

COMMENTS ON THE (IM)POSSIBILITY OF APPROXIMATING CONDITIONAL INTENT AND WILLFUL BLINDNESS

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Abstract

Interest in the institute of willful blindness has gained prominence in Brazilian jurisprudence and doctrine, with its equation with conditional intent, especially in the corporate sphere in order to eliminate loopholes in punishability. Throughout the analysis of the essentials requirements to criminal liability in Brazil, especially the ones to verify the agent's intent, and the elements that configure the willful blindness in the North-American criminal system, the compatibility of those institutes can't be established once they cannot be taken as equivalent, especially in the context of improper omission in the business context.

Keywords

Conditional intent. Willful blindness. Criminal liability.

Summary

1. Introduction. 2. Grounds for the problem of intent. 2.1. Intellectual and volitional elements of intent. 2.2. Conditional intent. 3. Conditional intent, improper omission of company officers and willful blindness. 3.1. Intellectual element as a prerequisite for conditional intent and willful blindness. 3.2. Volitional element necessary for conditional intent and willful blindness. 4. Conclusion.

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1 INTRODUCTION

Interest in the institute of willful blindness has gained prominence in Brazilian jurisprudence and doctrine, with its equation with conditional intent, especially in the corporate sphere in order to eliminate loopholes in punishability. In this sense, the object of this research is to verify whether or not it is possible to bring the institutes of willful blindness and conditional intent closer together for the purposes of imputing criminal liability for the improper omission of company directors.

Bearing in mind that these institutes derive from different legal systems, *common law* willful blindness and *civil law* intent, it is necessary to analyze the essential requirements for the configuration of each of them to identify whether it is possible to approximate their concepts. To this end, and using the normative teleological method, a brief analysis will be made of the integrating elements of intent, especially conditional intent, so that, in a second step, by analyzing the institute of willful blindness and its elements, we can verify whether they are compatible with the conforming elements of the latter.

2 GROUNDS FOR THE PROBLEM OF INTENT

Unlike other legal systems, the Brazilian Penal Code contains the concept of intent, stating that conduct is intentional when the agent *wanted* the result or *assumed the risk of* producing it. Traditionally, intent is divided into three types: first degree direct intent, second degree direct intent and conditional intent. In short, in the case of

first-degree direct intent, the realization of the typical conduct is the agent's own purpose, distinguishing it from second-degree direct intent to the extent that in the latter, the agent accepts the secondary consequences necessary for that purpose. The last type of intent, which will be analyzed here, is called conditional intent and is verified when the agent assumes the risk of producing the result.

Doctrine understands that, for the purposes of intent, the Penal Code has adopted the Will Theory regarding direct intent (*wanting the result*) and the Consent Theory with regard to conditional intent (*taking the risk of producing it*)². It can be seen from the description given by the legislator, therefore, that intent is made up of two elements: one of an intellectual nature, consisting of knowledge (representation) and the other of a volitional nature, represented by the will. Logically, you only *want* something or *assume* something that you know about.

2.1 Intellectual and volitional elements of intent

To begin with, it should be noted that the method adopted in this work is the normative teleological method, since the concepts to be dealt with must be considered legal concepts, concepts developed by and for criminal law. As Pedro Jorge Costa explains, "within this teleological approach, the protection of legal assets and of the citizen, who needs to know the area of the illicit act and cannot be punished

² BRANDÃO 2020; COSTA 2015; PRADO 2020.

beyond what is possible by the principle of culpability, is accepted as an end of criminal law, especially relevant to the issue of intent"³ .

Traditionally, and in its most generic form, intent is conceptualized as the knowledge and will to carry out the type of crime.

Although there is no consensus regarding knowledge, we believe that for the purposes of characterizing intent, it cannot be merely potential, but actual and must encompass all the objective elements of the criminal type⁴ . It is, therefore, the actual representation of the objective elements of the type. In this sense, Hans-Heinrich Jescheck points out well

Intent means knowing and wanting the objective elements of the legal type. (...) If knowledge of the circumstances pertaining to the legal type is lacking, intent is excluded, conversely, it is positively deduced that intent requires knowledge of said circumstances⁵ . (Free translation).

On the other hand, it is not necessary for the agent to subsume the objective and normative elements of the law with technical legal accuracy, but rather to have knowledge of the normative valuation of

³ COSTA 2015, 33.

⁴ Along the same lines, among others: DIAS 2007; WESSELS 1980.

⁵ JESCHECK 1981, 398.

the conduct, whether positive or negative, which is why we speak of knowledge as a parallel valuation in the sphere of the profane.

As already mentioned, awareness is a prerequisite for the configuration of the second element of intent, which is will. Since willful conduct is contrary to the legal norm, willfulness requires the agent to be predisposed to accept the realization of the criminal type as a consequence of their own conduct⁶.

It should be emphasized that what is relevant to intent is determining whether the danger was foreseen. This is because its creation is determined within the scope of objective imputation⁷, which only considers objectively foreseeable dangers, including the agent's special knowledge⁸.

2.2 Conditional intent

Specifically about conditional intent, an arduous and highly controversial task concerns the definition of its object. Traditionally, we work with the definition of conditional intent as opposed to the definition of conscious guilt. We speak of conscious guilt when the agent represents the concrete danger, but either doesn't take it seriously, because he denies that it exists because of failing to comply

⁶ STRATENWERTH 2005.

⁷ "Objective imputation is not the same as proving the entire objective type, but only the affirmation of the conditions that allow the injury or endangerment described in the type to be attributed to a subject through the requirement of certain specific elements". PUIG 2003, 05.

⁸ COSTA 2015.

with an objective duty of care or, even if he does take it seriously, trusts that the harmful result will not occur.

The two main theories that contribute to resolving the issue are the Consent or Will Theory and the Probability or Representation Theory. The first seeks to delimit conditional intent through the volitional element, requiring the agent to have approved, consented to the result. However, one of the criticisms that can be made is that, although this theory seeks to define the object of conditional intent based on the volitional element, the presence of the intellectual element as the basis of the will is essential, since the agent must have represented the occurrence of the result as probable⁹. The Probability theory, on the other hand, seeks to delimit conditional intent through the intellectual element, requiring for its configuration not only the mere possibility of the result occurring, but also its probability. Here too, the criticism is made that in both conditional intent and conscious guilt, the agent represents the probability of the harmful result occurring, but even if he does so, he may have trusted that it will not happen, which would rule out conditional intent. Furthermore, there is no consensus as to what degree of probability is necessary for conditional intent or conscious guilt.

⁹ "In addition, however, if the result occurs, there must be a certain relationship of will between the result and the perpetrator ("hypothetical apprehension of intent"); that is, the perpetrator must declare himself in agreement with the actualization of the result, "consent to the result". Conditional intent, therefore, is characterized because the execution of the dangerous action is preferable for the perpetrator to the complete renunciation of the action, despite the possibility of the result." (Free translation). MAURACH 1994, 389.

Despite the numerous criticisms that can be leveled at both theories, the Probability Theory currently has the most supporters. As far as Brazilian law is concerned, Pedro Jorge Costa explains that this would be the best theory because it is compatible with the Penal Code, stating that

The agent's actual prediction is determined by the law, for its own purposes, by behavior compared to rational standards of behavior. It is therefore an objective hypothesis of probability, not a hypothesis of objective probability. Probability is not and cannot be mathematical. Whoever acts foreseeing the injury or danger to the legal good assumes the risk of it happening¹⁰.

Thus, for conditional intent to be established, the agent needs to represent a high probability of the harmful result occurring, which is not capable of preventing him from acting when he shouldn't have, or omitting to act when he should have acted to avoid the harmful result.

3 CONDITIONAL INTENT, IMPROPER OMISSION OF COMPANY OFFICERS AND WILLFUL BLINDNESS

¹⁰ COSTA 2015, 297.

Currently, interest in the *Willful Blindness Doctrine*, usually translated as "Deliberate *Blindness*" or "Deliberate Ignorance", is gaining ground in both jurisprudence and doctrine in Brazil. This interest has culminated in the uncritical importation, or even outright transposition, of the aforementioned institute into the reality of Brazilian Criminal Law, without due care being taken to verify the effective compatibility between that institute and this branch of Law in Brazil.

Although the origin of Willful Blindness is uncertain in both English and North American law, its presence and diffusion in North American courts is undeniable and it is widely used today. It can therefore be said that its creation took place within the scope of jurisprudential discussions and not within academia through a theory per se. In summary, and from an analysis of the history of US court decisions on its emergence and application, it is possible to verify that a person is in a state of willful blindness when

(1) is aware of very good information indicating that the fact exists; (2) almost believes that the fact exists; and (3) deliberately avoids learning whether the fact exists; (4) with a conscious purpose to avoid the criminal liability that would result if he or she actually knew the fact¹¹.

¹¹ KAENEL 1993, 1214.

The problems encountered by the English and North American courts would, at first, not be of greater hermeneutical relevance in continental criminal *law*, given the presence of the concept of conditional intent in *civil law*, which, unlike *common law*, does not require the presence of the element of *knowledge of* the facts. However, this institute has been widely used by Brazilian jurisprudence and doctrine as something comparable to conditional intent¹², especially in the case of improper omissive crimes in the corporate sphere, which calls for an analysis of the possibility of its application in Brazilian criminal law and, in particular, the need to use this institute to resolve cases in the country.

Heloisa Estellita clarifies¹³ that, currently, the rationale that best fits the structure of managing people and objects in companies is to consider them as sources of permitted danger which, in turn, would attract to themselves the duty to control the risks arising from business activities and the duty to act to prevent results. Hence it can be said that the position of guarantor of their managers individually would derive from their control, albeit fragmented, over this source of danger. And for the position of guarantor to be fully established, its knowledge must encompass all the circumstances of the improper omissive type: the assumptions of the position of guarantor, the typical situation of danger, the omission of the conduct determined when due

¹² As examples, see judgments: AgRg no AREsp 1940726-RO, STJ; AgRg no REsp 1793377/PR, STJ; APn940/DF, STJ.

¹³ ESTELLITA 2017.

and capable of action and, finally, the causal link and objective imputation.

3.1 Intellectual element as a prerequisite for conditional intent and willful blindness

As discussed above, for conduct to be considered intentional, the agent must *want the result* (direct intent) or *assume the risk of producing it* (possible intent). Regardless of this differentiation, in both cases it is necessary to have the two integral elements of intent: intellect (knowledge) and volition (will). The knowledge required to establish intent must be actual, not merely probable, and must cover all the objective elements of the criminal type. In this sense, Welzel rightly points out that

All intent has an intellectual aspect and a volitional aspect (according to the will). The intellectual aspect includes the actual knowledge of all the objective circumstances of the crime. It is not enough for the perpetrator to be potentially aware of the circumstances of the fact, i.e. that he could have brought them to his awareness. Much more, he must have actually been aware of them at the time of his action, have represented them, perceived them, thought about them, but the intensity of awareness differs depending on whether it is

the end, the means or a concomitant circumstance¹⁴. (Free translation).

In willful blindness, the perpetrator deliberately places himself in a position of blindness with the intention of not achieving the minimum representation required for criminal liability and therefore avoiding criminal punishment. In view of this, part of the doctrine supports an approximation between conditional intent and willful blindness for the purposes of the agent's willful criminal liability, especially in the context of improper omission. On the grounds of adopting the concept of conditional intent as acting or omitting to act in cases where there is a high degree of probability that the criminal type will be carried out, they argue that most cases of willful blindness are equivalent to conditional intent, including in the current national legal system¹⁵.

However, we believe that this position is not correct. Firstly, anyone who is in a state of willful blindness, or even accidental blindness, is necessarily in a state of ignorance. Based on the concept of conditional intent as the assumption of the risk of producing a harmful result, the agent's representation must necessarily be focused on the objective elements that configure that result. The agent who is in a state of willful blindness is not allowed to measure the intellectual element of intent required by the legal system, since the result cannot be foreseen

¹⁴ WELZEL 1976, 96.

¹⁵ COSTA 2015; PARDINI 2019.

because it is uncertain, dependent on the actions of third parties and future.

The discussion should not focus on the representation of the degree of probability of the type being realized, but rather on the fact that the representation made by the agent in cases of willful blindness is not focused on the criminal type that may be verified later, but rather on the means necessary to achieve the blindness itself.

Furthermore, it is not possible to determine which harmful results should be represented by the agent. Taking the example of the de facto director of a company who puts himself in a state of willful blindness: should he represent all the possible criminal types applicable to the company's sphere of activity, or would it suffice to represent just one harmful result? And, in the case of representing only one harmful result, if there is a harmful result other than the one represented by the agent, would this be sufficient to configure the intellectual element required by intent? We don't think so.

The object of representation required for willful blindness cannot and should not be confused with the representation required for conditional intent. The former is directed at the means necessary to achieve the state of blindness; the latter is directed at the harmful result of the conduct which the risk of producing is assumed.

3.2 Volitional element necessary for conditional intent and willful blindness

Also with regard to the volitional element required by conditional intent, we believe that it is not possible to verify it in cases of willful blindness. Welzel explains that "the volitional part of intent is the

unconditioned will to perform the type (will perform). The conditioned will, that which has not yet been decided, is not willfulness at all. The will in criminal law is the will to fulfill the type of crime"¹⁶ .

As far as conditional intent is concerned, the volitional element is represented by the assumption of the risk of producing the result represented. In other words, the agent is indifferent to the danger of damage to the legal asset¹⁷ . As explained above, the perpetrator deliberately puts himself in a position of blindness to avoid achieving the minimum representation required for criminal liability and therefore avoid criminal punishment. The will of the agent who is in a state of willful blindness is therefore not aimed at assuming the production of a harmful result, but rather, firstly, to avoid the minimum representation required for intent and, secondly, to avoid being held criminally responsible.

If the intellective element of intent required by the legal system is not admissible, since the result cannot be foreseen because it is uncertain, dependent on the actions of third parties and future, by logical consequence, the presence of the volitional element required by conditional intent cannot be verified either, since it must be in line with the objective elements of the type represented and accepted by the agent.

¹⁶ WELZEL 1976, 97.

¹⁷ COLEN 2015.

4 CONCLUSION

Regardless of the type of intent, whether direct or conditional, two elements must be present for it to be configured: the intellectual element represented by the current awareness of all the objective elements of the criminal type and the volitional element represented by the will to achieve the harmful result or the assumption of the risk of producing it. It is not necessary for the agent to subsume the objective and normative elements of the law with technical legal accuracy, but rather to be aware of the normative valuation of the conduct, whether positive or negative, which is why we speak of knowledge as a parallel valuation in the sphere of the profane.

What is relevant to intent is determining whether the danger was foreseen. This is because the creation of the danger is determined in the context of objective imputation, which only considers objectively foreseeable dangers, including the agent's special knowledge.

Specifically, regarding conditional intent, its configuration requires the agent to represent a high probability of the harmful result occurring, which is not capable of preventing him from acting when he shouldn't have, or omitting to act when he should have acted to avoid the harmful result.

In willful blindness, the perpetrator deliberately places himself in a position of blindness in order not to achieve the minimum representation required for criminal liability and therefore avoid criminal punishment. Based on the concept of conditional intent as the assumption of the risk of producing a harmful result, the agent's representation must necessarily be focused on the objective elements

that configure that result. The agent who is in a state of willful blindness is not allowed to measure the intellectual element of intent required by the legal system, since the result cannot be foreseen because it is uncertain, dependent on the actions of third parties and future.

The intellectual element required by conditional intent cannot be confused with the intellectual element present in cases of willful blindness because they have different objects. The former focuses on the objective elements of the criminal type and the latter on the means necessary to achieve the state of willful blindness.

Also, with regard to the volitional element determining conditional intent, they cannot be considered equivalent, since the will present in conditional intent is aimed at assuming the production of a harmful result, while in willful blindness the will is aimed firstly at avoiding the minimum representation required by intent, and secondly at not being held criminally responsible. If the intellectual element of intent required by the legal system is not admissible, since the result cannot be foreseen because it is uncertain, dependent on the actions of third parties and future, by logical consequence, the presence of the volitional element required by conditional intent cannot be verified either, since it must be in line with the objective elements of the type represented and accepted by the agent.

This is why conditional intent and willful blindness, as advocated by some Brazilian doctrine and jurisprudence, cannot be taken as equivalent for the purposes of the agent's willful criminal liability, especially in the context of improper omission in the business context.

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