

CHAPTER ONE

QUANDARIES OF DESERT

1.1 Gary Hart and the Selby Rail Disaster

In February 2001, a man named Gary Hart was driving along an English motorway. In circumstances that are a matter of some dispute, his vehicle came off the road, careered down an embankment and ended up on railway tracks. A passenger train collided with it and was then pushed into the path of a goods train travelling in the opposite direction. The accident caused the deaths of ten people. Gary Hart was convicted of causing death by dangerous driving and sentenced to five years in jail (www.BBCnews.bbc.co.uk/1/hi/england/1754336.stm).

The prosecution maintained that Hart had fallen asleep at the wheel. He denied this, but it was concluded that tiredness had been a crucial factor in the cause of the accident. Hart had apparently spent the whole of the previous night chatting on the phone to his new girlfriend, whom he had met on the Internet.

The most obvious victims in this situation were the ten deceased and the injured, but some would argue that Hart himself was a victim of injustice. He had not intentionally done anything heinous. A freak combination of circumstances turned what would normally have been regarded as no more than mildly imprudent behavior into the cause of an exceptional disaster. Mildly imprudent behavior should not attract a five-year prison sentence. Every one of us is mildly imprudent from time to time, but few of us actually end up doing great harm either to ourselves or to others as a result. It seems that Hart was just extraordinarily unlucky. No doubt the relatives of the deceased would find this hard to accept. Taking their side for a moment, we might question the implicit assumption that bad luck can never render someone culpable. But we need to analyse the situation more carefully if we are to reach a confident judgement. Doing so will, I think, help us to clarify some important aspects of our thinking on the subject of desert.

In U.K. law at that time, the maximum sentence for causing death by dangerous driving was imprisonment for ten years, while that for dangerous driving alone was imprisonment for two years. (Since then, the former has been increased to fourteen years. Such discrepancies in sentencing are found in most jurisdictions.) So Hart's sentence obviously did not exceed what the law permitted—indeed, it was much less. However, the disparity in the maximum sentences for the two offences can be questioned from a moral stance. As the case showed in a very dramatic way, whether one has merely driven dangerously or driven dangerously and thereby killed can be due merely to luck, over which, by definition, one has no control. A person who drives dangerously, but is lucky enough not to end up killing anyone is treated much more leniently than someone who drives equally dangerously, but who, through massive ill fortune, does kill someone. It is highly plausible to claim that this is a morally unfair difference in treatment.

But the unfairness owed to disparity of treatment alone will not actually take us very far in deciding what should be done in cases of this kind. In order to equalize, should we be more lenient with dangerous drivers who kill or harsher with those who don't? We need further moral intuitions for guidance here.

Perhaps a hint is to be found in my reference to Hart's *intentions*. I pointed out that he did not intend to do anything heinous. We could argue that, irrespective of how the consequences turn out, punishment is inappropriate if the offender did not intend anything bad to happen. According to this view, Hart should not have been punished at all.

But this suggestion is too simple. Lawyers talk about *mens rea* (literally a 'guilty mind') as the basis of criminal responsibility. *Intention* to do harm is certainly one form of *mens rea*, but there are two other standardly recognized forms, namely *recklessness* and *negligence*. Are either of these relevant to the present case?

Recklessness means knowing that one's actions will or might do harm, but not caring about this, or not caring enough. It could be said about Hart that, though he did not intend to kill anyone, he did know that his actions might do harm and did not care enough to act differently. Is this plausible, given the agreed facts of the case? After his car had careered onto the railway tracks, Hart made a genuine attempt to prevent disaster, including alerting the emergency services. It is evident, then, that when he knew the danger, he cared greatly about saving lives. In response to this, it might be said that though the greatest danger existed after the car had gone onto the tracks, there was danger in his driving prior to that point. (The charge was after all causing death by dangerous *driving*.) His indifference on the latter score was what constituted his recklessness, according to this argument.

However, this is not at all plausible if we accept the prosecution's contention that Hart had fallen asleep at the wheel. If this was what happened, then at the moment the vehicle was starting to go down the embankment, he could not have been aware of what was happening. It is possible, of course, that somewhat earlier, he may have started to become aware that he was falling asleep and chose not to do what is generally recommended in such a situation, which is to stop and take a rest. And what is even more plausible to suppose is that, during the previous night, he had consciously chosen to continue chatting to his girlfriend on the phone instead of going to bed, thus creating the state of drowsiness in the first place. So for these reasons, wasn't Hart guilty of extreme recklessness, justifying a severe prison sentence?

Actually, this is not so clear. While it *might* be true that just expecting that one will be acting in a potentially harmful way, as opposed to *intending* to act harmfully, is sufficient for deserving some sort of punishment, we need to ensure that the punishment is proportionate to the offence. More specifically, this means that the punishment deserved by the agent should be proportionate to the degree of *expected* harm that he knew or believed was involved in his actions. The probability of killing ten people if one is in a state of drowsiness while driving and one does not take a rest, though not zero, is quite small. (The same point applies even more undeniably to the act of continuing to chat on the phone instead of going to bed.) Creating a very small danger of something terrible happening is not anywhere near as bad as creating a certainty of that thing's happening. Indeed, it is impossible to live a normal human life without creating such risks. So it does not seem right to say that Hart deserved a severe penalty for this form of *mens rea* either.

So finally let's consider the last of the three standardly recognized forms of *mens rea*, criminal negligence. This is held to apply in cases where, although the offender may not have believed that he was doing anything wrong, any *reasonable person* would have realized this. According to this view, one can be rendered culpable, and thus deserving of some sort of penalty, not because one actually believed one was doing harm, but because one *would* have believed this if one had been a reasonable person. One can apply this hypothetically to Hart if one supposes, for example, that he had somehow missed all the warnings about driving while sleepy. One can concede that his ignorance on this matter implies that he was not aware of the dangers, but still hold him to the standards appropriate to someone who was not thus ignorant. Of course, this line would still be vulnerable to the objection that the expected harmfulness of driving while sleepy is much less than the expected harmfulness of an act of deliberate killing. Therefore, it will still not support the harsh sentence passed on Gary Hart. But it is interesting to ask whether the idea of desert based on criminal negligence is a plausible one anyway.

It is hard to see that it is. If an agent is not aware of something that 'any reasonable person' would believe, then he is *ipso facto* not a reasonable person. In that case, why should he be held to account for not doing what a reasonable person would do? To suppose that he should is tantamount to blaming someone for his stupidity or ignorance, and this surely cannot be morally justified, especially if it results in significant distress for the person blamed. Of course, most people do have opportunities from time to time to improve their knowledge and understanding, and sometimes they could be held to account for failing to make use of these opportunities. But surely this should affect only what they deserve for their poor responses to such particular opportunities on the occasions that they are provided with them, not what they deserve for later lapses that may have been caused by those responses.¹ And as a purely practical matter, it would usually be rather difficult for judicial authorities to trace such lapses to actual instances of choosing to be ignorant. How would anyone go about tracing the source of Hart's (hypothetical) lack of awareness of the dangers of driving while sleepy and therefore of establishing that this source lay in specific decisions to remain ignorant?

In summary, of the three forms of *mens rea*—intention, recklessness and negligence—only recklessness is clearly attributable to Gary Hart and that only to a small degree. An injustice was certainly done, at least in so far as justice is a matter of moral desert. But what theoretical conception of deserved punishment is presupposed by this conclusion and can it be defended?

¹ Holly Smith has argued that the relationship between the earlier neglectful acts or omissions and the subsequent lapses is analogous to that between an act or decision that risks harm and the subsequent harmful event that may or may not occur (Holly Smith, 1983, 'Culpable Ignorance', *The Philosophical Review*, 92(4): 543-571.) Whether the agent is blameworthy for the later lapses in the former case therefore resolves itself into the question (already raised here in effect in my fourth paragraph) of whether the actual occurrence of a harmful event adds to the blameworthiness of the risky decision that led to it. Smith leaves the answer to this open. I claim that it does not, a position which I defend in the next section.