1945

Mens Rea in the Early Law of Homicide

A. E. Funk Jr.
University of Kentucky

Follow this and additional works at: https://uknowledge.uky.edu/klj

Part of the Criminal Law Commons

Right click to open a feedback form in a new tab to let us know how this document benefits you.

Recommended Citation
Available at: https://uknowledge.uky.edu/klj/vol33/iss4/7

This Note is brought to you for free and open access by the Law Journals at UKnowledge. It has been accepted for inclusion in Kentucky Law Journal by an authorized editor of UKnowledge. For more information, please contact UKnowledge@lsv.uky.edu.
MENS REA IN THE EARLY LAW OF HOMICIDE

In the early English law the doctrine of absolute liability prevailed for all affirmative acts. There was nothing in the Anglo-Saxon customs which even resembled our modern distinctions between willful, negligent and accidental injuries. Illustrative of the harshness of the times was the oath required of one accused of having killed another. That person had to be able to swear that he had done nothing which caused the deceased to be "nearer to death or further from life."2

A person was not only liable for his own acts, but also liable for the acts of his servants, his animals, and even his inanimate possessions. If a man hung up his sword and some one else knocked it down so that it cut another, the owner of the sword was liable, not because of his own act, but because he was the owner of the sword.1

The rule of absolute liability, however, did not mean that the mental element in crime was entirely disregarded. It was very important in determining the punishment for the crime. It is believed that at least by the ninth century the Anglo-Saxon courts had four

---

1 Pollock, English Law Before the Norman Conquest in 1 Select Essays in Anglo-American Legal History (1907) 88, 102; Turner, The Mental Element in Crimes at Common Law (1936) 6 Camb. L. J. 31, 34: "Legal historians tell us that in the earliest periods of our law the mental state of the wrongdoer was little, if at all regarded, and that no mental element was required to establish his liability." Contra Holmes, The Common Law (1881) 4: "It has been thought that an inquiry into the internal condition of the defendant, his culpability or innocence, implies a refinement of juridical conception equally foreign to Rome before the Lex Aquilia, and to England when trespass took its shape. I do not know any very satisfactory evidence that a man was generally held liable either in Rome or England for the accidental consequences even of his own acts;" Winfield, The Myth of Absolute Liability (1926) 42 L. Q. Rev. 37, 38.

2 Holdsworth, History of English Law (3d ed. 1923) 52.

3 Pollock and Maitland, History of English Law (2d ed. 1911) 472.

4 Sayre, Mens Rea (1932) 45 Harv. L. Rev. 974, 981; "Furthermore, the intent of the defendant seems to have been a material factor, even from the very earliest times, in determining the extent of the punishment;" 2 Pollock and Maitland, History of English Law (2d ed. 1911) 471: "If once it be granted that a man's death was caused by the act of another, then the other is liable, no matter what may have been his intentions or his motives. To this principle our evidence directs us, though for an unmitigated application of it we may have to look to a prehistoric time. In a yet early age law begins to treat intentional as worse than unintentional homicide."
punishments which could be imposed upon the wrongdoer. The selection of the punishment was determined by the seriousness of the crime and whether or not the crime was intentional or unintentional.

Possibly the first of the punishments, from the standpoint of severity, was Outlawry. When the courts imposed this penalty, the wrongdoer became a fugitive and the community made war upon him. Every man had the right and the duty to confiscate the fugitive’s property and slay him on sight. This penalty, from the beginning, was reserved for the worst crimes. The majority of the early offenses, such as rape, aggravated homicide, and treason, were impossible of commission without criminal intent.

The second was known as Blood-feud, which differed from Outlawry in that the wrongdoer was at war only with the relatives of the slain man. The relatives could pursue and kill not only the wrongdoer but also members of his family. By the ninth century, the courts began to curb the use of the Blood-feud, and it became mandatory that a money settlement be attempted before a feud was authorized. Later this punishment, along with Outlawry, was used only when the wrongdoer did not pay the money settlement imposed by the court.

The third punishment was Noxal-Surrender. When a person’s animal, servant, or inanimate possession was the cause of the injury, the court would demand that the chattel be given up to the relatives.

Due to the inadequacy of the records before the Law of Alfred (871-891), it is difficult to determine which of the punishments preceded the others. However, Outlawry, Blood-feud, Noxal-Surrender and Pecuniary Compensation are referred to in the Laws of Alfred. This would indicate that all of them were in effect by the ninth century.

2 Pollock and Maitland, History of English Law (2d ed. 1911) 451; Sayre, Mens Rea (1932) 45 Harv. L. Rev. 974, 981.

2 Pollock and Maitland, History of English Law (2d ed. 1911) 450: “Among our English forefathers when they were first writing down their customs, Outlawry was already reserved for those who were guilty of the worst crimes.”

Sayre, Mens Rea (1932) 45 Harv. L. Rev. 974, 981.

2 Pollock and Maitland, History of English Law (2d ed. 1911) 450.

2 Holdsworth, History of English Law (3d ed. 1923) 44, citing Laws of Alfred, sec. 42, which regulated the time and manner in which the feud could begin.

2 Holdsworth, History of English Law (3d ed. 1923) 44: “If the injured man did not choose to accept the compensation (bot), if the relatives of the deceased did not choose to accept the wer of their slain relative, the feud would be pursued. The wer is at first simply an alternative to the feud. But when we first get evidence as to Anglo-Saxon Law this stage has passed. Pecuniary compensation is, as a rule, obligatory.”
of the slain party, whereupon, the relatives, out of superstition, destroyed it, taking their revenge on it rather than on the owner.12 One of the laws of Alfred provided that, "if at common work one slay another unwilfully, let the tree be given to the kindred and let them have it off the land within 30 days." This punishment provided for the unintentional crime in that the owner was not physically or financially punished, beyond giving up the “bane” as it was called, although he was liable for the death.

The fourth and most important punishment was a system of pecuniary compensation. From the very beginning of Anglo-Saxon history many crimes had a set money penalty, and the system was expanded from time to time until it included nearly all crimes, except treason and aggravated homicide.14 Both intentional and unintentional crimes were emendable. The mental element did, however, determine the amount to be paid. In both cases the wrongdoer was forced to pay a sum, called a “wer,” to the relatives of the slain man. But when the homicide was by misadventure, the wrongdoer was not forced to pay a fine, called a “wite,” to the king.15 Only the blameworthy were required to pay the “wite” for breaking the King’s peace. If the wrongdoer was not able to pay these sums, the penalty of Outlawry or Blood-feud was imposed.16

Many authorities contend that criminal intent was not a requisite for criminal liability before the twelfth century. This view is supported by the phrase, “legis enim est inscienter peceat, scienter emendet” (for the law is that he who commits evil unknowingly must pay for it knowingly), which appears in many of the early records.17 But it is submitted that notwithstanding the existence of this maxim, the accused could plead that the homicide was by misadventure and receive a lighter punishment. Although, at this time there was no distinction, in fact, between torts and crimes, it is probable that there

---

15 2 Pollock and Maitland, History of English Law (2d ed. 1911) 471; Sayre, Mens Rea (1932) 45 Harv. L. Rev. 974, 982: citing Laws of Alfred, sec. 36: “It is moreover decreed, if a man have a spear over his shoulder and any man stake himself upon it, that he pay the wer without the wite.” Also, “Let a man who slayeth another willfully perish by death. Let him who slayeth another of necessity or unwillingly, or unwilfully, as God may have sent him unto his hands, and for who has not lain in wait, be worthy of his life. . . .”
16 2 Holdsworth, History of English Law (3d ed. 1923) 46: “If the compensation were not paid, the injured man or his kin might in former days have prosecuted the feud. In later days the defaulter was outside the law and as a wild beast could be pursued and slain.”
was a subconscious distinction which would justify a pecuniary liability in one case and a corporal punishment in another. It is contrary to all the laws of nature to treat the unintentional and the intentional wrongdoer with the same severity. As Holmes puts it, "even a dog can tell the difference between being kicked and stumbled over."

By the twelfth century crime had become a problem of the state rather than a matter of individual or kin vengeance. The mental element became important in determining guilt. Although the court could not excuse the homicide because the death was accidental, it could grant an appeal to the king. If the king found the accused not to be blameworthy, he granted a pardon. This change in policy was due to the influence of the Church and Roman Law. The first legal use of the phrase "mens rea" was in Leges Henrici, a compilation made in 1118 during the reign of Henry II. Once this phrase entered the law, it stuck tenaciously and became more and more important with the passage of time.

A. E. Funk, Jr.

\begin{flushright}
\textsuperscript{10} 2 Holdsworth, History of English Law (3d ed. 1923) 50: "We see therefore, some of the beginnings of a criminal law. Wrong-doing is not only the affair of the person wronged. The state is beginning to assert its right to interfere in its own interests."

\textsuperscript{11} 2 Pollock and Maitland, History of English Law (2d ed. 1911) 479.

\textsuperscript{12} 2 Holdsworth, History of English Law (3d ed. 1923) 49; 2 Pollock and Maitland, History of English Law (3d ed. 1911) 477.

\textsuperscript{21} Sayre, Mens Rea (1932) 45 Harv. L. Rev. 974, 978.
\end{flushright}