

MAKING DISHONESTY FIT THE CRIME

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[This handout is an outline of the speaker's full paper of the same title]

Problems associated with the notion of "dishonesty"

1. "Dishonesty" is not a simple concept.
2. A precise definition of "dishonesty" is elusive if not impossible to state.
3. "Dishonesty" does not consist of a fixed and closed set of community norms.
4. Whether something is "dishonest" or not, depends upon the circumstances and context in which things are done.
5. The expression, "dishonest", can be descriptive of conduct regardless of the motives and intentions of the performer. Alternatively, the expression can be applied subjectively, that is to say, that it describes the performer's state of mind. A further alternative is that dishonesty is in part objective and in part subjective.
6. An everyday understanding of what "dishonesty" is, may not be apt when what is at stake is liability in criminal or civil law.

Definitions

- Dictionary definitions unhelpful – too vague.
- There is little to be gained in attempting to derive a definition of "dishonesty" from the meaning of "honesty".

Use of the expression "dishonest" in the criminal law

- "Dishonestly" – enters the legal vocabulary in English and Welsh law (not Scots Law [?]) with the Theft Act 1968.
- "Dishonesty" part of the legal language in (e.g.) Australia, New Zealand, Canada – but problematic there too.
- "Dishonesty" – a poor substitute for "fraudulent" (external elements + mental elements).
- Positive and negative functions of "dishonesty".
- "Dishonesty" – an issue of morality – moral obloquy.
- Dishonesty determined objectively or subjectively: the courts have advanced different tests:
 - A subjective test (e.g., *Waterfall*,¹ *Gilks*², *Landy*³).
 - A test that is often seen as being predominately objective, but which might in fact have been a *subjective* test by which the defendant's beliefs and claims were judged as a question of fact (for the jury) and not a matter of law (for the judge): *Feely*.⁴
 - An objective test tempered by a subjective factor (*Ghosh*⁵).
 - An objective test (e.g., *R v Greenstein*⁶; *Ivey*⁷).

¹ [1970] 1 QB 148.

² *R v Gilks* [1972] 1 W.L.R. 1341: the trial Chairman directed the jury: "Well, it is a matter for you to consider, members of the jury, but try and place yourselves in that man's position at that time and answer the question whether in your view he thought he was acting honestly or dishonestly." In the view of the Court of Appeal "...that was in the circumstances of this case a proper and sufficient direction on the matter of dishonesty. On the face of it the defendant's conduct was dishonest: the only possible basis on which the jury could find that the prosecution had not established dishonesty would be if they thought it possible that the defendant did have the belief which he claimed to have" (per Cairns LJ).

³ *R v Landy* [1981] 1 WLR 355.

⁴ *R v Feely* [1973] 1 QB 530.

⁵ *R v Ghosh* [1982] Q.B.1053.

⁶ *R v Greenstein* [1975] 1 WLR 1353.

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The Ghosh approach

- Lord Lane CJ set out the test for dishonesty, which the Court of Appeal held had two limbs:
In determining whether the prosecution has proved that the defendant was acting dishonestly, a jury must first of all decide whether according to the ordinary standards of reasonable and honest people what was done was dishonest. If it was not dishonest by those standards, that is the end of the matter and the prosecution fails.
If it was dishonest by those standards, then the jury must consider whether the defendant himself must have realised that what he was doing was by those standards dishonest.
- Applied in breach of trust cases⁸ and in disciplinary proceedings;⁹ and in certain jurisdictions.

The decision in Ivey¹⁰

The test to be applied is [emphasis added]:

The test of dishonesty is as set out by Lord Nicholls in *Royal Brunei Airlines Sdn Bhd v Tan* and by Lord Hoffmann in *Barlow Clowes*... When dishonesty is in question the fact-finding tribunal must first ascertain (subjectively) the actual state of the individual's knowledge or belief as to the facts. The reasonableness or otherwise of his belief is a matter of evidence (often in practice determinative) going to whether he held the belief, but it is not an additional requirement that his belief must be reasonable; the question is whether it is genuinely held. When once his actual state of mind as to knowledge or belief as to facts is established, the question whether his conduct was honest or dishonest is to be determined by the fact-finder by applying the (objective) standards of ordinary decent people. There is no requirement that the defendant must appreciate that what he has done is, by those standards, dishonest.

The UKSC specified six “serious problems” about the second limb in *Ghosh*, namely:

- (1) It has the unintended effect that the more warped the defendant's standards of honesty are, the less likely it is that he will be convicted of dishonest behaviour.
- (2) It was based on the premise that it was necessary in order to give proper effect to the principle that dishonesty, and especially criminal responsibility for it, must depend on the actual state of mind of the defendant, whereas the rule is not necessary to preserve this principle.
- (3) It sets a test which jurors and others often find puzzling and difficult to apply.
- (4) It has led to an unprincipled divergence between the test for dishonesty in criminal proceedings and the test of the same concept when it arises in the context of a civil action.
- (5) It represented a significant departure from the pre-Theft Act 1968 law, when there is no indication that such a change had been intended.
- (6) It was not compelled by authority. Although the pre-*Ghosh* cases were in a state of some entanglement, the better view is that the preponderance of authority favoured the simpler rule that, once the defendant's state of knowledge and belief has been established, whether that state of mind was dishonest or not is to be determined by the application of the standards of the ordinary honest person, represented in a criminal case by the collective judgment of jurors or magistrates.

Response: (1) *Ghosh* was a self-limiting test; (2) neither *Ghosh* nor *Ivey* preserves subjectivism; (3) *Ivey* also potentially puzzling; (4) there is often principled divergence; (5) dishonesty was a TA 1968 notion; (6) arguably *Ivey* was not compelled by authority.

⁷ [2017] UKSC 67.

⁸ *Twinsectra Ltd v Yardley* [2002] 2 AC 164; *Barlow Clowes Case* [2006] 1 W.L.R.1476, Privy Council; *Starglade Properties v Nash* [2010] EWCA Civ 1314.

⁹ *Bultitude v The Law Society* [2004] EWCA Civ 1853; the case was decided two years prior to the judgment in *Barlow Clowes*; *GMC v Krishnan* [2017] EWHC 2892 (Admin).

¹⁰ [2017] UKSC 67.