Criminal Law Q&A

Private Law Tutor Publishing

Contents

Private Law Tutor Publishing

Chapter 1 - Welcome/Introduction/Overview

This book provides you with basic information as a basis for you to form your own critical opinions on this area of law. Once you have mastered the basics, you will be inspired to question principles in your essays and apply them in mock client advisory scenarios. Again, for your convenience, we have provided you with examples of how to answer such questions and how to apply your knowledge as effectively as possible to help you get the best possible marks. This aid is a fully-fledged source of basic information, which tries to give the student comprehensive understanding of how to answer questions for this module.

The aim of this Book is to:

- Provide an introduction to anyone studying or interested in studying Law to the key principles and concepts that exist in this module.
- To provide a framework to consider the law in this module within the context of examinations or written work.
- Provide a detailed learning resource in order for legal written examination skills to be developed.
- Facilitate the development of written and critical thinking skills.
- Promote the practice of problem solving skills.
- To establish a platform for students to gain a solid understanding of the basic principles and concepts of in this module, this can then be expanded upon through confident independent learning.

Through this Book, students will be able to demonstrate the ability to:

- Demonstrate an awareness of the core principles;
- Critically assess challenging mock factual scenarios and be able to pick out legal issues in the various areas of this module;
- Apply their knowledge when writing a formal assessment;
- Present a reasoned argument and make a judgment on

competing viewpoints;
- Make use of technical legalistic vocabulary in the appropriate manner; and
- Be responsible for their learning process and work in an adaptable and flexible way.

Studying this module

This question and answer series covers core subjects that the Law Society and the Bar Council deem essential in a qualifying law degree. Therefore, it is vital that a student successfully pass these subjects to become a lawyer. The primary method by which your understanding of the law will develop is by understanding how to solve problem questions. You will also be given essay questions in your examinations. The methods by which these types of question should be approached are somewhat different.

Tackling Problems and Essay Questions

There are various ways of approaching problem questions and essay questions. We have provided students with an in-depth analysis with suggested questions and answers.

Chapter 2 - Homicide Actus Reus & Causation: Murder

Problem Question 1

Rasco was a premier league footballer. He had a large house in the country and in his spare time he hunted and fished. He owned a number of firearms and had firearms certificates for them.

He dated Eva for 2 months. Eva was a model. Their relationship was tempestuous because of Rasco's jealous nature. Eva resented his suspicious personality and his attempts to control her.

Rasco accused Eva of seeing James who was a rugby player. Eva assured Rasco that she was only friends with James. Rasco told Eva that he did not believe her and insisted that she was not to see James. Eva said that he was being ridiculous. She shouted at him that he was insanely jealous and that he could not stop her from seeing any one she liked.

Rasco was furious at Eva and hit her. She grabbed a candlestick and hit him over the head. Eva ran crying to the downstairs cloakroom and locked the door. Rasco told her to open the door. She screamed at him to leave her alone. An enraged Rasco shouted at her, "We'll see about that".

Rasco went to his study and he got a shotgun. He fired the gun at the cloakroom door. He heard Eva scream in pain. He kicked open the door and found Eva slumped on the floor in a pool of blood.

Rasco called for an ambulance. The ambulance had a puncture on the way to the house and by the time the ambulance arrived Eva had died. As a result of the delay life-saving treatment could not be administered.

Rasco explained to the police that he had been concerned that Eva could harm herself and that was why he shot at the lock and by mistake one of the bullets had hit her. There were 4 bullet holes in the door only one of which was near the door lock.

By reference to case law and statute advise Rasco as to:

- Whether he has committed the actus reus of murder;
- Whether he has the mens rea for murder; and
- Whether he can be found guilty of manslaughter

Answer

Introduction

This answer will discuss the above scenario in relation to criminal law.

1. First whether Rasco has committed the actus reus of murder;
2. Second whether Rasco has committed the mens rea for murder; and
3. Third whether he can be found guilty of manslaughter;

Rasco and the actus reus of murder

The *actus reus* for murder is the unlawful killing of a reasonable person who is in being under the Kings peace: Coke (3 Inst 47). Issues that may arise for discussion in relation to the *actus reus* of Rasco include whether the act of firing the gun actually caused the death, and whether the victim is "a reasonable person in being" according to the law.

Causation

The killing must have caused the death of the person. Rasco called for an ambulance. The ambulance had a puncture on the way to the house and by the time the ambulance arrived Eva had died. As a result of the delay life-saving treatment could not be administered. It must be proved that the acts or omissions of the accused caused the relevant consequence. The issue of causation is a question for the jury. There are two aspects to causation, both of which must be proved by the prosecution. First, the jury must be satisfied that the acts or omissions of the accused were *in fact* the cause of the relevant consequence. Secondly, it must be established that the acts of Rasco were a *legal cause* of that consequence. In deciding the issue of causation, the jury must apply the following legal principles.

Factual Causation

Factually, it must be proved that 'but for' the acts (or omissions) of Rasco, the relevant consequence would not have occurred in the

way that it did. In other words, if you eliminate the act of the defendant would the victim have died anyway? It appears that the firing of the gun was the cause of the death but we are also told had the ambulance arrived on time life-saving treatment could have been administered.

Legal Causation

How do the courts decide whether the conduct was a cause in law? By determining whether the defendants act is the 'operating and substantial' cause of the result. This means that when the defendant factually caused the result his act must have a substantial cause of the result. In *R v Cato* [1976] 1WLR 110 it was held that substantial does not mean "really serious". It means that is not a "de minimus, trifling one". Later, the courts have held that D's act need not be a substantial cause in *R v Malcherek and Steel* [1981] 1WLR 690. In *R v Pagett* (1983) 76 Cr App R 279, Goff LJ said *"in law the accused's act need not be the sole cause, or even the main cause, of the victim's death, it being enough that his act contributed significantly to that result.'* And in *R v Kimsey* [1996] Crim LR 35 it was held that it is sufficient that the accused's conduct was more than a minimal cause of the consequence (*per* trial judge, approved by Court of Appeal): *"... you do not have to be sure that Kimsey's driving was a substantial cause of death, as long as you are sure that it was a cause and that there was something more than a slight or trifling link."*

In determining whether the accused is the operative cause of the result, there will be occasions where a subsequent event or act of either the victim or a third party (referred to as a *novus actus interveniens)* will render the defendants part in the consequence very small. It is then said that the chain of causation has been broken, and the defendant is not legally liable.

The Ambulances Medical Negligence

The courts are reluctant to allow medical malpractice to break the chain of causation, this was held in *R v Smith* (1959) 2 QB 35. Smith stabbed the victim during a fight at their barracks and pierced his lung. Another soldier tried to carry him to the medical station but dropped him twice on the way. On his arrival it was not

realised how seriously ill the victim was and he received treatment which was not only inappropriate but positively harmful and he died a couple of hours later. Smith was convicted of murder. Also in R v Cheshire [1991] 3All ER 670 the victim's original wounds had healed, but the Court of Appeal held that bad medical treatment did not break the chain of causation. Therefore using the above two authorities we can argue that the ambulances' negligence will not break the chain of causation in these circumstances.

Rasco and his *mens rea* for murder

The *mens rea* requires intention either to kill or to cause grievous bodily harm which was held in *R v Vickers* [1957] 2 QB 664. Where the defendant's purpose or objective in acting is the death or GBH of the victim, then the necessary direct intent will be found. However here Rasco's purpose in acting is to achieve something other than death or GBH, then a *Woollin* direction (on oblique intent) can be given to the jury, from which they may find the necessary intent:

"Where the charge is murder and in the rare cases where the simple direction is not enough, the jury should be directed that they are not entitled to find the necessary intention unless they feel sure that the death or serious bodily harm was a virtual certainty (barring some unforeseen event) as a result of the defendant's action and that the defendant appreciated that such was the case. The decision is one for the jury to be reached upon consideration of all the evidence." Per Lord Steyn.

If the jury confirm that Rasco's actions to bring about harm to Eva were a virtual certainty then the necessary *mens rea* is present. Moreover, there were 4 bullet holes in the door only one of which was near the door lock. This is evidence on which the jury is likely to conclude 4 shots in the door was excessive with only one located near the door lock which was fired at almost point blank range. This will be a virtual certainty of serious harm.

Rasco found guilty of manslaughter

The defence of provocation which has now been replaced by loss of self-control is a partial defence to murder that brings it down to manslaughter. Rasco may want to raise this for a number of reasons. First because he believes Eva is seeing James who was a rugby player. Second she hit him over the head with a candle stick. The new defence is contained within s54 Coroners and Justice Act 2009 and appears to retain the basic structure of the old law of provocation. Rasco must have lost self-control as a result of something (a "qualifying trigger") and the jury must conclude that the reasonable person, or the age and sex of the defendant, might have reacted in the same way.

However, this defence cannot be used if it stems from an act of revenge: s54(4). This was already the position within the previous law on provocation and is illustrated by the Court of Appeal in the case of *R v Ibrams and Gregory* (1982) 74 Cr App R 154 where seven days lapsed between the last act of bullying during which there was clear evidence of planning. Further narrowing of the defence, in comparison with provocation, is indicated by s55(6). It is no longer possible to raise this defence if the defendant is the initial antagonist, s55(6)(a) & (b). This effectively overrules the case of *R v Johnson* [1989] 1 WLR 740. In that case the defendant had been drinking at a nightclub when he made threats of violence to the victim; a struggle ensued during which time the defendant stabbed the victim. At that time the Court of Appeal held that the defence of provocation should have been left to the jury despite the fact that the defendant had started the fight. Also gone are the days when defendants could rely on adulterous affairs as being the reason why they lost their self control following the enactment of s55(6)(c). This overrules *R v Davies* [1975] QB 691. Therefore, for all of these reasons the defence of loss of control will be of no use to Rasco.

Problem Question 2

Angie lives next door to Bill, a single parent. As a child Angie was sexually abused by her father, and still suffers from bouts of severe depression that medical experts attributed to her childhood experiences. Angie also has a prolonged history of drug abuse to which doctors have attributed her occasional mental instability and violent outbursts. She is well known amongst her neighbours for having a bad temper and picking arguments for no reason. She has previous convictions for animal cruelty – she put her cat in the microwave to dry it off after it fell into the bath.

Two years ago Bill's daughter Tracey then aged seven, complained to Angie that Bill had been interfering with her. Further questioning revealed that Bill had indecently assaulted Tracey. Angie did not report this incident but asked Tracey to tell her if anything like it happened again. On a number of occasions over the following two years Tracey indicated to Angie that her father had been "touching her up". Although Angie became progressively more concerned and angry, she took no action. One night, however, Tracey came to Angie in great distress, indicating that Bill had tried to have sexual intercourse with her. Angie took a cordless drill from her garage, and knocked on Bill's front door. When Bill opened the door Angie calmly stated "Do you know what I would like to do to you?" Bill turned and ran up the stairs of his house intending to escape by locking himself in the bathroom. Angie chased after him, pressing the operating switch of the drill, and plunged the drill bit into Bill's thigh causing extensive bleeding.

Angie realised Bill was seriously injured but left the scene without summoning help, shouting 'Hope you die you pervert!' Moments later Tracey found her father bleeding profusely and raised the alarm. Bill was rushed to hospital where he was placed on a life support machine. Due to a problem with the hospital's generator, the supply of electricity to Bill's machine was interrupted. Bill died before power could be restored.

Angie has been charged with the murder of Bill and intends to plead not guilty.

Answer

Introduction

This answer will discuss the above scenario in relation to criminal law.

1. First Angie's liability for murder

2. Second possible defence of diminished responsibility

Angie's liability for murder

Angie stabbed Bill with a drill. Bill dies later. The *actus reus* for murder is the unlawful killing of a reasonable person who is in being under the Kings peace: Coke (3 Inst 47)**.** This requires that the defendant caused the death of the victim. This has been satisfied here.

The *mens rea* requires intention either to kill or to cause grievous bodily harm. Since the Homicide Act 1957, it is accepted that the *mens rea* for murder, 'malice aforethought', means:

1. an intention to kill (express malice) OR
2. an intention to cause GBH (implied malice).

GBH has the meaning of really serious harm as defined in *DPP v Smith* [1960] 3 All ER 161 and *Saunders* [1985] Crim LR 230. The *mens rea* for murder was confirmed by the Court of Appeal in *R v Vickers* [1957] 2 QB 664. If the jury confirms that Angie's actions were to bring about death or serious harm to Bill then the necessary *mens rea* is present. Issues that may arise for discussion in relation to the *actus reus* of Angie include whether the act of stabbing with the drill actually caused the death, and whether the victim is "a reasonable person in being" according to the law.

Causation

Bill was rushed to hospital where he was placed on a life support machine. Due to a problem with the hospital's generator, the supply of electricity to Bill's machine was interrupted. Bill died

before power could be restored. The courts are reluctant to allow medical malpractice to break the chain of causation, this was held in R *v Smith* (1959) 2 QB 35. Smith stabbed the victim during a fight at their barracks and pierced his lung. Another soldier tried to carry him to the medical station but dropped him twice on the way. On his arrival it was not realised how seriously ill the victim was and he received treatment which was not only inappropriate but positively harmful and he died a couple of hours later. Smith was convicted of murder. Also in R v Cheshire [1991] 3All ER 670 the victim's original wounds had healed, but the Court of Appeal held that bad medical treatment did not break the chain of causation. Therefore using the above two authorities we can argue that the hospitals negligence will not break the chain of causation in these circumstances.

Diminished responsibility

As a child Angie was sexually abused by her father, and still suffers from bouts of severe depression that medical experts attributed to her childhood experiences. Angie also has a prolonged history of drug abuse to which doctors have attributed her occasional mental instability and violent outbursts. The defence of diminished responsibility is a special defence to murder and is only a partial defence, which reduces the conviction to manslaughter.

Section 52 Coroners and Justice Act 2009 provides the definition of diminished responsibility. The general principle is the defendant's abnormality of mental functioning must arise from a specific medical condition, an effective if not stated requirement of the current law. The provision also makes clear that the abnormality must be a contributory factor to the loss of control etc. but need not be the only cause. The courts when determining abnormality of mental functioning must arise from a specific medical condition have held post-natal depression and pre-menstrual syndrome (*R v Reynolds* [1988] Crim LR 679); acute depression and battered woman syndrome/post-traumatic stress disorder (R v Ahluwalia and *R v Thornton*) to come within this section. On the other side of the coin, the courts were quite clear what does not come within these two sections. In *Fenton* (1975) 61 Cr App R 261, it was held that hate, jealousy or bad temper would not come within s 52. Angie suffers from bouts of severe

depression that medical experts attributed to her childhood experiences this gives Angie an abnormality of mental functioning arising from a specific medical condition.

The abnormality of mental functioning must have substantially impaired the Angela's ability to do certain things stated within s52(1A). The factors contained within s52(1A) essentially codify those stated within the case of Byrne. Following *R v Simcox* [1964] Crim LR 402 and *R v Lloyd* [1967] 1 QB 175 the court affirmed that the impairment must be more than trivial or minimal. Angie should be advised this question is one of fact and is for the jury to decide. The above definitions tend to allow the jury a wide discretion and much will depend on the extent to which the jury feel the Angie is morally culpable. The defence if successfully argued will reduce the Angie's conviction of murder to manslaughter.

Chapter 3 - Mens Rea

Problem Question

Matt, Pete, Luke and John are members of the Hell's Angels, a motorcycle club.

The Bulldogs, a rival motorcycle club, held a meeting called the Bulldog Bash in a place that the Hell's Angels considered to be their patch. The Bulldogs and the Hell's Angels have a long history of rivalry and a member of the Bulldogs was recently murdered by a Hell's Angel.

Mark, a member of the Bulldogs, attended the Bulldog Bash and left to go home. He drove on his motorcycle on the inside lane of the motorway. Matt, Pete, Luke and John were in a car behind.

Pete drove the car on the outside lane and they all jeered at Mark. As the car pulled alongside the motorcycle Luke fired a shot from his gun. Mark was hit just below his helmet and his motorcycle spun out of control for 50 yards before it came to a halt. He died instantly.

The police interviewed Matt, Pete, Luke and John.
Luke refused to answer any questions put to him by the police.
Pete said he knew that Luke had a gun but he thought that Luke was such a bad shot he did not think that Luke would be able to hit Mark.

Matt said that he did know that Luke had a gun on him but that he thought that Luke had a knife. He said that he did not think that Luke intended to kill Mark.
John informed the police that he did not know that Luke had any weapon on him and that they were only going to scare Mark.

Advise the Crown Prosecution Service as to the criminal liability of the following for the death of Mark:

- Luke
- Pete
- Matt; and
- John

Answer

Introduction

This answer will discuss the above scenario in relation to criminal law.

1. First Luke's criminal liability;
2. Second Pete's criminal liability;
3. Third Matt's criminal liability; and
4. Fourth John's criminal liability.

Luke

The *actus reus* for murder is the unlawful killing of a reasonable person who is in being under the Kings peace: Coke (3 Inst 47)**.** This requires that the defendant caused the death of the victim. This has been satisfied here. The *mens rea* requires intention either to kill or to cause grievous bodily harm. Since the Homicide Act 1957, it is accepted that the *mens rea* for murder, 'malice aforethought', means:

1. an intention to kill (express malice) OR
2. an intention to cause GBH (implied malice).

GBH has the meaning of really serious harm as defined in *DPP v Smith* [1960] 3 All ER 161 and *Saunders* [1985] Crim LR 230. The *mens rea* for murder was confirmed by the Court of Appeal in *R v Vickers* [1957] 2 QB 664. If the jury confirms that Luke's actions to bring about death or serious harm to Mark then the necessary *mens rea* is present. It appears therefore that Luke will be guilty of Marks's murder.

Pete

Pete said he knew that Luke had a gun but he thought that Luke was such a bad shot he did not think that Luke would be able to hit Mark. It can be argued that because Pete knew that Luke had a gun this makes it a joint enterprise i.e. where two or more people are committing a crime together. The issue of accessorial liability arises when one of the parties goes on to commit a different crime.

In a joint enterprise case at the time of the accessorial offence, the accomplice was committing another offence with the principal. By contrast, in a simple case of aiding, abetting etc, the accomplice is not committing an offence as a principal. The Courts have given a *mens rea* requirement for joint enterprises which is different from other cases of aiding, abetting, counselling and procuring.

In relation to the *mens rea* for liability it appears that Pete knew the objective was to harm or scare the victim. The question that arises here is the intention for unforeseen consequences arising from the agreed acts. Where 2 people embark on a joint unlawful enterprise each is equally liable for the unforeseen consequences of such acts of the other as are done in pursuance of the agreement. In *Baldessare* [1930] 22 Cr App Rep 70 D1 and D2 took a car and the court decided there was an agreement to drive it recklessly. Someone was killed by the car and they were both held liable for manslaughter, the unforeseen consequence of a common agreement.

Matt

Matt said that he did know that Luke had a gun on him but that he thought that Luke had a knife. He said that he did not think that Luke intended to kill Mark. The only *mens rea* requirement in joint enterprise cases is that the defendant foresaw that the principal might do what he did. It was extended to cases other than murder in *Roberts* [1993] 96 Cr App R 291 where the Court of Appeal said the rule was of general application, whether weapons were carried or not and whether the object of the enterprise was to cause physical injury or to do some other unlawful act, e.g. scare the victim. It was confirmed by the House of Lords in the conjoined appeals of *R v Powell and Daniels, R v English* [1997] 4 ALL 545. In this case English took part in an attack on a police officer in which his co-accused attacked the officer with wooden posts. English knew that this friends may kill or cause the officer serious bodily harm with the posts. Unknown to English, Weddle, one of his co-accused, was carrying a knife, which he used to stab the officer to death. English appealed against his conviction as an accessory to murder on the basis that, although he knew his friend might kill or cause the officer serious harm, he expected this to be done by the use of the wooden posts rather than a knife, which was

an act outside his contemplation. The House of Lords quashed his conviction, holding that an accessory could not be liable for an offence that is foreseen, if that offence is committed in a manner that was unforeseen.

However, the House of Lords said obiter that if the weapon used by the primary party was different, but equally as dangerous as the weapon which the secondary party contemplated he might use, the secondary party should not escape liability for murder because of the difference in the weapon, for example if he foresaw that the primary party might use a gun to kill and the latter used a knife to kill or vice versa. This would mean that it would make no difference that he did not know that Luke had a gun on him but that he thought that Luke had a knife. He would still be guilty of murder in joint enterprise.

Matt said that he did not think that Luke intended to kill Mark. This raises the question of what is the degree of risk which must be foreseen? Lord Hutton in *R v Powell, R v English* said: *"It is sufficient to found a conviction for murder for a secondary party to have realised that in the course of the joint enterprise the primary party might kill with intent to do so or with intent to cause grievous bodily harm."* He later agreed with the Privy Council in *R v Chan Wing-Sui*: "The secondary party is subject to criminal liability... unless the risk was so remote that the jury takes the view that [he] genuinely dismissed it as altogether negligible." Thus it is likely he will be found guilty as an accessory because they went out to scare Mark and it was foreseeable that some serious harm would ensue.

John

The Accessories and Abettors Act 1861 s 8 identifies the ways in which someone can be an accessory to a crime. It provides as follows: *"Whosoever shall aid, abet, counsel or procure the commission of any offence whether the same be an offence at common law or by virtue of any Act passed, shall be liable to be tried, indicted and punished as a principle offender"*. John has aided Luke in the murder of Mark. Aiding requires the accessory to give help, support or assistance to the principal offender in carrying out the principal offence. Examples include supplying materials or tools to commit the offence in *Thambiah v R* [1966]

AC 37, and holding down a victim in assault *R v Clarkson* [1971] 3 All ER 344. Here, John has participated in scaring Mark, this is evident through his own admission.

For *mens rea* of aiding, abetting, counselling or procuring cases it must be shown the defendant's state of mind about his own act must be considered along with the state of mind about the principal's acts. In relation to the defendant's act, Potter LJ: "It is necessary to show firstly that the act which constitutes the aiding, abetting etc was done intentionally in the sense of deliberately and not accidentally and secondly that the accused knew it to be an act capable of assisting or encouraging the crime." He then went on to say that the defendant must intend to assist, abet etc the principal in what he was doing. Moreover, in relation to the principal's act the defendant must have foreseen that there was 'a real possibility', or 'a real or substantial risk' that the principal might commit the offence. In conclusion it can be said John has aided Luke in the murder of Mark, because he was deliberately involved in scaring Mark. Moreover, there was a substantial risk' that the principal might commit the offence, as they were pursuing the victim in a car and the risk was real.

Essay Question

'After *Woollin*, the law of intention remains unclear, but it nonetheless works in a satisfactory manner.'

Discuss.

Introduction

This essay will discuss how the case of *R v Woollin*[1] has left the law quite unclear. Nevertheless, the law still works in a satisfactory manner. This essay will firstly discuss direct intention and differentiate this with the circumstance in which oblique intention arises. This essay will then discuss whether oblique intention is a definition of intention or whether it is merely evidence of intention. This paper will analyse the case of *Woollin*. It will follow by suggesting any possible reforms. Lastly this paper will conclude its findings.

Direct intention

The present case law establishes that a defendant may 'intend' an outcome because it is the purpose of his act. For illustration, if a defendant wants to kill his victim and shoots at him from a considerable distance knowing that he may miss, he still intends this outcome. The death of the victim will be part of the reason for him acting. This is known as direct intention. If the death of the victim is the defendant's purpose, he intends it even if his chances of success are minimal. This is a subjective test.

This state of mind of the defendant is that he has intended to murder his victim. The general rule was highlighted by Lord Bridge in *R v Moloney*,[2] where he stated it was the jury's job to come to decide if the defendant had the necessary intention. Lord Bridge confirmed the word 'intention' should be given its normal meaning and that judges should stay away from providing a full

[1] [1999] A.C. 82
[2] [1985] A.C. 905

working defining of the term, and only explain that it is different to 'desire' and 'motive'.

> *"The golden rule should be that, when directing a jury on the mental element necessary in a crime of specific intent, the judge should avoid any elaboration or paraphrase of what it meant by intent, and leave it to the jury's good sense to decide whether the accused acted with necessary intent, unless the judge is convinced that, on the facts and having regard to the way the case has been presented to the jury in evidence and argument, some further elaboration is strictly necessary to avoid misunderstanding."*[3]

Thus as a rule in murder trials, the judge should direct the jury to return a guilty verdict if they are satisfied that the defendant intended to kill or cause serious bodily harm. Judges should not give juries any other elaboration as to what intention means.

The exceptions

Rarely cases come up where the judge will have to provide further elaboration as to what intention is. For example, where the jury has asked for further guidance or where the trial judge believes that the facts or the presentation of evidence in court would mean the jury will benefit from further elaboration. Lord Bridge in *Moloney* suggested that such cases are 'rare'.[4]However, Lord Bridge did not make clear what type of cases would fall into this 'rare' class. It has since been suggested that it may sometimes be necessary to give a jury a detailed direction on the meaning of intention in those rare cases where the defendant does a dangerous act which as a result causes the death of the victim, but the principal desire or motive was not to harm the victim.

[3][1985] A.C. 905 at page 926
[4][1985] A.C. 905 at page 907

Oblique Intention

Where the defendant's reason for acting is not murder but he causes the death of the victim he can still be found to have the necessary intention if the defendant has oblique intention. For example this can occur if the consequence in not the defendant's operative purpose but rather a by-product that he accepts as inevitable. The consequence of the victim's death here does not have to be 'desired'. The defendant may be remorseful that this accompanying result will occur.

The Courts have come to the view that foresight of a *"high degree of probability* "could amount to intention.[5] However, in 1985, the House of Lords in *R v Moloney* made it clear that foresight of probability did not amount to intention. Lord Bridge gave the jury this direction:

> *"First, was the death or really serious injury in a murder case (or whatever relevant consequence must be proved to have been intended in any other case) a natural consequence of the defendant's voluntary act? Secondly, did the defendant foresee that consequence as being a natural consequence of his act? The jury should then be told that if they answer yes to both questions it is a proper inference for them to draw that he intended that consequence…"*[6]

Lord Bridge did not give a complete explanation of what he meant by 'natural consequence' in his guidance to the jury. This resulted in confusion and further appeals in subsequent cases. In *R v Nedrick* [7]the Court of Appeal provided a clearer test:

> *(the jury) are not entitled to infer the necessary intention, unless they feel sure that death or serious*

[5]***Hyam v DPP*** [1975] AC 55 at p.68
[6][1985] A.C. 905 at p. 929, per Lord Bridge
[7][1986] 1 W.L.R. 1025

> *bodily harm was a virtual certainty and that the defendant appreciated that such was the case.*[8]

This is the test that was adopted by the House of Lords in *R v Woollin*.[9]The court gave the following model direction to be given to the jury:

> *"Where the charge is murder and in the rare cases where the simple direction is not enough, the jury should be directed that they are not entitled to find the necessary intention unless they feel sure that the death or serious bodily harm was a virtual certainty (barring some unforeseen event) as a result of the defendant's action and that the defendant appreciated that such was the case. The decision is one for the jury to be reached upon consideration of all the evidence."*[10]

Intention or evidence of intention

What is apparent is the lack of clarity when considering whether oblique intention is a definition of intention or whether it is merely evidence of intention.[11] This confusion arose as a result of the decision in *R v Moloney*, where Lord Bridge stated that such a state of mind could only be evidence of intention.[12] In *R v Nedrick* the Court of Appeal was bound by the decision in *Moloney* therefore they could only give a direction that would depart from this. The proposition that foresight of virtual certainty could be evidence of intention without also being intention has been much criticised by academics.[13] Sir John Smith has stated:

---

[8][1986] 1 W.L.R. 1025at 1028,Per Lord Lane CJ
[9][1999] A.C. 82
[10][1999] A.C. 82 at p.88, Per Lord Steyn
[11] W. Wilson, Criminal Law: Doctrine and Theory (London: Longman, 1998) at p. 126-128
[12] See footnote 5
[13] W. Wilson, 'Doctrinal Rationality after Woollin', [1999] 62 MLR 448 at 448

> *"After Nedrick some of us hoped that a perceptive jury would ask some unlucky judge what was the state of mind they were required to find proved which was not purpose but was something more than foresight of virtual certainty? – a question to which there appears to be no answer."*.[14]

In *R v Woollin* Lord Steyn appeared to be treating foresight of virtual certainty as part of the definition of intention. He stated that *"a result foreseen as virtually certain is an intended result"*[15] and that *Nedrick* stated "what state of mind (in the absence of a purpose to kill or cause serious harm) is sufficient for murder."[16] He then adapted Lord Lane's model direction so that the jury now 'find' intention, rather than 'infer' intention, and by removing the two parts of the direction which gave the jury guidance as to how they might infer intention from foresight. However Lord Steyn did not tamper with the negative structure of the *Nedrick* direction, so the jury are still to be instructed that they are not entitled to find the necessary intention unless they find foresight of virtual certainty, not that they must find the necessary intention in such a case.

Analysis

The question surrounding *Nedrick* and *Woollin* was whether the foresight of virtual certainty was an evidentiary or substantive direction. While the term seems clear it is phrased in the negative, so it possible to imagine the case where the jury finds foresight of virtual certainty, but decides it is "entitled" to not find intention. This question was considered in *Matthews and Alleyne*, but the Judges decided the evidentiary/substantive question was not an important one and so the evidence is still ambiguous and undecided. In this sense *Woollin* hasn't made the law of intention much clearer; yes we have a simple definition for intention, but the jury could (theoretically) choose to discard or ignore it.

---

[14]Sir John Smith's commentary on Nedrick [1986] Crim LR 742, 743
[15] [1999] 1 A.C. 82 at p. 93
[16][1999] 1 A.C. 82 at p.94

In the case of *R v Matthews and Alleyne*,[17] the trial judge gave the jury a direction that an intention to kill was proved if they were satisfied that the defendant had appreciated that there was a virtual certainty of death of the victim. The Court of Appeal did not consider that Lord Steyn had changed the law and said the foresight of virtual certainty was still only evidence of intention.

> *"the law has not yet reached a definition of intent in murder in terms of appreciation of a virtual certainty."* [18]

In *Woollin* Judges seem to have been working towards a very clear definition of foresee- ability, with the degree of foresight needed placed very high in the scale, in order to make a clear difference between intention and recklessness and also to ensure there is a clear distinction between intention and motive. This view, the subjectivist orthodox view, (of for example *Smith* or *Williams*)[19] is the dominant one in case law today. However there are objections to this view, for example by *Norrie*[20] or *Duff*[21]who advocate the study of intention along with motive and desire; the so called 'desirability package' and are against the artificial separation of intention and other forms of state of mind in the case law.

A final problem with *Woollin* is the question of over and under-inclusiveness. It could be over-inclusive; for example a doctor could have foresight of virtual certainty that a patient will die if he administers a painkiller, but feels obliged to go through with it. Or if a Father throws his son out of a high window to escape a burning building, the Father would have foresight of virtual certainty, but as *Norrie* or *Duff* would say, he didn't intend his son's death, as you would see if you considered the motive.

---

[17] [2003] 2 Cr. App. R. 30
[18] [2003] 2 Cr. App. R. 30 at 476, paragraph 43, *Per Rix LJ*
[19] W. Wilson, 'Doctrinal Rationality after Woollin', [1999] 62 MLR 448 and Sir John Smith comment on Woollin [1997] Crim LR519, at p, 520-1
[20] A. Norrie, 'Oblique Intention and Legal politics' [1989] Crim LR 793, 800-7
[21] R.A. Duff, 'The Politics of Intention: a Response to Norrie' [1990] Crim LR 637

The problem of under-inclusiveness can be seen in the terrorist example, which first arose in *Moloney*, where Lord Bingham said a terrorist who plants a bomb and then sends out a warning would not have the necessary foresight for the death of a bomb diffusal expert who is killed when the bomb accidentally goes off early.[22] However Lord Bingham decided this would not matter since the terrorist would still be convicted of manslaughter and could get as along a sentence for murder. Lord Steyn in *Woollin* also commented on the terrorist scenario, saying that in such a matter of public safety, the case would be considered differently.[23] We cannot stretch our law around rare terrorist scenarios.

This essay advocates Lord Steyn's approach seems the most sensible, while, as *Norrie* mentioned, the courts seem more concerned with the label of murder than with the length of the sentence, (being reluctant to, for example call a Father who killed his son a murderer, but being more likely to put the label on a terrorist).[24] This kind of subjective, political thinking will only arise in a small number of cases. The majority of cases dealing with oblique intention, (which are in themselves a minority compared to direct intention) are clarified by the *Nedrick/Woollin* direction.

Reforms

Blackhurst argues the House of Lords in Woollin missed a golden opportunity to break from the previous approach of the courts and produce clarity by expressly telling us that foresight of virtual certainty is a type of criminal intention.[25] However, one place we can find an attempt to clarify the law is the Law Commission Draft Criminal Code which includes oblique intention in its definition of intention.

[22][1985] A.C. 905 at p. 910
[23][1999] A.C. 82 at p. 94-95
[24]A. Norrie, [1989] Crim LR 793, 800-7
[25]Blackhurst, (10 K.C.L.J. 121 (1999)) Retrospective Mistakes of Law; Mitchell, Charles, p. 121

"1. .... a person acts (a) 'intentionally' with respect to a result when –

(i) it is his purpose to cause it, or

(ii) although it is not his purpose to cause it, he knows that it would occur in the ordinary course of events if he were to succeed in his purpose of casing some other result."[26]

However, an important point is this definition is only for non-fatal offences against the person. It is submitted that the definition should be extended to all offences including murder as suggested by the Draft Criminal Code. However, the phrasing of "*in the ordinary course of events"* is very broad and even wider than the *Nedrick* and *Woollin* test of *'virtual certainty'*. One problem is in establishing what "*in the ordinary course of events"* means in every situation. Another argument that can be advanced is that it may lead to an increase in convictions of offences that people did not intend to commit and in some case could lead to a miscarriage of justice.

Conclusion

Foresight of consequences and intention are clearly both different and should not be equated in order to avoid further confusion in an area of law which has already demonstrated much complexity. There have been problems in this area of law however the fact that foresight of consequences is not the same as intention has remained the law and therefore we must accept it and follow it.

[26]Law Commission (1989)*Criminal Law: A Criminal Code for England and Wales. Vol. 1: Report and Draft Criminal Code Bill* (House of Commons papers 1988-89 299 ed.). London: HMSO

Endnote

The whole book can be bought on our website. We hope you found the example interesting and that it was useful to you. It is the goal of Private Law Tutor Publishing to make legal education resources that are easy to use and comprehensive for students of all abilities, without regard to profit. We use book revenue to create more resources. Private Law Tutor is written and published by a group of barristers who are also law tutors. They have come together to help law students all over the world.