.

Finally, how does this proposed test, based on the distinction between giving and taking, apply in cases where the property belongs to another by virtue of section 5(4)? In *Attorney-General's Reference (No 1 of 1983)*,¹⁸ the defendant was over-paid her wages by some £75 (the money being paid by direct debit straight into her bank account). Assuming her employers meant to pay that sum into her account, being mistaken as to how much was owed, when she decides to keep the excess, or when she withdraws it, is she 'taking' money that has not been 'given'? Shute and Horder say that 'either the property was given or it was taken: there is nothing in between.'¹⁹ In this case, however, the property can only be regarded as 'taken' on the ground that her employers would not have allowed her to take the excess if they had known that it was an excess. This is the equivalent of saying that there has been a 'taking' in *Gomez*, because the shopkeeper would not have parted with the goods if he had known the truth about the defendant's cheque. Their test does not work in such cases.

This test of 'voluntariness' does, however, point us in the right direction. The fact that there has been an involuntary transfer of property is evidence that the taking was 'manifestly theftuous.'²⁰ It will be evidence that there has been an objective and observable wrong that has resulted in the thief assuming the rights of the owner in defiance of the true owner's title. The robber has clearly done this irrespective of whether the victim's parting with the property is 'voluntary' or not. The passer of a dud cheque, as in *Gomez*, has not done an objective and manifest 'theftuous wrong'; the dishonest state of mind of the deceiver is not something that can be seen by the reasonable observer to be clearly criminal.

This suggested approach of requiring conduct to be 'manifestly criminal' stands

dishonest and in both instances the victim has lost the property. Following this approach, one could abolish most of the offences in the Theft Acts that can be committed dishonestly and create one very broad single offence. For the reasons argued above, this would be unacceptable.

15 *Ante* n 5, at p 552.

16 George Fletcher, *Rethinking Criminal Law* (Boston: Little Brown & Co, 1978) p 803.

17 As in *Morris* [1984] AC 320.

18 [1985] QB 182.

19 *Ante* n 5, at p 552.

20 Fletcher, *ante* n 16, at p 705; Clarkson and Keating, *Criminal Law Text and Materials* (London: Sweet & Maxwell, 2nd ed, 1990) pp 690–695; Marianne Giles and Steve Uglow, 'Appropriation and Manifest Criminality in Theft' (1992) 56 JCL 179.

in stark contrast to the 'protectionist criminology' which is being increasingly endorsed by English law. Under this latter view, one adopts whatever measures are necessary to protect persons and their property even if this means imposing liability when a defendant has done nothing observably wrong. Emphasis is placed on the defendant's state of mind to the exclusion of anything *wrong* that he or she might have done. Following this line, the House of Lords in *Gomez* has diluted the *actus reus* requirement in theft to the point where 'appropriation' has become almost meaningless, with the entire emphasis being shifted to whether the defendant was dishonest or not. A person who places goods in a supermarket trolley with a secret intention of not paying for them (as in *Eddy v Niman*²¹) is probably appropriating those goods.²² This is casting the net of theft too wide and removing it too far from its paradigm.

The much-maligned House of Lords' decision of *Anderton v Ryan*²³ recognised these dangers and, in the context of impossible attempts, drew a distinction between 'objectively innocent' acts (where there could be no liability for such attempts) and 'criminal' or 'guilty' acts (where liability could be imposed). One of the problems with this approach (which led to its speedy demise in *Shivpuri*²⁴) is that it generates uncertainty if a jury is simply to be asked whether conduct 'looks innocent or criminal.' Marianne Giles and Steve Uglow²⁵ have argued that for theft the jury should be asked whether the conduct is manifestly criminal (in much the same way as they are asked whether the defendant was dishonest). As a test for the jury this is surely impracticable. How much knowledge can be invested in the jury as representatives of the 'officious bystander'? How does this test help distinguish theft from obtaining by deception? The conduct would need to be manifestly *theftuous*. Does this mean that the jury must be instructed: 'does this conduct look like theft to you?'

It is submitted that the test of 'manifest criminality' cannot be used as such in a trial — but it can and should be employed by the legislature and the courts as a guiding light in the development of offence definitions. Parliament has enacted separate penalties for theft (seven years) and obtaining by deception (ten years), underlining the moral distinction between the two. It is lamentable that the majority in *Gomez* should have brazenly ignored this. It is now too late to hope that the courts will develop any test based on 'voluntariness' or 'manifest criminality.' Urgent statutory reform is imperative. A new definition of theft or appropriation is called for. In devising a new formula, the legislature needs to keep firmly in mind the necessity for clear differentiation between morally distinguishable offences and a definition of theft should be devised that is consistent with the theft paradigm. There should be an insistence on objective wrongdoing, perhaps through the inclusion of a requirement of unlawfulness. Given the courts' cavalier approach to this area of law, a statutory definition of 'unlawful' would be prudent. Because of the problems of defining 'consent' and 'voluntariness,' a lead could be taken from the *Morris* definition: 'an act by way of adverse interference with or usurpation of those rights.' Provided it was spelt out that this necessitated the usurpation of *all* the rights of

21 (1981) 73 Cr App R 237.

22 The certified question before the House of Lords in *Gomez* was whether it could be theft when property passed to the defendant with the consent of the owner *but that consent had been obtained by a false representation*. It was this question that was answered in the affirmative. However, Lord Keith did add that 'there was much to be said in favour of the view' that merely taking an article from the shelf of a shop and putting it in a trolley did amount to an appropriation (at p 1076).

23 [1985] AC 560.

24 [1987] AC 1.

25 *Ante* n 20.

the owner,²⁶ such a test would adequately describe the conduct that ought to be regarded as theft. If *Gomez* precipitates such a major statutory overhaul of the offence of theft, then perhaps all will not have been in vain.

Solicitors' Liability Towards Third Parties: Back Into the Troubled Waters of the Contract/Tort Divide

Werner Lorenz and Basil Markesinis***

Introductory Remarks

In *White v Jones*¹ the Court of Appeal was asked to consider the continued vitality of *Ross v Caunters*² in the post-*Murphy v Brentwood DC*³ era. An additional reason for attempting to escape the *Ross* ruling was that in the instant case the negligence of the solicitor, which deprived the beneficiaries of the intended legacy, consisted of failing to draw up the will that the defendants had agreed to prepare for his client, rather than advising him badly about the witnessing requirements. This double-pronged attack failed, it is submitted rightly, to shake the court's belief in the soundness and applicability of the *Ross* ruling. The decision raises many important issues which, for reasons of space, we shall discuss unequally under three sub-headings.

The Relatively Easy Questions

(i) Was *Ross* Affected by *Murphy*?

The Court rightly said 'No.' *Murphy's* opinions make it clear that, at most, *Ross* was treated as one of those exceptional cases that lay outside the rule their Lordships were trying to fashion. This must be right since the economic and policy arguments that may have (implicitly) dictated the *Murphy* result are not duplicated in *Ross*.⁴ Nor, it is submitted, is the *Murphy* decision as unassailable as it may appear by virtue of the fact that it was delivered by a seven-judge Bench. Its doctrinal weaknesses, stressed by eminent judges⁵ and academics,⁶ will in due course come home to roost. Counsel should thus not be encouraged to use *Murphy* to cut down further the ambit of tortious redress.

26 See further Giles and Uglow, *ante* n 20.

*D Iur (Heidelberg); D Iur hc (Copenhagen); Emeritus Professor of Comparative Law in the University of Munich and Director of the Institute for International Law at the University of Munich.

**D Iur (Athen), MA, PhD, LLD (Cantab), D Iur hc (Ghent); Denning Professor of Comparative Law in the University of London; Professor of Anglo-American Law in the University of Leiden.

1 *The Times*, 9 March 1993.

2 [1980] Ch 297.

3 [1991] 1 AC 398.

4 See Markesinis and Deakin, 'The Random Element of Their Lordships' Infallible Judgment: An Economic and Comparative Analysis of the Tort of Negligence from *Anns* to *Murphy*' (1992) 55 MLR 619 *et seq*, esp 622–632.

5 eg Sir Robin Cooke in (1991) 107 LQR 46.

6 eg Professor Fleming (1990) 106 LQR 525; Peter Cane in *Tort Law and Economic Interests* (OUP, 1991) 511–518.