# CASE COMMENT

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# WHAT IS DISHONESTLY FOR? MISTAKING THE NORMATIVITY OF AN HONESTY CLAIM

*Dennis J. Baker**

*R v Barton* [2020] 2 CrAppR 7 following *Ivey v Genting Casinos (UK) Ltd (trading as Crockfords Club)* [2018] AC 391, at 412.

## ABSTRACT

If the mental element of a crime required no more than objective fault, then objective mistakes as to the normative standard of honesty, impropriety etc would inculpate. There is a tension here between the doctrine that "ignorance of the criminal law is no excuse" and the constitutional right not to be subject to ex post facto law making. Because evaluations by fact finders about the normative wrongness of conduct (ie the medical operation was normatively well below the average norms of medical care or the conduct was dishonest against the norms of honesty) only become apparent after the fact the defendant is not able to search the published offences to find the *actus reus* of such an offence, which they must be able to do if the doctrine that ignorance of the criminal law is no excuse is to apply to them. In the case of mistakes about normative standards, when the mental element requires D to have a subjective state of mind in respect to the normative standard, the constitutional right against ex post facto law making takes precedence over the rule that ignorance of the criminal law is no excuse. It is because crimes of negligence such as gross negligence manslaughter do not require D to have subjective fault in relation to the norms that D has failed live up to, that D's ignorance of those norms is considered to be ignorance of the criminal law per se. Under *R v Ghosh* what is honest is an objective normative question, but D can make a subjective mistake about the norms of honestly since those norms are not set out in law as is required by the doctrine that "ignorance of the criminal law is no excuse". The latter doctrine does not excuse ignorance, but that is on the condition that the "law" was "discoverable" (i.e. existed in case law or statute and was online or otherwise published) had D attempted to know it in advance of doing the proscribed act.

**Keywords:** dishonesty, consent, property offences, mistaking norms

* Professor in Criminal Law, Leicester De Montfort Law School, dennis.baker@dmu.ac.uk

## INTRODUCTION

In this case commentary on the decision in *R v Barton*,[1] the focus will be on substantive criminal law issues. There was a side issue in that case concerning the rules of precedent, but the decision does not lay down any new rules in that area and thus I do not intend to provide a critical analysis of the way existing rules concerning precedent were applied in that case. The central substantive issue of criminal law in *R v Barton* was the two prong dishonesty test laid down in *R v Ghosh*[2] in 1982. The *R v Ghosh* test required: (1) The defendant's conduct must be dishonest by the standards of ordinary decent people (*i.e.*, normatively dishonest in contemporary Britain). And (2) The defendant was subjectively aware that ordinary honest people would regard the particular conduct as dishonest as judged against those norms of honestly. *R v Ghosh*[3] simply held that the dishonesty requirement is not made out if there is a relevant subjective mistake about what is normatively dishonest. For an analogy consider the proportionality prong in self-defence, which requires any necessary defensive force to be proportionate when measured against normative standards of proportionality. What is proportionate force is not determined by some subjective standard created by the defendant, but exists as a normative fact and is to be ascertained by the fact-finder as a matter of evaluation. While the defendant might make a genuine mistake as to what was normatively proportionate, this will provide no excuse sense the courts have held in self-defence that only reasonable mistakes as to proportionality exculpate.[4] The rule established by the court incorporated a double test of dishonesty, stated by Lord Lane CJ in the following words:

> A jury must first of all decide whether according to the ordinary standards of decent 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.
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> 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.[5]

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[1] [2020] 2 CrAppR 7.
[2] [1982] QB 1053.
[3] [1982] QB 1053.
[4] See Dennis J Baker, *Glanville Williams and Dennis Baker Treatise of Criminal Law* (LexisNexis 2024) at chapter 23.
[5] [1982] QB 1053.

The second prong of *R v Ghosh*[6] test recognises the defence of mistake and holds that subjective mistakes about the norms of honesty exculpate. Notice the standard was whether or not the defendant realised he or she was acting dishonestly according to the relevant normative standards. If a person mistakenly thinks the conduct is normatively honest then she cannot be subjectively acting dishonestly, even though objectively her conduct is dishonest. The court held that the standards are normative and that subjective mistakes about normative honesty count. The judgment did not hold that normative standards themselves are determined subjectively. (Hence, it was never a Robin Hood defence: Robin Hood knew the normative standards but simply did not agree with them—there is a fundamental difference between not agreeing and mistaking. Hood was not asserting that he mistakenly thought his standard was the norm). A strong Court of Appeal in *R v Barton*, following the *obiter* of Lord Hughes in *Ivey v Genting Casinos (UK) Ltd (trading as Crockfords Club)*,[7] abrogated the second prong.

After *Ivey*, courts were not sure whether to follow *R v Ghosh*. *R v Barton* at least clears up any confusion, because it firmly applies the *obiter* from *Ivey*, and the Court of Appeal rejected Barton's application to appeal to the Supreme Court. Denying Barton the opportunity to appeal to the Supreme Court was hardly surprising given the unanimity in *Ivey* concerning the abrogation of the second prong.

In this comment, I will try draw out this complicated area of the law to shed some light on the distinctions between the core doctrines of dishonesty and mistake and their interaction with each other. It will be submitted that to the extent that subjective mistakes about what is normatively honest in contemporary Britain can negate fault, such mistakes ought to count. Theft, fraud and related property offences are serious crimes carrying lengthy prison sentences, so ought to at least require subjective dishonestly. Against this, it might be said what is dishonest, in the abstract, is a question of law. If it is taken to be part of the criminal law, the citizen could not defend themselves by saying that they did not know this part of the law. Arguably these normative standards are not part of the criminal law since they are not set out in advance as required by Article 7 of the ECHR. One of the problems with the offence of gross negligence manslaughter is that D's subjective mistake of the normative standard of care expected does not exculpate.[8]

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[6] The decision has one other importance: Lord Lane took the opportunity of affirming that the test of dishonesty is the same for conspiracy to defraud as for theft—a matter that had previously fallen into doubt. See *R v McIvor* [1982] 1 WLR 409.

[7] [2018] AC 391.

[8] This has been part of the problem with offences such as gross negligence manslaughter. See Baker (n4) Chap 14.

The normative standards cannot be set out in statutes, since they depend on hundreds of thousands of different norms (i.e., it is not possible to set out all the proper and grossly improper ways to perform various medical operations, or the grossly improper ways to fly aircraft, drive, etc.). As we will see, under sections 1 and 4 of the *Bribery Act 2010*, a person is only liable for trying to bribe another if she intends that person to perform her functions improperly. The proper way to perform functions is determined objectively/normatively. Normatively the function may be performed in an improper way, but unless the briber intended the bribe to influence the bribee to improperly perform her functions she will not be liable. Hence, she must *intend* the *improper performance* so if she mistakenly believes the conduct is normatively *proper* she will not be liable. If a person genuinely intends that a person act in a normatively proper way, her mistake about what is normatively proper does not mean she intends the person to act in a normatively improper way. The law of theft simply states that the appropriation of property belonging to another needs to be intentional. It does not state that a person needs to intend to be dishonest. The law of bribery expressly provides that the briber must intend to influence a person to improperly perform her functions. It would have been better, if the theft statute had expressly required intention or subjective recklessness to cover dishonesty, but it is silent on the point.[9]

A mistake about when conduct is normatively dishonest is akin to a grossly negligent medical doctor arguing she was ignorant and thus mistaken about the normative standards of care required at the time she caused a patient's death through gross negligence, but that offence has an objective fault element.[10] Property offences were intended to be offences of fault, not of negligence.[11] It is

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[9] In the course of delivering the judgment of the Court of Appeal in *R v Sinclair* [1968] 1 WLR 1246, where the defendants had been convicted of conspiracy to cheat and defraud a company, its shareholders and creditors by fraudulently using its assets for purposes other than those of the company and by fraudulently concealing such use, James J said, at 1250: 'To cheat and defraud is to act with *deliberate dishonesty* to the prejudice of another person's proprietary right.' Again, one finds in this case no support for the view that in order to defraud a person that person must be deceived." *Scott v Metropolitan Police Commissioner* [1975] AC 819 at 838–839 *per* Viscount Dilhorne.

[10] *R v Adomako* [1995] 1 AC 171.

[11] "To cheat and defraud is to act with deliberate dishonesty to the prejudice of another person's proprietary right. In the context of this case the alleged conspiracy to cheat and defraud is an agreement by a director of a company and others dishonestly to take a risk with the assets of the company by using them in a manner which was known to be not in the best interests of the company and to be prejudicial to the minority shareholders." *R v Sinclair* [1968] 1 WLR 1246 at 1250 endorsed by the House of Lord in *Scott v Metropolitan Police Commissioner* [1975] AC 819 at 838–839 *per* Viscount Dilhorne.

this junction that allows for a distinction between the general rule that ignorance of the criminal law is no excuse. Gross negligence works slightly different in that it grounds criminal liability on the ignorance of the proper normative standards of care to be provided in the given factual scenario. The defendant is liable for failing to see the normative standards on the basis that any reasonable person in her position would have understood the norms and would have followed them. In essence, it is the grossly unreasonable mistake that gives rise to liability for gross negligence manslaughter.

Under *R v Barton*, simple mistakes of fact (*i.e.*, mistaking the property of another for your own) will negate *mens rea* and thus will continue to exculpate. The core change is that ignorance as to what is normatively honest or dishonest will not count. Mistakes here will not count even if the jury conclude a reasonable person might have made the same mistake, because under *R v Barton* a person is strictly liable for mistakes about the normativity of any honesty claim. It need only be established that the conduct was dishonest normatively for liability to follow—assuming the fault elements of the offence are made out such as an intention to appropriate property belonging to another and so forth. Once a jury find that the conduct was normatively dishonest, it cannot excuse the defendant on the basis that a reasonable person might have also been ignorant of the fact that the particular conduct was dishonest. It also would be somewhat paradoxical to hold that a reasonable person would have been mistaken by a standard a reasonable person would identify.

## THE FACTS OF R V BARTON

The facts of the case are not complex and do not require the sort of intense analysis that perhaps might be required for a complex financial crime case or a proceeds of crime case. They certainly do not need overanalysing for the audience of this journal. Barton operated a number of care homes and used his position to befriend vulnerable elderly residents to steal large sums from them. Barton's *modus operandi* followed a repeat pattern. He would target elderly residents based on the following criteria: (1) wealth; and (2) childlessness. His victims were all wealthy and childless. To the extent that some of them had other family and independent advisors before moving into Barton's care homes, he played on their vulnerability to completely isolate them from such contacts. After he isolated them from their friends and family he became their next of kin and their power of attorney. Remarkably, he also became an executor and beneficiary of their wills.

Barton stole more than £4 million from six elderly residents in his care home. He liquidated their assets and thereafter transferred the funds out of their bank accounts to his own accounts. His scams included selling two elderly women his

Rolls Royce cars, each worth between £100,000 and £150,000, for £500,000 per car. Barton alleged he took the two ladies out once a weak in the cars and this benefited them. When they died, Barton reclaimed the cars through wills that had been drawn up in his favour due to undue influence. The victims included Patricia Anderson Scott, who had £1.4 million stolen from her. He also targeted multi-millionaires Kate and Gordon Willey. They had independent advisors, friends, nephews and nieces, but Barton managed to completely isolate them. Barton persuaded Kate and Gordon Willey to give him Mr Willey's classic car collection even though Mr Willey was suffering Alzheimer's disease and was incapable of making an informed decision. After Mr Willey passed away, Barton tried to convince Mrs Willey to enter a scheme where all of her wealth would pass to Barton. Before Barton succeeded Mrs Willey passed away and this led to him lodging a fraudulent claim for £10 million against her estate. Barton even tried to use lawyers to sue for the £10 million. It appears this fraud was the one that ultimately brought his two decades of fraud to an end.

Lord Burnett, CJ said:

> Perhaps the most egregious part of the claim related to fees due for taking Mr Willey on drives out in classic cars. This part of the claim was costed at £7.2 million (including VAT). This was on the basis of David Barton's assertion that there was an understanding that there would be a payment in excess of £25,000 per day for Mr Willey's drives out, which were a means of managing his condition.
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> Barton manipulated them and isolated them from their family, friends and advisers. A number of these residents made him the residuary beneficiary of their wills, usually within a short time of arriving at Barton Park. They also allowed him to assume control of their finances, by making him next of kin, or granting him power of attorney, or by making him executor, and he used this control to enrich himself. …. David Barton dishonestly exploited his relationship with these residents in a number of different ways.[12]

Barton was convicted of five fraud offences, three counts of theft, false accounting and transferring criminal property. In a final attempt to avoid justice, Barton appealed on a point of law that had little hope of helping him given the degree of his dishonesty. Barton sought a ruling on the *R v Ghosh* test in the hope that a subjective interpretation of the second prong of that test might set him free. The facts were so egregious that it is difficult to see how his counsel thought the *R v Ghosh* test as opposed to the *Ivey* test would have helped. Nonetheless, it did provide the Court of Appeal with an opportunity to reconsider *R v Ghosh* in light

[12] *R v Barton* [2020] 2 CrAppR 7 at para 64.

of the decision in *Ivey*. The facts are not complex and thus a deeper analysis of these facts is not required for present purposes. I have given enough facts to show the level of dishonesty involved.

## THE DISHONESTY DOCTRINE

In *Ivey* Lord Hughes seemed to take the view that since *R v Ghosh* judges have been directing jurors under the second prong to apply not even their own standard, but that of the defendant herself whose behaviour was under scrutiny: did the defendant believe what she did was honest? This is not how the standard was applied in practice, and it was never intended to apply in such a fashion.

In *Boggeln v Williams*,[13] the defendant had failed to pay his electricity bill, and his supply was disconnected. He was convicted by magistrates for dishonestly abstracting electricity, but successfully appealed to the Crown Court, which found as a fact that he was not dishonest, even though he knew that the supplier did not consent to his use of the electricity. It was held that since he intended to pay for it and believed that he would be able to do so, he had not been dishonest. He was acquitted because he believed it was honest to take electricity if a person intended to pay and had the means to pay. This was not a case of defendant asserting some fanciful standard of honesty, but a case of subjective beliefs preventing him from intending to act dishonestly, he believed it would only be dishonest to abstract the electricity, if he had no intention of paying. It might be thought that is mistake about the standard is no different to him asserting his own standard, but that is not what did the exculpating work. The exculpating work was done by his belief he was acting honestly because he intended to pay. If the evidence demonstrated that he had no means of paying and was unlikely to be in a position to pay when the bill came, a jury might infer his belief was not genuine. The core feature was not relying on some Robin Hood type normative standard of honesty of his own invention, but simply was mistaken about existing norms.

In *Ivey*, the Supreme Court in *obiter dicta* held that subjective mistakes no longer count. The Supreme Court held the test is objective and the jury need only consider what is honest according to prevailing community standards of honesty. Therefore, if the defendant makes a genuine mistake about the normativity of her conduct, she will be strictly liable if the conduct and fault elements are otherwise made out. Lord Hughes's *obiter* is as follows:

> 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

[13] [1978] 1 WLR 873.

> determined by the fact-finder by applying the (objective) standards of ordinary decent people.[14]

This statement was only *obiter* and was given in a civil case and thus was not binding law. *Obiter* statements are persuasive, but that is all. However, the *ratio decidendi* in *R. v. Barton*[15] has now adopted the Supreme Court's *obiter* as the law. It is worth noting it was a strong Court of Appeal (The Lord Chief Justice, President of the Queen's Bench Division (Dame Victoria Sharp), Vice President of the Criminal Division (Lord Justice Fulford) and Mrs Justice McGowan).[16] Given that this has now been adopted as the law by a strong Court of Appeal, the subjective prong in *Ghosh* can be taken as abrogated.

Those concerned with rules of precedent will no doubt write essays about that issue, that is not my concern as a criminal law scholar. It does seem audacious for the Supreme Court to assert: "that the test for dishonesty they identified, albeit strictly contained in *obiter dicta*, should be followed in preference to an otherwise binding authority of the Court of Appeal."[17] There was nothing about the question of law raised in *Ivey v Genting Casinos UK Ltd (t/a Crockfords Club*, a civil case, that warranted the court taking that particular opportunity to change the criminal law test.[18] The Supreme Court has no power to change laws that are not raised as a central issue in the given case,[19] but can make *obiter* statements. The Supreme Court was not being asked to reconsider one of its own decisions nor was it considering an appeal on the *R v Ghosh* test. Nonetheless, the Court of Appeal

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[14] *Ivey v Genting Casinos UK Ltd. (t/a Crockfords Club)* [2018] AC 391 at 416–417.

[15] [2020] 2 CrAppR 7 following *Ivey v Genting Casinos (UK) Ltd (trading as Crockfords Club)* [2018] AC 391 at 412.

[16] *R v Barton* [2020] 2 CrAppR 7.

[17] "As in *R v James* [2006] 2 WLR 887, we do not consider that it is for this court to conclude that it was beyond their powers to act in this way." *R v Barton* [2020] 2 CrAppR 7 at para 102.

[18] *The Practice Statement* [1966] 1 WLR 1234, provides: "Their Lordships nevertheless recognise that too rigid adherence to precedent may lead to injustice in a particular case and also unduly restrict the proper development of the law. They propose, therefore, to modify their present practice and, while treating former decisions of this House as normally binding, to depart from a previous decision when it appears right to do so."

[19] "Their Lordships regard the use of precedent as an indispensable foundation upon which to decide what is the law and its application to individual cases. It provides at least some degree of certainty upon which individuals can rely in the conduct of their affairs, as well as a basis for orderly development of legal rules." *Practice Statement (HL: Judicial Precedent)* [1966] 1 WLR 1234.

was well within its right to depart from the decision in *R v Ghosh*[20] and also to be *persuaded* not *bound* by the Supreme Court's *obiter dicta*. The *obiter dicta* was only of persuasive authority and the Court of Appeal ought to have made that clear. The Court of Appeal was wrong to conclude it was bound by the *obiter dicta*. In *R v Taylor*,[21] the Court of Criminal Appeal held:

> This court, however, has to deal with questions involving the liberty of the subject, and if it finds, on reconsideration, that, in the opinion of a full court assembled for that purpose, the law has been either misapplied or misunderstood in a decision which it has previously given, and that, on the strength of that decision, an accused person has been sentenced and imprisoned it is the bounden duty of the court to reconsider the earlier decision with a view to seeing whether that person had been properly convicted.[22]

The issue of precedent is more of a concern for the decision in *Ivey* as opposed to *R v Barton* where the issue of dishonesty was central and where the Court of Appeal was permitted to be persuaded by *obiter*, even though it mistakenly thought it was bound by it. In other words, it could have simply said that it was persuaded by the *obiter* without trying to provide an elaborate explanation about why it was justified to circumvent well-established rules of precedent. The focus in this comment is not on that side issue, but on the core doctrine of dishonesty, so I will desist from any further discussion on that issue.

## THE DOCTRINE OF MISTAKE

Mistakes are relevant as follows:

1. Mistakes of criminal law provide no excuse.[23]
2. Mistakes of normative standards excuse, if the offence requires fault to relate to that standard. For example, the offence of bribery requires subjective fault with respect to whether or not the bribee will perform his or her function functions improperly—but what is improper is decided normatively and objectively.

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[20] *R v Taylor* [1950] 2 KB 368.

[21] [1950] 2 KB 368 at 371 at *per* Lord Goddard, CJ.

[22] *R v Taylor* [1950] 2 KB 368.

[23] Ignorance of the law is no excuse. This for appropriate promulgation. It was expressed by Roman jurists in the form, '*ignorantia juris non excusat*.' *Attorney General's Reference (No.1 of 1995)* [1996] 1 WLR 970 at 974.

3. Mistakes of normative standards do not excuse, if the offence does not require fault to relate to that standard. Here there is not a simple mistake of fact as such, but an evaluative mistake of what is dishonest. Ignorance of the normative standard of what is dishonest does not count.[24] So it is effectively strict liability, because ignorance of what is normatively honest or dishonest does not count.

Conduct is determined to be dishonest if it fails to meet contemporary Britain's normative standards concerning what is objectively regarded as honest. The problem with the law as stated in *R v Barton*[25] is that it collapses theft and fraud into offences of strict liability apropos honesty. A genuine mistake about the normative standard of what was or was not honest does not count even if it was reasonable. It is not clear there was a pressing case for making such serious offences into offences of strict liability apropos dishonesty, given that jurors are likely to adjust the standard of honesty in meritorious cases. Should a solo judge on whim be making these sorts of changes by judicial fiat? A jury is not going to allow mistakes that are patently unreasonable: the more unreasonable a mistake, the less likely the jury are to believe there was a genuine mistake.[26]

Mistakes of fact might negate *mens rea* even when dishonesty is not an issue. For example, a mistake of civil law could cause a person to act without out the *mens rea* for theft, for example, if she believes she is taking property that belongs to herself.[27] The mental element requires the perpetrator to intend to perpetrate property belonging to another. Thus, in this sort of case the inquiry is over before the issue of dishonesty is raised: it is the lack of an intention to appropriate property

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[24] *R v Barton* [2020] 2 CrAppR 7.

[25] [2020] 2 CrAppR 7 at para 107.

[26] In *R v Norman* (1842) Car&M 501, it was held that if D "admits the appropriation, alleging a right in himself, no matter how unfounded, or setting up an excuse, no matter how frivolous, his offence in taking and keeping, is no embezzlement." Nonetheless, if it is totally unreasonable and unfounded, a jury might simply infer no such belief was held. *DPP v Morgan* [1976] AC 182; *Ivey v Genting Casinos (UK) Ltd (trading as Crockfords Club)* [2018] AC 391 at 412; *R v Twose* (1879) 14 Cox CC 327; *R v Hall* (1828) 3 Car&P 409.

[27] "It follows that in our judgment no offence is committed under this section if a person destroys or causes damage to property belonging to another if he does so in the honest though mistaken belief that the property is his own, and provided that the belief is honestly held it is irrelevant to consider whether or not it is a justifiable belief." *R v Smith* [1974] QB 354 at 360. A similar mistake was said to provide an excuse to criminal damage in *R v Rutter* (1909) 1 CrAppR 174.

belonging to another that does the exculpating work.[28] If a person takes another's umbrella believing it is her own umbrella, she is not guilty of theft because she did not *intend* to appropriate property *belonging to another.* These are simply cases of the defendant being able to negate *mens rea* by asserting there was no fault on the facts as she believed them to be.

*R v Barton* holds *ignorance of the normative standards of what counts as dishonest is no excuse*. This is a hybrid mistake, because it is not a mistake about what is a crime, but is akin to the approach taken for gross negligence manslaughter in that the defendant failed to notice and comply with a normative standard that any reasonable person in her position would have noticed and complied with. Suppose Judy has just arrived from Luxembourg and believes public transportation is free in London and thus uses it without paying for that service. Firstly, public transport does require a payment, and it is a criminal offence not to pay. To the extent that Judy is mistaken about whether or not it is a criminal offence not to pay for to the use of public transportation her ignorance is no excuse. The fact that she did not know it was an offence[29] to avoid paying for tickets will not provide her with an excusatory defence.

Nonetheless, the above does not mean that a mistake cannot negate *mens rea* for the relevant offences in the normal way. For example, it is arguable that Judy has not formed the *mens rea* for section 11 of the *Fraud Act 2006* or for section 3 of the *Theft Act 1978*. Section 5(3) of the *Regulation of Railway Act 1889* makes a person liable if he: "Travels or attempts to travel on a railway without having previously paid his fare, and with *intent to avoid* payment thereof." Judy might negate *mens rea* by demonstrating that she had no intention of avoiding paying for the fare. If a person mistakenly thinks she has a valid ticket, she could hardly be said to be trying to avoid paying for a ticket (or paying the fare).[30] Similarly, section 11(2)(c) of the *Fraud Act 2006* provides: "c) when he obtains them, he knows—(i) that they are being made available on the basis described in paragraph (a), or (ii) that they might be." These are not strict liability offences and the rule that ignorance of the criminal law is no excuse does not make them such.[31]

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[28] *R v Smith* [1974] QB 354 at 360.

[29] Under section 5 of the *Regulation of Railway Act 1889* you would be given an opportunity to pay. Section 5(3) of the *Act of 1889* provides: "Travels or attempts to travel on a railway without having previously paid his fare, and with intent to avoid payment thereof." A person would only be liable here if she formed the intent not to pay or to avoid payment.

[30] Cf *Browning v Floyd* [1946] KB 597.

[31] Likewise, section 3 of the *Theft Act 1978* (making off without payment) also includes a knowledge requirement.

This is different from Judy arguing "I knew a fare was due but thought most people do not pay so it was not dishonest for me not to pay". Recall *R v Smith*,[32] Smith made a genuine mistake as to the civil law and this caused him to believe he was damaging his own property. Smith did not assert he unreasonably believed it was permissible to destroy property belonging to another. Nor was it a case of him asserting he unreasonably believed it was permissible to steal and loot property because everyone was doing it in a riot situation and so on. Thus, Smith acted honestly on the facts as he believed them to be. Nonetheless, what is or is not honest is judged by community standards and this is an objective test. If Smith had unreasonably believed that it was permissible to steal from his employer because it is a large corporation evading taxation, his subjective mistake of what is honest would not count under *R v Barton*.

The normative standard of what is right or wrong is always determined objectively (*i.e*., evaluative assessments are always objective assessments of what is normatively required). Nonetheless, an action can be normativity the wrong thing to do, but a person might be subjectively mistaken about the fact that she was behaving in a normatively impermissible way. Some offences allow subjective mistakes to count by including a mental element that covers the normative standard. For example, section 1 of the *Bribery Act 2010* provides:

1. A person ("P") is guilty of an offence if either of the following cases applies.
2. Case 1 is where—(a) P offers, promises or gives a financial or other to another person, and (b) intends the advantage—(i) to induce a person to perform improperly a relevant function or activity, or (ii) to reward a person for the improper performance of such a function or activity.

Thereafter section 5(2) of the *Bribery Act 2010* provides:

1. For the purposes of sections 3 and 4, the test of what is expected is a test of what a reasonable person in the United Kingdom would expect in relation to the performance of the type of function or activity concerned.
2. In deciding what such a person would expect in relation to the performance of a function or activity where the performance is not subject to the law of any part of the United Kingdom, any local custom or practice is to be disregarded unless it is permitted or required by the written law applicable to the country or territory concerned.
3. In subsection (2) "written law" means law contained in—(a) any written constitution, or provision made by or under legislation, applicable to the

[32] [1974] QB 354 at 360.

country or territory concerned, or (b) any judicial decision which is so applicable and is evidenced in published written sources."

Like the test of dishonesty for property offences, the normativity of the way the function or activity is performed is measured against contemporary British norms. If the conduct is against normal business practice and is generally regarded as improper, then it will be deemed as such by following a reasonable person assessment of what to expect in the United Kingdom. The mental element relates to having knowledge of the fact that the way the bribee will perform his or her function will be improper and thus a subjective mistake counts, even if a reasonable person would not have made the same mistake. The section 1 offence in the *Bribery Act 2010* requires the defendant to intend or obliquely intend the bribee to engage in normatively improper conduct. Oblique intention and intention require subjective fault, which means the defendant would have to intend the function be performed improperly according to contemporary British standards (section 1(2)) or alternatively obliquely intend "the acceptance of the advantage would itself constitute the improper performance of a relevant function or activity" (section 1(3)).

The law of theft can be distinguished as intention only relates to the appropriation. Dishonesty sits outside the primary mental element and works more as an auxiliary way to negate fault. The law of theft does not require a person to intend to be dishonest, but simply requires that person to intend to appropriate property belonging to another. *Per contra*, the *Bribery Act 2010* adopts a normative test for determining what is the proper way to perform functions or activities, but unlike dishonesty in theft it is not independent of the primary fault element. In the bribery offence the intention concerns whether or not another will perform their functions improperly. Intention, knowledge or belief as to whether the performance of the function or the acceptance of the bribe is improper, requires more than mere negligence and is not a matter of strict liability.

The subjective mental element requires a person to intend the function be performed in a normatively improper way or obliquely intend that the acceptance of the bribe be normatively improper. Likewise, suppose D1 believes that D2 doing conduct X is an improper performance of her functions. D1 provides a bribe to induce D2 to do X, but finds out *ex post facto* X is normatively permissible. The mistake about the normative standard does not change the fact that D1 attempted to induce D2 to act improperly. Hence, "improper conduct" is not working as a secondary element in the way that dishonesty does in the law of theft, but is the thing that needs to be intended or obliquely intended. A person cannot intend or obliquely intend another to improperly perform his or her functions if she intends (due to her mistaken belief about the normative standard of what is the proper way to act) that that person properly perform her functions. Theft differs since it does

not expressly provide a person must intend to appropriate property with the ulterior intention of doing so dishonestly. Nonetheless, this is clearly implied by the legislation and *R v Ghosh* recognised as much.

Some might argue that this makes the law of bribery a "charter for bribers", but it does not. In most cases it will be patently obvious that the conduct is improper according to British standards. Given the high level of fault required and given that the legislation requires a person to intend "the receiver or a third party to improperly perform a function" or obliquely intend improper acceptance of an advantage, the mistake of fact requirement is relevant to fault. As always, "While a defendant's belief need not be reasonable provided it is genuine, the reasonableness or unreasonableness of the belief is by no means irrelevant. The more unreasonable the belief, the less likely it is to be accepted as genuine."[33]

This brings us back to theft where technically the law of theft, fraud and related property offences use dishonesty independently of the primary fault requirement. Mistake of fact can negate *mens rea* in property offences and honesty can be raised normatively to exculpate, but when a person mistakenly believes she is acting honestly, following *R v Barton* she will no longer be able to raise her subjective mistake about what was normatively the honest way to act. Arguably this is a step too far, because a jury can identify a genuine mistake in most cases. There was no pressing need to change the law—it was working well in practice.

## CONCLUSION

The way the law was changed may seem controversial, but that is a side issue given that *obiter* is persuasive and may be followed. Especially *obiter* from a higher court. The controversy is that a person who is genuinely mistaken and does not intend to be dishonest can be liable for a very serious crime. The *Bribery Act 2010* seems more enlightened in this sense, because it requires the defendant intend another engage in an "improper performance" of her functions as a result of the bribe. The properness of any functions will be determined through the same sort of normative evaluation that dishonesty is determined, but unlike property offences those charged with bribery will have a defence if they subjectively believed they were encouraging the other party to engage in proper conduct and that any payments were legitimate business payments.[34]

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[33] *R v K* [2002] 1 AC 462 at 474 *per* Lord Bingham. See also *R v Williams* [1987] 3 All ER 411 at 415; section 76 of the *Criminal Justice and Immigration Act 2008*.

[34] Cf. *Serious Fraud Office v Barclays Plc and Another* [2020] 1 CrAppR 481 at 489, where Ds successfully convinced the court that £322 million in side payments were legitimate even though not disclosed in a capital raising prospectus as required by law.

A person can intend something only if she knows what she is doing. A person can intend to act dishonestly only if she knows or believes that the conduct is normatively dishonest. If a person is trying to act honestly, but acts dishonestly in a normative sense, her mistaken belief means she is not morally culpable. She may be negligent in not knowing that conduct X is normatively dishonest, but negligence as to the norms of honesty ought not make a person liable for a serious crime such as theft. This is not a "charter for thieves", because "While a defendant's belief need not be reasonable provided it is genuine, the reasonableness or unreasonableness of the belief is by no means irrelevant. The more unreasonable the belief, the less likely it is to be accepted as genuine."[35] Barton was no more mistaken than the men in *DPP v Morgan*.[36] Barton would not have succeeded under *R v Ghosh*. However, to remove the subjective mistake prong from the dishonesty requirement might mean honest people will be convicted.

[35] *R v K* [2002] 1 AC 462 at 474 *per* Lord Bingham. See also *R v Williams* [1987] 3 All ER 411 at 415; section 76 of the *Criminal Justice and Immigration Act 2008*.
[36] [1976] AC 182.