

Mens Rea: Intention, Recklessness, Negligence and Gross Negligence



Key Points

This chapter will help you to:

1. Identify the two meanings of intention:
 - Direct intent: aim or purpose; and
 - Indirect/Oblique intent: foresight of a virtually certain result as defined in the *Nedrick/Woollin* Test.
2. Understand that recklessness has one meaning:
 - Recklessness is now subjective and is defined according to *Cunningham* [1957] as the conscious taking of an unjustified risk.
 - *Caldwell* [1982] objective recklessness, defined as failure to think about a serious and obvious risk, was overturned by *R v G* [2003].
3. Distinguish between recklessness, negligence and gross negligence:
 - Negligence: unreasonable conduct which creates an obvious risk of harm or damage through genuine inadvertence.
 - Gross negligence: an extremely high degree of negligence so as to deserve criminal punishment. It only applies to manslaughter.
4. Evaluate the relative merits of a subjective/objective approach to MR.

Chapter 3

Mens Rea: Intention, Recklessness, Negligence and Gross Negligence

- Introduction
- 3.1 Intention
- 3.2 Recklessness
- 3.3 Negligence and Gross Negligence

Introduction

No one can be convicted of a crime unless their criminal conduct (AR) was accompanied by a criminal mental element known as mens rea (MR). Each offence defines the particular MR which must be proved beyond reasonable doubt in order to secure a conviction. The prosecution will need to prove MR in relation to each element of the AR. Some offences, such as murder for example, contain several AR elements, and the D must have MR in relation to each one.

We say that MR consists of a guilty 'state of mind', which is usually the case with the more serious crimes requiring intention, recklessness or dishonesty. These terms represent states of mind where D will have decided or chosen to bring about a *result* prohibited by the criminal law. They reflect varying degrees of blameworthiness or culpability so as to deserve punishment. In addition, many offences also require knowledge or belief in relation to a particular *circumstance*. For example, rape requires the absence of reasonable belief in consent.

Gross negligence on the other hand does not represent a definable mental element but an extremely careless and unreasonable standard of conduct. Where grossly negligent conduct leads to harm, it is also regarded as blameworthy. It is nevertheless included here along with the two other major categories of MR.

Other MR terms, such as knowledge or wilfulness will be studied in the following chapter on strict liability where they may more logically be placed as belonging to statutory offences.

3.1

Intention

- Introduction
- Context: Intention and Murder
- Intention: Ordinary Meaning – Immediate Actions and Result are Desired
- Legal Meaning: Direct Intent – Aim or Purpose
- The Distinction between Motive and Intention
- Mercy Killings

- Doctors, Palliative Care and Double Effect
- Oblique or Indirect Intent: Foresight of a Virtual Certainty
- The Test for Intention is Subjective: Section 8 Criminal Justice Act 1967
- Finding Intention from the Evidence
- Oblique Intention Distinguished from Recklessness: Foresight of a Virtual Certainty v Foresight of Risk
- Evaluation
- Reform
- Transferred Malice

key cases

Steane [1947] 1 All ER 813 – intention confined to motive;

Moloney [1985] 1 All ER 1025 – oblique intention: foresight of a moral certainty;

Hancock & Shankland [1968] 1 All ER 641 – the greater a consequence is foreseen, the greater the probability it is intended;

Nedrick [1986] 3 All ER 1 – the Nedrick Direction: foresight of a virtual certainty is oblique intention;

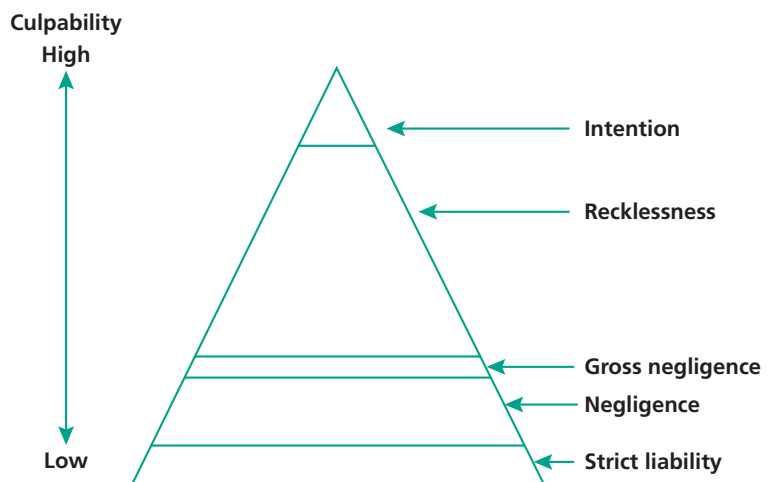
Woollin [1998] 4 All ER 103 – Nedrick Direction confirmed.

3.1.1 Introduction

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Diagram 3.1

Mens rea and culpability



Intention is the highest form of MR. It is also the only MR requirement of offences of specific or ulterior intent.

Crimes of specific and ulterior intent

A crime of specific intent is one where the prosecution must establish intention rather than recklessness in relation to the AR of an offence, eg:

Murder: MR is defined as an intention to kill or cause grievous bodily harm (GBH). The AR is 'the unlawful killing of a human being.'

A crime of ulterior intent is one where MR includes an intention to cause a consequence or result beyond the AR of the crime in question, eg:

Causing grievous bodily harm with intent contrary to s18 Offences Against the Person Act 1861:

‘Whosoever shall unlawfully and maliciously by any means whatsoever wound or cause any grievous bodily harm to any person . . . with intent . . . to do some grievous bodily harm to any person, shall be guilty . . . [of an offence and liable to imprisonment for life].’

Burglary under s9(1)(a) Theft Act 1968:

‘(1) A person is guilty of burglary if:

- (a) he enters any building or part of a building as a trespasser and with intent to commit any such offence as is mentioned in subsection (2) below; or . . .
- (2) The offences referred to . . . are stealing anything in the building in question, or inflicting on any person therein any grievous bodily harm and of doing unlawful damage to the building or anything therein.’

Crimes of specific or ulterior intent must be distinguished from crimes of **basic** intent, where MR consists of intention or recklessness, such as criminal damage.

3.1.2 Context: Intention and Murder

Intention occupies a symbolic place in the criminal law. As the highest form of MR it applies to murder, the gravest crime in the criminal justice system. Given this fact, you might expect it to have a relatively certain definition. The alternative homicide offence of manslaughter is defined by reference to other forms of MR, the most serious of which is recklessness. The only distinction between the two offences is the mental element. Uncertainty regarding the line between intention and recklessness will therefore result in confusion between murder and manslaughter. This could lead to injustice: a defendant who recklessly kills ought not to be convicted of murder which requires nothing less than an intentional killing. The blurring of the distinction could result in an unsafe murder conviction. However, as we shall see, the current concept of intention is far from clear.

The discussion regarding intention generally takes place in the context of murder. Consequently, it is a topic which has attracted much academic debate. It might be argued that the amount of academic speculation is disproportionate to the relatively small number of reported cases on intention. However, we need to be able to understand some of these arguments and will refer to them throughout. Law Commission report No 304 ‘Murder, Manslaughter and Infanticide’ (2006) concerning homicide reform includes recommendations on intention which we will examine at the end of this section.

As you read through this section, it might help to bear in mind this question:

- *Given the importance of intention to murder and the risk of injustice if there is uncertainty about its distinction from recklessness, is the definition of intention too wide, too narrow or satisfactory?*

3.1.3 Intention: Ordinary Meaning – Immediate Actions and Result are Desired

In ordinary language, we understand the concept of intention to be linked to immediate voluntary actions that we mean, want or desire to do, eg:

‘I intend to finish my criminal law coursework tonight.’

Usually, desired actions will imply a desired result:

'I intend to work extremely hard on my coursework tonight and get an A grade.'

Sometimes, we may act with many intentions in mind. Thus:

'I intend to finish my criminal law coursework tonight and work extremely hard so as to get a good grade. I can then take the weekend off before starting three outstanding course-works which should have been finished last Friday!'

We may also intend a result even though the chances of achieving it are minimal. Doubtless every football team manager says at some point that his team intends to play well so as to win the league title or some other cup. Both immediate action (playing well) and aim/result (winning) are desired and intended even if the chance of success may not be very high!

3.1.4 Legal meaning: Direct Intent – Aim or Purpose

There is no statutory definition of intention. Its meaning has evolved through decisions of the higher courts (the common law). Intention in criminal law is defined in two ways: direct and indirect or oblique.

Direct intent = desire, aim or purpose

A directly intended result is one which is it is the aim or purpose of D to achieve. It will usually be desired. This accords with the ordinary meaning above.

Direct intent conforms most closely to the ordinary meaning of intention. As we have seen, in ordinary language the meaning of intention coincides with wanting a particular result to occur or having it as one's aim or purpose. See the following homicide scenario:

example

I pull the trigger of a gun which I know to be loaded and aimed at the chest of a person three metres away. It is my desire to kill and death is my aim or purpose.

I have the MR for murder: death or GBH are directly intended.

It would make no difference if the chance of success is less than certain because, for instance, I am a poor shot or the gun is very unreliable. It is still my aim or purpose to kill or seriously injure. Although desire usually coincides with aim and purpose, to express direct intent in terms of aim or purpose is more certain and connotes control or influence over the result of one's actions. One might want or desire one's national football team to win the World Cup but only the manager or team can have it as their aim or purpose and, thus, directly intend it. You should note that intention need not necessarily imply premeditation. Intention can arise without planning or forethought but it does imply a decision to act in a certain way, or an attitude towards the consequences. Direct intention therefore has a straightforward meaning and this is now a principle of substantive law.

3.1.5 The Distinction between Motive and Intention

In general the law draws a distinction between motive and MR. One may have a very good reason or motive for committing an offence but moral justification will not excuse where D intends prohibited harm. Motive is relevant to evidence and punishment and is, in general, no

defence. Quite simply, the law is not interested in why you act but in whether you committed the AR of any particular crime with the necessary MR.

However, two cases have confined the definition of intention to motive whilst others have held, in accordance with the principle above, that intention should ignore motive and correspond to aim or purpose. None were concerned with murder:

Intention confined to motive

● **R v Steane** [1947] 1 All ER 813 Court of Criminal Appeal

The appellant had been convicted of an offence under the Defence (General) Regulations, regulation 2A, with doing acts likely to assist the enemy *with intent to assist the enemy*. D had on several occasions in 1940 during the Second World War made propaganda broadcasts from Germany on behalf of the Nazi government. He asserted that he had had no intention of assisting the enemy but that his actions were done for the purpose of saving his wife and children from being sent to a German concentration camp. The question was whether the broadcasts were made with the intention of assisting the enemy.

Held: Lord Goddard CJ gave the leading judgment in which he said that the proper direction to the jury would be that it was for the prosecution to prove the necessary criminal intent and while the jury would be entitled to presume intention if they thought that the act was done as the result of the free, uncontrolled action of the accused, they would not be entitled to presume it if the circumstances showed that the act was done in subjection to the power of the enemy or if it was equally consistent with *an innocent intent* as with the criminal intent, for example a desire to save his wife and children from a concentration camp.

The court was of the opinion that acts performed whilst subjected to an enemy power, although likely to assist the enemy, were not intended to do so. The construction of intention here was a narrow one, confined to motive and desire. Steane did not want (or directly intend) to assist the enemy. He wanted to assist his family. This was his motive for acting and thus the court held that he lacked the intention for the offence.

The possibility that *Steane* might use the defence of duress was raised during the trial. This defence arises where a criminal act is performed under threat of violence. The court dismissed the possibility of duress because it was first necessary to find that the conduct was intended. The underlying basis for the acquittal is that *Steane's* motive was laudable. But this is contentious. Did he have two direct intentions, one to save his family and another to assist the enemy (G. Williams, *Textbook of Criminal Law* (1983)) or did he simply have an innocent intent to save his family?

Similar reasoning applied in the case of *Gillick v West Norfolk and Wisbech Area Health Authority* [1985] 1 All ER 553 where the House of Lords held that a doctor giving confidential contraceptive advice to under-age young women would not intend an offence of assisting and encouraging unlawful sexual intercourse if his purpose was to prevent unwanted pregnancy and secure the best interests of the patient. The doctor's motive negated any criminal intent.

Further medical cases relevant to motive and direct intention have been included in 'Doctors and palliative care' below.

Intention corresponding to purpose

● **Chandler v DPP** [1964] AC 763 House of Lords

D was charged with conduct revealing a *purpose prejudicial to the safety of the state* under s1 of the Official Secrets Act 1911 by breaking into a nuclear base and obstructing aircraft from flying. In this offence, as with many others, intention is not specifically identified but it

is concealed within the term ‘purpose.’ D claimed that his purpose was not to prejudice state security but to draw attention to the danger of nuclear weapons by protesting. The House held that purpose should have an objective definition. D’s motive may have been political protest but this was irrelevant to as to whether his purpose, objectively defined as prejudicing state security, was intentional.

● **Yip Chiu-Cheung v R** [1994] 3 WLR 514 Privy Council

D agreed with an American undercover officer to commit an offence of trafficking a dangerous drug (heroin). He was charged with conspiracy. Conspiracy consists of an *agreement* between two or more people to commit a crime, each possessing an intention that the crime should occur. The agent’s purpose was to infiltrate and collect evidence on a gang of criminal drug dealers in which D was suspected to be involved. The Council decided that the undercover agent had intentionally committed conspiracy to traffic in heroin. His good motive was irrelevant to his intention. It therefore followed that the D co-conspirator was guilty of conspiracy.

In these two cases the courts ignored motive and defined intention so as to correspond to D’s objective purpose which was to commit offences (obstruction/conspiracy).

Similar reasoning applied in *Hales* [2005] EWCA Crim 1118. D had stolen a motor cycle and had been pursued by a police car. The police caught up with him and whilst an officer was attempting to handcuff D, he and an accomplice escaped, got into the police car which still had its engine running and deliberately reversed over the police officer who was seriously injured and who later died. It was argued on appeal that D did not desire death and his motive was to escape arrest. He therefore did not directly intend to kill. This was rejected by the Court of Appeal. If D was prepared to kill in order to escape, that was a case of direct intent. Motive and desire were separate.

3.1.6 Mercy Killings

You might think that the *Steane* interpretation of intention should apply to a mercy killing where a person intentionally kills in order to end the suffering of a terminally ill relative or close friend. The killing may be through medication or some other means and for compassionate reasons. In these cases, however, the motive may be benign but the intention is not regarded as innocent because the law resorts to the conventional distinction between motive and intention. If death is the aim or purpose of acting, or if it is, at least, a known virtual certainty, this constitutes murder in the absence of a relevant defence such as provocation or diminished responsibility. Death will be either directly or obliquely intended. Oblique intent, as we shall see below, is defined according to a defendant’s foresight of a virtually certain result which is ancillary to his aim or purpose.

3.1.7 Doctors, Palliative Care and Double Effect

Where a doctor administers high doses of palliative/pain-relieving drugs, even if he knows it is virtually certain that death will be accelerated, no question of intent arises unless it is the doctor’s purpose or direct intention to kill. The defence of ‘double effect’ cancels out the effect of the bad consequences by an intention to produce a good effect.

We can illustrate this by the case of *Dr Adams*, whose case was summarized in [1957] Crim LR 365. Dr. Adams administered increasing doses of morphine to a terminally ill patient who died. Devlin J directed the jury in the following terms:

‘Murder is an act or serious of acts done by the prisoner which were intended to kill and did in fact kill the dead woman. It does not matter for this purpose that her death was inevitable and her days were numbered. If her life was cut short by weeks or months; it is just as much murder as if it were cut short by years... But that does not

mean that a doctor aiding the sick or dying has to calculate in minutes or hours or perhaps in days or weeks, the effect on a patient's life of the medicines which he administers. If the first purpose of medicine – the restoration of health – can no longer be achieved, there is still much for the doctor to do, and he is entitled to do all that is proper and necessary to relieve pain and suffering even if measures he takes may incidentally shorten life.'

Thus, although a doctor's actions may cause death in the sense of accelerating it, there is no MR because a benign motive will preclude an unlawful intent. This reasoning also applied in the case of *Dr Cox* 12 BMLR 38 (cited in 'The Trial of Dr. David Moor' [2000] Crim LR 31) who administered a dose of potassium chloride to a woman who had long suffered from arthritis and other conditions. She died shortly afterwards. Ognall J directed the jury as follows:

'There can be no doubt that the use of drugs to reduce pain and suffering will often be fully justified notwithstanding that it will, in fact, hasten the moment of death. What can never be lawful is the use of drugs with the primary purpose of hastening the moment of death.

And so, in deciding Dr. Cox's intention, the distinction the law requires you to draw is this. Is it proved that in giving the injection, in that form and in those amounts, Dr. Cox's primary purpose was to bring the life of Lilian Boyes to an end? If it was then he is guilty. If on the other hand, it was, or may have been, his primary purpose in acting as he did to alleviate her pain and suffering, then he is not guilty.'

Dr. Moor's case concerned a charge of murder against a Newcastle GP for administering a large dose of diamorphine to an 85-year-old cancer patient who was close to death. The charges had been brought following publicity regarding Dr. Moor's views on helping patients to die. He was acquitted of murdering the man on the basis of the reasoning in the earlier cases.

The doctrine of double effect has received recent attention in the case of *Re A (Children) (Conjoined Twins: Surgical Separation)* [2001] 4 ALL ER 961. This was the case of the conjoined twins born in England to Maltese parents who opposed on religious grounds the medical decision to separate the twins so as to give the stronger a chance of life at the expense of her weaker sister. The argument on behalf of the NHS Trust was in line with *Adams* and *Cox* above, that if the surgeon's primary purpose was not to kill then death would not be intended. This was rejected by two of the three Court of Appeal judge. A doctor both intends and causes death but the intention is not culpable and the cause not blameworthy because the law permits such action where it can be justified. Killing one twin could be justified by the necessity of saving the other.

The view that a doctor has the MR of murder when knowingly accelerating death is favoured by the Law Commission in Consultation Paper No 177, 'A New Homicide Act for England and Wales?' (2005). However, defences should operate so as to negate liability. You should note that the Assisted Dying for the Terminally Ill Bill 2005, currently before the House of Lords, will legalize physician-assisted death of a competent terminally ill patient who provides a written request to that effect. Government guidelines confirm that a doctor continuing to treat a patient who has requested assistance with death through a 'living will' will be committing a non-consensual assault. The test of competence is defined in the Mental Capacity Act 2005. (For details, see 'Capacity' in Chapter 10.)



Thinking point 3.1

1. A doctor gives confidential contraceptive advice to a 15-year-old girl whom he knows is virtually certain to commit the offence of unlawful sexual intercourse under s13 Sexual Offences Act 2003. Does the doctor have an intention to encourage the offence?
2. A woman organizes and addresses a public meeting on a highway. The meeting blocks the road and she is charged with wilful obstruction of the highway. It was not her purpose to cause an obstruction. Has she intentionally committed the offence?

3.1.8 Oblique or Indirect Intent: Foresight of a Virtual Certainty

Diagram 3.2

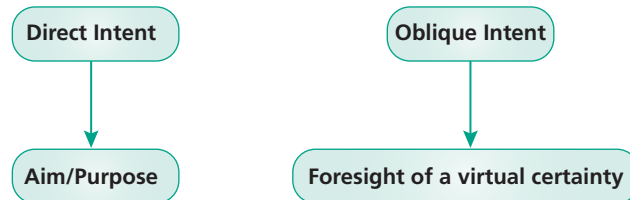
Mens rea by reference to foresight

Indirect or Oblique intent = The result must be a virtually certain consequence of the achievement of D's primary purpose (objective)

AND

D must foresee/appreciate that fact (subjective)

Therefore:

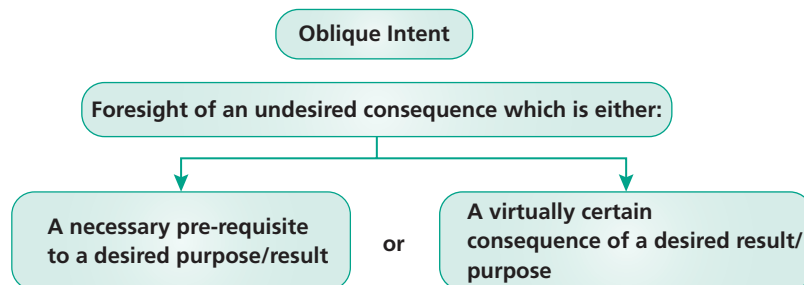


Under the criminal law you can intend a result which is not your aim or purpose. This is more problematic in terms of both definition and principle. Indirect or oblique intention is wider than direct intent. *Foresight* or *knowledge* is fundamental to this type of intention as, indeed, it is to recklessness, but there is a vital distinction between the two as we shall see below.

A result may not be desired, nor be your aim or purpose, but will be obliquely intended if it is a) a virtually certain result and b) foreseen by you as a virtual certainty. Indirect/oblique intent will apply to results caused when D acts with some other purpose in mind. An obliquely intended result is therefore a spin-off or side-effect of D's main purpose. This means that one can indirectly intend a result which is either a *pre-requisite* to the achievement of the desired primary purpose or a *virtually certain consequence* of such purpose.

Diagram 3.3

Oblique intent



Foresight of a pre-requisite result

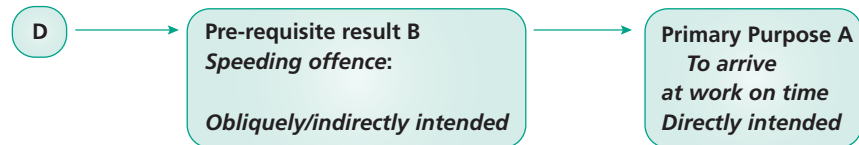
example

I live 60 miles away and drive to work each day. I wake up late one morning with only 30 minutes to get to work. In order to achieve my desired (primary) purpose of getting to work on time (A) it will be necessary to drive at 120 mph (B: a speeding offence). B is a pre-requisite to the achievement of A and I appreciate this fact.

My only desire or purpose is to arrive on time for work (A). In ordinary language, that is the only result I intend. Under the criminal law, however, I have an indirect or oblique intention to offend (B) because speeding is a necessary pre-requisite to achieving my desired purpose (A). I know this to be so and foresee that it must occur as a means or pre-requisite to the desired end. Thus:

Diagram 3.4 *Oblique intent: foresight of pre-requisites*

Driving 60 miles in 30 minutes:



In order to achieve A, B must first occur as a means to an end and is obliquely or indirectly intended.

The next example is found throughout all criminal law text books:

example

I wish to shoot V. I see V standing in a house behind a window and I shoot him. I have a direct intent to kill V. According to the law, I also have an indirect or oblique intention to break the pane of glass behind which he is standing and thus commit criminal damage. Criminal damage is a pre-requisite and necessary means to achieving my desired purpose of killing V. I know this to be so and foresee that it must first occur.

Foresight of a virtually certain result

example

Suppose I am late in getting up and have just over 50 minutes to drive the 60 miles to work. Breaking the speed limit will not be a pre-requisite in order to achieve my aim of getting to work on time (A) but it is a virtual certainty that at some point I will need to do so and thus commit a speeding offence (B). I know this to be so and foresee the offence as a virtually certain consequence of achieving my desired purpose.

In criminal law, I will be said to have an indirect or oblique intention to commit a speeding offence. Take another example:

example

If I give a football a hard kick with the purpose of hitting a small target in front of a very large window, it is a virtual certainty that I will break the window. To hit the target is my desired (primary) purpose which I directly intend. Breaking the window is not a pre-requisite to hitting the target but will be a virtually certain consequence. If I know or foresee the damage to be virtually certain then I obliquely intend it. It is so closely connected to my voluntary act of kicking the ball that to deny an intention to break the window when I could foresee that it was inevitable would not make sense. I may protest that I do not want or intend B to occur but the law would attribute fault to me in the form of indirect/oblique intention for the purposes of the offence of criminal damage. This is now an accepted rule of substantive law.

This extended meaning of intention was first expressed in *Mohan* [1976] QB 1 where James LJ stated that intention meant:

'a decision to bring about, in so far as it lies within the Accused's power, [the prohibited consequence], no matter whether the accused desired that consequence of his act or not.'

There have been many cases on the meaning of oblique intention since then and although the concept is now well-established a good deal of speculation still remains as to whether foresight of a virtual certainty is a separate definition of intention or mere evidence of it.



Thinking point 3.2

Consider whether A has either a direct or indirect/oblique intention in the examples below:

1. A dislikes B and decides to run him over with his car. He succeeds in doing so with the result that B dies.
2. A, a very short person, has a quarrel with B. B is 6'6" tall and a fast runner. A wishes to hit B on the nose.
3. A has a toothache and goes to the dentist knowing that the treatment will result in unwanted pain. Does he intend to suffer pain?
(This example is taken from *Norrie/Duff* in the indicative reading.)
4. A puts a bomb on a plane hoping to collect insurance money when it explodes in mid-air. He hopes that the crew and passengers will survive. The explosion kills all on board.

The current test for oblique/indirect intention is laid down in the cases of *Nedrick* and *Woollin* (below). Before examining relevant case law we must understand the following principle.

3.1.9 The Test for Intention is Subjective: Section 8 Criminal Justice Act 1967

With the exception of gross negligence, MR today is assessed subjectively. This means that D's actual state of mind at the time of the offence must be examined to see whether it complies with the MR requirements of the offence definition. There will be no comparison with the reasonable person. The fact that a reasonable person or onlooker would have foreseen the result when D claims that he did not will not establish intention, although this might be evidence from which intention could be inferred by a jury, a point to which we will return below. Therefore, D cannot be held to have intended a result unless it can be proved beyond all reasonable doubt that it was his actual purpose to bring it about (direct intent) or he actually foresaw a virtually certain risk of it occurring (oblique intent).

example

The MR of murder is intention to kill or cause grievous bodily harm. A subjective approach to intention means that at the time of acting D must be proved to have had either:

- An aim, purpose or desire to kill or cause GBH (direct intent) or
- Foresight of death or GBH as either a pre-requisite to or a virtually certain consequence of some other result (oblique/indirect intent).

3.1.10 Finding Intention from the Evidence

The subjective test was confirmed by section 8 Criminal Justice Act 1967 which lays down guidance for juries on *how* to determine D's MR at the time of committing the offence:

'A court or jury in determining whether a person has committed an offence—

(a) shall not be bound in law to infer that he intended or foresaw a result of his actions by reason of its being a natural and probable consequence of those actions but

(b) shall decide whether he did intend or foresee that result by reference to all the evidence, drawing such inference from the evidence as appear proper in the circumstances.'

Section 8 explains the *means* by which intention should be inferred or found from the evidence. Intention may well be disputed by D, in which case the jury will need to take into account all the *evidence* in the case in order to draw an inference of intention. Suppose, for example, D denies an intention to kill but has no plausible alternative explanation of his state of mind at the time of committing the crime. The jury will be directed to weigh up the facts and all the evidence tendered on behalf of the parties in order to infer or find D's state of mind at the time of the act. What D thought would happen as a result of his actions and the degree of risk of harm foreseen will be significant. So too the testimony of police officers, other witnesses and experts. The jury will look at forensic and circumstantial evidence such as DNA, motive, fingerprints, weapons, documentary evidence and any earlier admissions, silence or lies by D in the police station. If the evidence is strongly against D, then, despite a denial of intention, and in the absence of any reasonable explanation, the jury will be invited to draw the conclusion, or to find, that the harm was intended. The judge will *direct* the jury, who decide issues of fact, on the legal meaning of intention and on the weight of the evidence, leaving it to the jury to decide whether D's state of mind was intentional or not. Whether a result was actually intended is essentially a question of fact for the jury not the judge.

At the end of the day, this may look like an objective test but the point is that irrebuttable (automatic) presumptions are not permitted. An inquiry into D's state of mind must occur. Section 8 Criminal Justice Act 1967 abolished any suggestion that the test for intention was objective.

The cases on oblique intent below all raise the unresolved question of whether foresight of a virtually certain risk of death/GBH is a *definition* of intention or simply *evidence* of it for the purposes of murder. This is important because if a jury is told that foresight of a virtual certainty of death/GBH is the *same* as, or a definition of, intention, it has no choice but to convict if the necessary foresight exists. Its freedom to decide otherwise would be denied. On the other hand, if a jury is told that foresight is only *evidence* of intention, as section 8 indicates, then it *may* but is not *obliged* to convict.

The confusion between evidence and the legal definition of intention began in the case of *Smith* below which temporarily broadened the MR for murder. The case decided that a man intends the natural and probable consequences of his actions as an irrebuttable presumption of law, regardless of his state of mind. This principle arose from an established rule of *evidence* that a result which was the natural and probable result of a proven act was presumed to be intended if there was little or no other evidence in a trial to establish MR. The degree of risk with which the result was foreseen, despite not being wanted, would be evidence from which intention might be inferred. Proof of foresight of a high degree of probability of the result could confirm the evidential presumption of intention provided there was also other evidence tending to confirm it. Proof of foresight of a lower degree of risk might negate it.

● **DPP v Smith** [1960] 3 All ER 161 House of Lords

D, who had stolen goods in his car, was asked to pull into the kerb by a police officer. Instead of doing so he drove away at high speed, the police officer clinging to the door of the car.

D zig-zagged and hit three oncoming vehicles. The police officer was thrown off into the path of a vehicle and was killed. D denied an intent to kill or cause GBH asserting that his only intention was to escape. The trial judge directed the jury on a wholly objective test:

‘If you are satisfied that he must as a reasonable man have contemplated that the grievous bodily harm was a likely result . . . and that such harm did happen and that the officer died as a consequence then the accused is guilty of capital murder.’

Smith was convicted and sentenced to death. The House of Lords confirmed that an objective test was to apply to the question of whether or not death or GBH was intended. The only modification was that D should be presumed to be a reasonable man, responsible and accountable for his actions. Smith’s conviction for murder but not the sentence was confirmed. The threshold of culpability and MR for murder was therefore very low.

The equation in *Smith* between an evidential presumption and a definition of intention was potentially misleading. That intention should be presumed without an inquiry into D’s actual state of mind at the time of the crime was seen as controversial. Parliament subsequently passed s8 Criminal Justice Act 1967 which overruled *Smith*.

The cases on oblique intent raise an additional issue: that of the distinction between recklessness and intention.

3.1.11 Oblique Intention Distinguished from Recklessness: Foresight of a Virtual Certainty v Foresight of Risk

Recklessness refers to the conscious taking of an unreasonable or unjustified risk of harm. If an undesired harmful consequence is less than virtually certain to occur, it could be expressed as being a highly probable, possible or likely risk. If this risk is foreseen by D who carries on regardless then he will be subjectively reckless. For example: if I kick a ball *moderately* (as opposed to very) hard towards a small target to the side of a large window I may see that there is some risk of breaking the window but it is not virtually certain or inevitable. If the window breaks, I would be reckless. Therefore, a result which is not foreseen as virtually certain but as a lower degree of risk will be recklessly caused but not intended.

You might have already gathered that the concept of intention is an elastic one. At one end of the spectrum is *Steane* (below) where intention was defined narrowly so as to coincide with motive. At the other is the next case, *Hyam v DPP*, where intention appeared to include a state of mind which we would today call recklessness. This was the first time oblique intention had been considered by such a high level court and although it has been implicitly overruled by *Moloney* below it remains a good illustration of the difference between foresight of a probability (which would today be considered recklessness) and foresight of a virtual certainty (oblique intention).

● *Hyam v DPP* [1975] AC 55 House of Lords

In this case, it was held that a person has the MR of murder if he knows that it is *highly probable* that he will cause death or GBH. Mrs. Hyam, a jilted lover, had poured petrol through the letterbox of a house occupied by her rival and ignited it. In the ensuing fire two children were killed. Mrs Hyam claimed that she only intended to frighten her rival although she foresaw that death or grievous bodily harm was highly probable. The trial judge directed the jury that if they were satisfied that death or GBH were objectively highly probable the prosecution

had established the necessary intention of the murder. It was not necessary to prove that Mrs Hyam had either wanted or intended that result. This direction involved two assumptions:

1. That foresight was the same as intention as opposed to being *evidence* of intention;
2. That the degree of risk required for a finding of *intention* was foresight of a high probability.

Lord Diplock said in the House of Lords judgment at p 86:

'I agree with those of your Lordships who take the uncomplicated view that in crimes of this class no distinction is to be drawn in English law between the state of mind of one who does an act because he desires it to produce a particular evil consequence, and the state of mind of one who does the act knowing full well that it is likely to produce that consequence although it may not be the object he was seeking to achieve by doing the act. What is common to both these states of mind is willingness to produce the particular evil consequence: and this, in my view, is the mens rea needed to satisfy a requirement... [the accused]... must have acted with 'intent'... or... with malice aforethought.'

The House confirmed the conviction, but gave different reasons: eg foresight of a high probability was regarded as sufficient by one of the Law Lords; another thought that a mere probability was enough, and a third considered that a serious risk would suffice. Only Lord Hailsham expressed concern about equating consequences foresight with intention:

'Knowledge or foresight is at the best material which entitles or compels a jury to draw the necessary inference as to intention.'

The distinction between intention and recklessness, and consequently murder and manslaughter, was thereafter extremely unclear. The meaning of intention had moved beyond ordinary language. The case came to be regarded not as laying down a definition of intention, the statements in respect of which were obiter dicta, but as providing a definition of the MR for murder. The question of the degree of risk to be foreseen was therefore a debatable issue and was clarified in *Moloney*. All of the following cases are concerned with murder. The leading cases on oblique intent are *Nedrick* and *Woollin* but as they only crystallize two earlier decisions it is necessary to review them all.

● **R v Moloney** [1985] 1 All ER 1025 House of Lords

Moloney was on leave from the army and had shot his stepfather at close range during a drunken argument over which of them could load and fire a shot gun in the shortest time. Moloney had been the first to load the gun and in response to his stepfather's statement, 'I didn't think you'd got the guts, but if you have, pull the trigger,' Moloney fired the gun and killed his stepfather. He claimed that he had not aimed the gun at his father and denied an intent to kill. The trial judge directed the jury that Moloney would be guilty of murder if he intended to kill or cause serious injury. On the meaning of intention he said that:

'a man intends the consequences of his voluntary act (a) when he desires it to happen, whether or not he foresees that it probably will happen and (b) when he foresees that it will probably happen whether he desires it will not.'

This was the *Hyam* direction from which a jury might deduce that a low level of foresight was the equivalent of intention and not a matter of evidence. The Court of Appeal dismissed the appeal and *Moloney* appealed to the House of Lords. Lord Bridge gave the leading judgment:

'... [W]here a crime of specific intent was under consideration, including *R. v Hyam* itself, they suggest to me that the probability of the consequence taken to have been foreseen must be little short of overwhelming before it will suffice to establish the necessary intent....'

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 is meant by intent, and leave it to the jury's good sense to decide whether the accused acted with the 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 explanation or elaboration is strictly necessary to avoid misunderstanding. . . .

I do not, of course, by what I have said in the foregoing paragraph, mean to question the necessity which frequently arises, to explain to a jury that intention is something quite distinct from motive or desire. But this can normally be quite simply explained by reference to the case before the court or, if necessary, by some homely example. A man who, at London airport, boards a plane which he knows to be bound for Manchester, clearly intends to travel to Manchester, even though Manchester is the last place he wants to be and his motive for boarding the plane is simply to escape pursuit. The possibility that the plane may have engine trouble and be diverted to Luton does not affect the matter. By boarding the Manchester plane, the man conclusively demonstrates his intention to go there, because it is a moral certainty that that is where he will arrive. . . .

But what of the terrorist who plants a time bomb in a public building and gives timely warning to enable the public to be evacuated? Assume that he knows that, following evacuation, it is virtually certain that a bomb disposal squad will attempt to defuse the bomb. In the event the bomb explodes and kills a bomb disposal expert. In our present troubled times, this is an all too tragically realistic illustration. Can it, however, be said that in this case the bomb was "aimed" at the bomb disposal expert? . . .

In the rare cases in which it is necessary to direct a jury by reference to foresight of consequences, I do not believe it is necessary for the judge to do more than invite the jury to consider two questions. First, was 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 D's voluntary act? Secondly, did D 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.' [Emphasis added.]

NOTE

1. The MR of murder was defined as an intention to kill or cause GBH. Murder was a crime of specific intent and therefore intention had to be proved.
2. In order to establish intention, the probability of the consequence which had to be foreseen must be *little short of overwhelming or morally certain*.
3. Foresight belonged to the law of evidence, not to the substantive law of intention. Evidence of foresight of the consequence was material from which the jury may draw an inference of intention if satisfied beyond reasonable doubt that it is the right inference. Lord Bridge:

'I am firmly of the opinion that foresight of consequences, as an element bearing on the issue of intention in murder, or indeed any other crime of specific intent, belongs, not to the substantive law, but to the law of evidence. Here again I am happy to find myself aligned with my noble and learned friend, Lord Hailsham of St Marylebone LC, in [*Hyam v DPP*] [1974] 2 All ER 41, [1975] AC 55, where he said, at p65: "Knowledge or foresight is at the best material which entitles or compels a jury to draw the necessary inference as to intention." A rule of evidence which judges for more than a century found of the utmost utility in directing juries was expressed in the maxim: 'A man is presumed to intend the natural and probable consequences of his acts.'" . . .

I think we should now no longer speak of presumptions in this context but rather of inferences. . . .'

4. *Inferring intent* meant inferring a state of mind from the evidence. (It was meant to replace and be clearer than the language of *presumptions*.)
5. Lord Bridge thought that a terrorist who plants a time bomb in a public building and gives a good warning so as to enable the public to be evacuated is guilty of murder where he knows that it is virtually certain that a bomb disposal squad will attempt to defuse the bomb and a disposal officer is killed in the explosion. But was Lord Bridge asking the right question regarding foresight? Should it have been foresight of a virtual certainty of *death/GBH*? It is generally thought that this type of terrorist would escape conviction for murder because death would only be probable not certain.
6. The actual meaning of intention was to be left to the good sense of the jury.

Points 1, 2 and 6 received approval in subsequent cases although point 2 was refined further in *Nedrick* and *Woollin*. Point 3 gave rise to debate. Was Lord Bridge saying that foresight of any degree of risk was only evidence of, and not the same as, intention? Or was he saying that foresight of a virtual certainty was the same as intention but that foresight of anything less, such as a probability or likelihood, was evidence from which a jury might infer intent? It is generally thought he meant the latter in which case foresight of a virtual certainty was another form of intention. However, it would then be contradictory to leave the meaning of intention to the jury.

One of the difficulties about *Moloney* was that Lord Bridge diluted the ratio regarding foresight of a moral certainty when, in a final summary, he set out model directions for judges to give juries in future intention cases. The model was unclear and, in referring to natural consequences, introduced confusion between intention and causation.



Thinking point 3.3

1. *D* places a bomb on an aeroplane which is timed to explode mid-flight so that he might recover insurance money. His purpose is not to kill or injure those on the plane. Does he nevertheless intend that result?

2. What if the terrorist was not an expert in explosives or the type of bomb was unreliable with only a 50% chance of exploding? Look at clause 18(b)(ii) of the Draft Criminal Code which was amended by clause s1(a) of the Draft Criminal Law Bill to include this scenario:

[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 causing some other result.

The ‘natural consequences’ *Moloney* direction was given to the jury in the next case:

● **R v Hancock and Shankland** [1986] 1 All ER 641 House of Lords

Hancock and Shankland were striking miners in Wales during the 1984 national miners’ strike. They wanted a working miner to join the strike. He was being driven to work in a taxi with a police escort. One day Hancock and Shankland pushed a block of concrete and a concrete post over a motorway bridge with the objective of intimidating him into joining the strike. The

block hit the taxi and killed the driver. Hancock and Shankland were prepared to plead guilty to manslaughter but the prosecution pursued a charge of murder on the grounds that they had intended to kill or cause GBH. The two miners asserted that they had merely wished to frighten and thus force the working miner to join the strike force. They were convicted of murder. The trial judge had directed the jury according to Lord Bridge's guidelines in *Moloney*: that they were entitled to infer an intention to kill or cause GBH if Ds had foreseen that result as a natural consequence of their actions. The convictions were quashed by both the Court of Appeal and the House of Lords. Manslaughter was substituted. Lord Scarman gave the leading judgment:

'... In a murder case where it is necessary to direct a jury on the issue of intent by reference to foresight of consequences the probability of death or serious injury resulting from the act done may be critically important. Its importance will depend on the degree of probability: if the likelihood that death or serious injury will result is high, the probability of that result may, as Lord Bridge of Harwich noted and the Lord Chief Justice emphasised, be seen as overwhelming evidence of the existence of the intent to kill or injure. Failure to explain the relevance of probability may, therefore, mislead a jury into thinking that it is of little or no importance and into concentrating exclusively on the causal link between the act and its consequence... **In my judgment, therefore, the *Moloney* guidelines as they stand are unsafe and misleading. They require a reference to probability. They also require an explanation that the greater the probability of a consequence the more likely it is that the consequence was foreseen and that if that consequence was foreseen the greater the probability is that that consequence was also intended. But juries also require to be reminded that the decision is theirs to be reached upon a consideration of all the evidence.**

Accordingly, I accept the view of the Court of Appeal that the *Moloney* guidelines are defective. I am, however, not persuaded that guidelines of general application, albeit within a limited class of case, are wise or desirable. The Lord Chief Justice formulated in this case guidelines for the assistance of juries but for the reason which follows, I would not advise their use by trial judges when summing up to a jury.' [Emphasis added.]

The ratio of *Moloney* was approved but Lord Bridge's guidelines were held to be defective. The difficulty was that Lord Scarman's guidelines omitted to specify the need for foresight of a 'moral certainty' as *Moloney* had required. It would still be possible to confuse intention with recklessness on the basis of *Hancock*. The degree of foresight was clarified in:

● **R v Nedrick** [1986] 3 All ER 1 Court of Appeal

D poured paraffin through the letterbox of the house of a woman against whom he bore a grudge and set it alight. In the fire a child died. D was charged with murder. He denied the crime and at his trial the judge directed the jury that D was guilty of murder if he knew that it was highly probable that his act would result in serious bodily injury to somebody in the house in accordance with *Hancock*. On appeal to the Court of Appeal the leading judgment was given by Lord Lane CJ:

'We have endeavoured to crystallise the effect of their Lordships' speeches in *R v Moloney* and *R v Hancock* in a way which we hope may be helpful to judges who have to handle this type of case.

It may be advisable first of all to explain to the jury that a man may intend to achieve a certain result whilst at the same time not desiring it to come about....

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 infer the necessary intention unless they feel sure that death or serious bodily harm was a virtual certainty (barring some unforeseen intervention) as a result of D's actions and that D appreciated that such was the case.

Where a man realises that it is for all practical purposes inevitable that his actions will result in death or serious harm, the inference may be irresistible that he intended that result, however little he may have desired or wished it to happen. The decision is one for the jury to be reached on a consideration of all the evidence.'

NOTE

Rather than give a settled definition, the Court of Appeal, following earlier cases, adopted the model of jury guidelines.

Even though this is a judgment of the Court of Appeal it has been treated as authoritative. The case gave rise to what is now known as the *critical* or *Nedrick Direction* (in bold type above). There are objective and subjective parts.

- The objective part of the test requires that death or serious bodily harm be a virtual certainty.
- The subjective part requires D to have foreseen death or serious bodily harm as a virtual certainty.

Many questions arise:

1. What is a virtual certainty and how is it different from a high probability?

In *Walker and Hayles* (1990) 90 Cr App R 226, D was charged with attempted murder having thrown V from a third floor balcony. Lloyd LJ in the Court of Appeal stated that there was little difference between a very high degree of probability and a virtual certainty and that the dividing line between intention and recklessness had not been blurred. This was somewhat surprising.

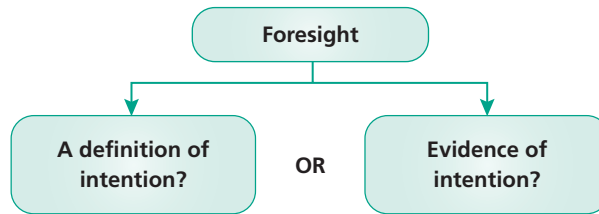
2. The test is negatively phrased: if a jury is *not entitled* to infer intention unless death or serious bodily harm is a virtual certainty then it is free to decide otherwise even if both objective and subjective conditions are satisfied. There is room for flexibility. If an objective virtual certainty and foresight of the same must both be present the negative of phrasing of the test implies that, whilst they may be preconditions to a finding of intention, they do not necessarily constitute intention. The test is therefore 'permissive'.
3. If intention equalled foresight, then the Direction constituted a definition. If intention did not equal foresight, then it was not a definition. But what did intention mean in that case? Would it not be possible for a jury to mistake recklessness for intention and arrive at an unjust verdict? Or vice versa and be more sympathetic to a deserving case? The test itself had no answers.

If the *Nedrick Direction* was not a definition, then the meaning of a rather important MR concept was to be left to the jury with the risk that different juries might reach different conclusions on the same facts. The law could violate the certainty and predictability required by Article 7 ECHR:

'7(1) No-one shall be held guilty of any criminal offence on account of any act or omission which did not constitute a criminal offence under national or international law at the time when it was committed nor shall a heavier penalty be imposed than the one that was applicable at the time the criminal offence was committed.'

Diagram 3.5

Foresight,
intention or
evidence



Nevertheless, the *Nedrick Direction* was confirmed in the following case:

● **R v Woollin** [1998] 4 All ER 103 House of Lords

The appellant lost his temper and threw his three-month-old son onto a hard surface as a result of which he sustained a fractured skull and died. Woollin was charged with murder. The Crown did not contend that he wanted to kill his son or to cause serious injury. The issue was nevertheless whether he had the intention to cause serious harm. Woollin denied intent. The judge directed the jury in accordance with the guidance given by Lord Lane C. J. in *Nedrick*. However towards the end of his summing up the judge directed the jury further that if they were satisfied that the appellant:

‘must have realised and appreciated that when he threw that child that there was a **substantial risk** that he would cause serious injury to it, then it would be open to you to find that he intended to cause injury to the child and you should convict him of murder.’ [Emphasis added.]

The jury found Woollin had the necessary intention; they rejected a defence of provocation and convicted him of murder. On appeal to the Court of Appeal his main argument was that by directing the jury in terms of substantial risk the judge unacceptably enlarged the mental element of murder and confused intention with recklessness. The Court of Appeal dismissed the appeal on the basis that the *Nedrick Direction* only applied where the only evidence of intention was D’s actions and consequences (that is, if there was objectively a virtually certain risk of death/GBH, and no indication as to what D actually foresaw, then the jury should be invited to consider that the result was foreseen as a virtual certainty and thus intended). In other cases, as here, where there was other evidence, it was not necessary to give the *Nedrick Direction*. Before the House of Lords the prosecution argued:

1. That the conviction was correct because *Nedrick* was wrong or did not apply here. Foresight was only evidence of intention and since the probability of the consequence was only one factor to take into account, it was not necessary to direct a jury in a murder trial in terms of virtual certainty. This would be limiting their discretion, contrary to s8 CJA 1967 and *Hancock*, and substituting a rule of substantive law for a rule of evidence.
2. ‘Substantial risk’ was more than ‘might’ and the trial judge did not blur the distinction between intention and recklessness.

The appellant (Woollin) argued:

1. *Nedrick* was right and the *Nedrick Direction* should have been given by the trial judge. Foresight in general was evidence of intent and that there was a necessary connection between foresight of a moral or virtual certainty and intention. Therefore, the conviction should be overturned.
2. The use of the term ‘virtual certainty’ ensures that a jury will not confuse recklessness and intention.

Lord Steyn gave the leading judgment:

'The direct attack on Nedrick

It is now possible to consider the Crown's direct challenge to the correctness of *Nedrick*. First, the Crown argued that *Nedrick* prevents the jury from considering all the evidence in the case relevant to intention. The argument is that this is contrary to the provisions of section 8 of the Criminal Justice Act 1967....

The Crown's argument relied on paragraph (b) which is concerned with the function of the jury. It is no more than a legislative instruction that in considering their findings on intention or foresight the jury must take into account all relevant evidence... *Nedrick* is undoubtedly concerned with the mental element which is sufficient for murder. So, for that matter, in their different ways were *Smith*, *Hyam*, *Moloney* and *Hancock*. But, as Lord Lane emphasised in the last sentence of *Nedrick*, "The decision is one for the jury to be reached upon a consideration of all the evidence." *Nedrick* does not prevent a jury from considering all the evidence: it merely stated what state of mind (in the absence of a purpose to kill or to cause serious harm) is sufficient for murder. I would therefore reject the Crown's first argument.

In the second place the Crown submitted that *Nedrick* is in conflict with the decision of the House in *Hancock*. Counsel argued that in order "to bring some coherence to the process of determining intention Lord Lane specified a minimum level of foresight, namely virtual certainty". But that is not in conflict with the decision in *Hancock* which, apart from disapproving Lord Bridge's "natural consequence" model direction, approved *Moloney* in all other respects. **And in *Moloney* Lord Bridge said that if a person foresees the probability of a consequence as little short of overwhelming, this "will suffice to establish the necessary intent."** Nor did the House in *Hancock* rule out the framing of model directions by the Court of Appeal for the assistance of trial judges. I would therefore reject the argument that the guidance given in *Nedrick* was in conflict with the decision of the House in *Hancock*.

The Crown did not argue that as a matter of policy foresight of a virtual certainty is too narrow a test in murder. Subject to minor qualifications, the decision in *Nedrick*, was widely welcomed by distinguished academic writers: see J.C. Smith [1986] Crim.L.R. 742–744; *Glanville Williams, The Mens Rea for Murder: Leave It Alone*, 105 [1989] L.Q.R. 387; J. R. Spencer, [1986] C.L.J. 366–367; *Andrew Ashworth, Principles of Criminal Law*, 2nd ed. [1995], p. 172. It is also of interest that it is very similar to the threshold of being aware "that it will occur in the ordinary course of events" in the Law Commission's draft Criminal Code: compare also *J.C. Smith, A Note on Intention* [1990] Cr. L.R. 85, at 86. Moreover, over a period of twelve years since *Nedrick* the test of foresight of virtual certainty has apparently caused no practical difficulties. It is simple and clear. It is true that it may exclude a conviction of murder in the often cited terrorist example where a member of the bomb disposal team is killed. In such a case it may realistically be said that the terrorist did not foresee the killing of a member of the bomb disposal team as a virtual certainty. That may be a consequence of not framing the principle in terms of risk taking. Such cases ought to cause no substantial difficulty since immediately below murder there is available a verdict of manslaughter which may attract in the discretion of the court a life sentence. In any event, as Lord Lane eloquently argued in a debate in the House of Lords, to frame a principle for particular difficulties regarding terrorism "would produce corresponding injustices which would be very hard to eradicate": Hansard [H.L. Debates], 6 November 1989, col. 480. I am satisfied that the *Nedrick* test, which was squarely based on the decision of the House in *Moloney*, is pitched at the right level of foresight.

It follows that judge should not have departed from the *Nedrick* direction. By using the phrase "substantial risk" the judge blurred the line between intention and recklessness, and hence between murder and manslaughter. The misdirection enlarged the scope of the mental element required for murder. It was a material misdirection. At one stage it was argued that the earlier correct direction "cured" the subsequent incorrect direction. A misdirection cannot by any means always be cured by the fact that the judge at an earlier or later stage gave a correct direction. After all, how is a jury to choose between a correct and an incorrect direction on a point of law?

That is, however, not the end of the matter. For my part, I have given anxious consideration to the observation of the Court of Appeal that, if the judge had used the phrase “a virtual certainty,” the verdict would have been the same. In this case there was no suggestion of any other ill-treatment of the child. It would also be putting matters too high to say that on the evidence before the jury it was an open-and-shut case of murder rather than manslaughter. In my view the conviction of murder is unsafe. The conviction of murder must be quashed.

The status of Nedrick

In my view Lord Lane’s judgment in *Nedrick* provided valuable assistance to trial judges. The model direction is by now a tried-and-tested formula. Trial judges ought to continue to use it. . . . **But it would always be right for the judge to say, as Lord Lane put it, that the decision is for the jury upon a consideration of all the evidence in the case.**’ [Emphasis added.]

NOTE

1. Use by the judge at Woollin’s trial of the term *substantial risk* blurred the line between intention and recklessness and hence the line between murder and manslaughter.
2. The *Nedrick Direction* was approved subject to substituting the words ‘to find’ for the words ‘to infer’ which had detracted from the clarity of the model direction. The jury should always be told that the decision is for them on the basis of all the evidence in the case.
3. However, *Nedrick/Woollin* seems not to have dispelled the uncertainty regarding law and evidence. Look at the two statements in bold type in Lord Steyn’s judgment. Is there any contradiction between them? The first appears to state that the effect of the critical direction in *Nedrick* (or *Nedrick Direction*) is that a result foreseen as virtually certain is an intended result (ie foresight equals intention). But the second statement appears to say that foresight is only evidence of intent because Lord Steyn remarks that *Nedrick* does not prevent a jury from considering all the evidence. It merely stated what state of mind (in the absence of a purpose to kill or cause serious harm) is sufficient for murder.

Nedrick is very similar to the Law Commission’s draft Criminal Code definition of intention in Clause 18(b): ‘A person acts intentionally with respect to a result when he acts either in order to bring it about or being aware that it will occur in the ordinary course of events’.

In relation to the terrorist case, it may be said that the bomb disposal officer’s death is not foreseen as a virtual certainty. Such a case would become one of manslaughter with the possibility of a life sentence.



Thinking point 3.4

1. Under the amended *Nedrick/Woollin* Direction, do you think a person causing death/GBH with a benign motive would necessarily be intentional?
2. The ‘indefinable notion of intent’ referred to by Professor Smith below implies flexibility in the meaning of intention. Why should a court want to avoid rigidity?

Does *Woollin* clarify any of the questions raised by *Nedrick*? J.C. Smith commented in [1998] Crim LR 890:

‘. . . At one point Lord Steyn says of *Nedrick* “The effect of the critical direction is that a result foreseen as virtually certain is an intended result”. If that is right, the only question for the jury is, did D foresee the result as virtually certain? If he did, he intended

it. That, it is submitted is what the law should be; and it now seems that we have at last moved substantially in that direction. The *Nedrick* formula, however, even as modified [entitled to find], involves some ambiguity with the hint of the existence of some ineffable, undefinable, notion of intent, locked in the breasts of jurors.'

However, the Court of Appeal in the following case saw no contradiction in the law:

● **R v Matthews & Alleyne** [2003] EWCA Crim 192 Court of Appeal

Ds attacked V, an 18-year-old A-level student, on leaving a club one night. They stole his bankcard but could get no money from his account because it was empty. They returned to find him, forced him into their car, drove to a high bridge and threw him into a wide river. V could not swim and drowned. There was evidence that Ds knew V could not swim. The judge directed the jury in terms of an amended *Woollin* direction that if... 'drowning was a virtual certainty and Ds appreciated that, and in the absence of any desire or attempt to save him, and if they also realised that the others were not going to save him too they must have had the intent to kill.' Ds were convicted of robbery, kidnapping and murder. They appealed on the basis of a misdirection because the amended *Woollin* direction was put as a rule of substantive law rather than evidence. The prosecution argued that *Woollin* moved away from a rule of evidence to a rule of substantive law but the Court of Appeal disagreed. It held that:

1. The law had not yet reached a *definition* of intent in murder in terms of a virtual certainty and *Woollin* should not be regarded as laying down a substantive rule of law.
2. The judge had gone further than permitted by directing the jury to find the necessary intent.
3. However, there was very little difference between a rule of evidence and a rule of substantive law where foresight of a virtual certainty, as opposed to foresight of a lesser degree of risk, was concerned. The appeal was dismissed.

Professor Ashworth said in the commentary to the case in the Criminal Law Review [2003] 553 that the *Woollin* formula remains a rule of evidence:

'The upshot is that a court that is satisfied that D foresaw the prohibited result as a virtual certainty may properly decide not to find that D intended that result. The court cannot find intention if D foresaw the result as less than virtually certain; but foresight of virtual certainty may not be sufficient in some cases.'

The consequence of the continuing uncertainty is as follows:

1. D, a terrorist, kills by exploding a bomb in a public place giving a reasonable warning. He thinks death is probable but not certain. The *Nedrick/Woollin* test ought to exclude any D who fails to foresee the undesired consequence as a virtual certainty. But by leaving intention undefined beyond foresight, the jury has the scope to convict of murder if they think it is deserved.
2. D, a father, kills his child by throwing her from a high window of a burning building into the arms of the crowd below knowing that death/GBH is virtually certain. Again, the *Nedrick* test invokes flexibility, scope or what Professor Ashworth calls 'moral elbow room' to acquit deserving cases.

The Court of Appeal in *R v MD* [2004] EWCA Crim 1391 appeared to accept that *Nedrick/Woollin* had defined intention but that *Woollin* was designed to help the prosecution fill a gap in the rare circumstances where D acts so as to cause death *without the purpose* of killing or causing serious injury but where death or serious injury had been a virtual certainty (barring some unforeseen intervention) as a result of D's actions and D had appreciated that such was the case.

Therefore:

Intention includes:

- Direct intent: desired aim or purpose and
- Oblique intent as defined in the amended *Nedrick Direction*: a result which is not desired but which is either a pre-requisite to D's primary purpose or one which is virtually certain to occur (barring some unforeseen intervention) and which is, in either case, foreseen as such.
- The jury may but does not have to find intention using this test.
- Whether *Nedrick/Woolin* provide a definition or evidence of intention is undecided.

Evidence of intention:

- Foresight of a consequence which is (objectively or in actual fact) virtually certain to occur but which is assessed as a lower probability may be *evidence* of intention, taking into account all the other evidence and circumstances of a case, but will never be regarded as intention as a matter of *substantive law*.

Intention distinguished from recklessness:

- A lower degree of an unreasonable risk of harm foreseen as probable or possible will constitute recklessness.

3.1.12 Evaluation

All of these cases were concerned to clarify and crystallize the law on oblique intention. Many questions are left unanswered:

- Why do the courts still maintain such uncertainty?
- Is intention too wide and over-inclusive?
- Is it right to convict someone of murder when death/GBH was not the purpose of D's actions but a virtually certain consequence?
- Does it matter that the distinction between intention and recklessness is still unclear and that there is potential for overlap?
- Would a narrower definition be under-inclusive?

Even though the *Nedrick/Woolin* test of intention will be rarely required, it is not hard to see why such an important concept still generates such uncertainty. The views of some authors are as follows: Buxton is satisfied that the current guidelines are workable, but that a state of 'fragile equilibrium' exists which should not be disturbed. Norrie argues that the concept of oblique intention raises questions as to whether consequences foreseen as virtually certain could nevertheless be said to be just as desired as in a case of direct intent where they are part of the same package. If foreseen consequences are inescapable, then they too are desired. As to whether foresight is evidence or the same as intention remains problematic. Judges tend to say one thing then another within the same judgment: A. Norrie, 'Oblique Intention and Legal Politics' [1989] Crim LR 793.

The above questions are given force by virtue of the context in which the leading cases arise: murder. The courts have been concerned not only with the meaning of intention but also the dividing line between murder and manslaughter. The distinction is important: following conviction for murder a judge must pass a mandatory life sentence. Following conviction for manslaughter the judge retains discretion as to the most appropriate sentence. The maximum

is life but it might, depending on the circumstances, be a short or even a suspended sentence. The difference between these two states of mind is therefore of considerable practical significance. Whether someone should be convicted of one or the other will, in a minority of cases, generate moral or philosophical debate.

The moral context

The moral arguments concern murder and the sanctity of life. If one is prepared to forsake the life of another, not purposely, but as an inevitable consequence of securing a desired aim, then perhaps one deserves the gravest punishment and moral censure that society can impose. A. Norrie identifies within the debate on intention a political tension in the role of the law between liberal ideology and social control. Thus the bomber who kills the bomb disposal officer after a reasonable warning could be convicted of murder despite the lack of foresight of a virtual certainty of death/GBH because society would feel that morally D should be censured. Read this extract at p 806:

'Conclusion

The ultimate problem in formulating a law of oblique intent consistent with ordinary or commonsensical usage lies in the contradiction between the form of the law, which through doctrines of mens rea and the various excuses embodies a liberal ideology and logic of individual right and its function as a mechanism of social control wielded by a judicial elite who possess clear perceptions as to what such control requires. Law is formed in this contradictory crucible. Williams has written that

“the law on mens rea illustrates the eternal tension in the position of the judge. He is supposed to be an impartial adjudicator, applying the existing law and protecting the rights and liberties of the subject; but he is also a State instrumentality - in the wider sense, an organ of government. In general it is the second concept of the judge's role that shapes judicial attitudes on the issue of fault in the criminal law.” (Textbook of Criminal Law (1983) pp 143–144.)

In fact the law can go either way – in favour of or against liberal principles – as *Moloney's* correction of *Hyam* shows. But whichever way it goes, we should cease to see the laws as potentially founded on rationality and principle. Rather, it is the site of a struggle between separate and contradictory rationalities and conflicting aims and principles. Contrary to the orthodox view of the standard textbook writers, criminal law is constituted fundamentally as much by lack of liberal principle and logic as by their presence.’

Ashworth in *Principles of the Criminal Law*, 5th edition (Oxford) argues that a flexible concept of intention leaves a jury a certain amount of ‘moral elbow room’ to reflect this moral element. This is why the case of *Steane* has never been overruled. There would be moral objection to convicting a person acting under duress. These remain debatable issues.

Intention as an ordinary concept

Is there anything wrong in leaving the meaning of intention to the good sense of the jury? Are the courts leaving the definition ‘up in the air’? N. Lacey in ‘A Clear Concept of Intention: Elusive or Illusory?’ (1993) 56 MLR 621 thinks not, because most people have an innate sense of what terms such as intention and dishonesty mean. MR terms are invested with ordinary meaning to reflect society's values and to give the jury, representatives of society, the decision-making power rather than judges. Read this extract at p636:

‘For the appeal to “ordinary” usage has a number of discrete and ideologically significant positive attractions. Although they are related, we need for a moment to distinguish between appeals to “ordinary” usage at large (some of which are disingenuous)

and passing of the determination of a particular question to the jury, the jury to decide on its own, non-technical, “common sense” understanding of the relevant term. In the case of the former, the appeal to “ordinary” usage usefully underlines the familiarity and commonality of criminal law: it suggests that criminal law operates on the basis of widely shared meanings and widely endorsed judgments. It hence suppresses the idea that criminal law is hierarchical, an exercise of power, based on meanings which are imposed. So it has a powerful, subtle legitimating effect within legal discourse.’

W. Wilson, writing in ‘Doctrinal Rationality after *Woollin*’ (1999) 62 MLR at 448 agrees because by leaving it to the jury, cases of ‘wicked recklessness’ such as *Hyam* could be caught, where her conduct was consistent with both intending to kill and intending to frighten. A. Pedain in ‘Intention & The Terrorist Example’ [2003] Crim LR 579 argues that it is possible to include both *Hyam* and the terrorist within the definition of intent on the basis of attitude and endorsement of the outcome. He asks in what sense did Mrs. Hyam not want the result to happen? Foresight of a low probability of risk need not signify recklessness if the focus is on prior moral endorsement. References to wicked recklessness are made in the latest proposals for reform to which we now turn.

Of course, the necessity for an expanded definition of intention would evaporate if the mandatory life sentence for murder were to be amended. If judges could dispense sentences to reflect the moral culpability of the crime at hand, there would be no need to tinker with the definition of MR. Justice could also be effectively achieved if defences applied to murder in a more consistent way.

You will need to decide for yourself whether academic criticism of the law is warranted. Does it help to clarify or complicate a difficult concept? In either case, you might conclude that if you have found this topic rather taxing, you are evidently not alone!

3.1.13 Reform

The Law Commission has considered the law on intention in 1989, 1993, 1998, 2005 and 2006, the latter being Law Com Report No 304, Murder, Manslaughter and Infanticide (2006). Here the Law Commission recommends implementation of a proposed definition of intention first advanced in Consultation Paper No 177, Part IV, ‘A New Homicide Act for England and Wales?’ (2005). It is as follows:

(1) A person is to be regarded as acting intentionally with respect to a result when he or she acts in order to bring it about.

(2) In the rare case where the simple direction in clause (1) is not enough, the jury should be directed that:

they are not entitled to find the necessary intention with regard to a result unless they are sure that the result was a virtual certainty (barring some unforeseen intervention) as a result of D’s actions and that the defendant appreciated that such was the case.

(3) In any case where D’s chance of success in his or her purpose of causing some other result is relevant, the direction in clause (2) may be expanded by the addition of the following phrase at the end of the clause (2) direction:

or that it would be *if he or she were to succeed in his or her purpose of causing some other result*, and that D appreciated that such was the case.

Two examples are given where the expanded definition would be required:

V attempts to stop D from stealing a car and leaps onto the bonnet. D drives off, accelerating and V falls off and is killed. D claims he did not intend to kill V or to cause serious injury but simply wanted to escape.

D is jogging along a narrow path that follows a cliff edge. V is walking ahead. D wantonly barges V over the cliff rather than asking that he step aside. V is killed. D was not concerned with whether V lived or died.

In both, D displays homicidal or murderous disregard for human life. We shall look at the Homicide provisions in detail in Chapter 6.

A. Norrie in 'Between Orthodox Subjectivism and Moral Contextualism' [2005] Crim LR 497 criticizes the definition of intention recommended by the Law Commission. He states that the definition and the consultation document from which it derived adopts a theoretical structure in which the mandatory life sentence for murder is 'totemic' (at p 487). What he means is that the proposals work around the existing mandatory life sentence rather than call for its abolition for different categories of case or for the creation of more defences for murder such as duress and necessity. It combines both a subjectivist and moral contextual approach. However, he points out that the proposals disclose an inconsistency between the view that the father who throws a child from a burning building would be excluded from intention through use of the proviso yet doctors would be caught and should claim the benefit of a defence, especially when justificatory defences, such as necessity, were excluded from the paper. Further, by continuing to use the word purpose, juries will confuse it with motive. Read the following extract:

'Defining intention

The Law Commission develop two positions on intention in Pt 4, one based upon previous Commission attempts to establish a clear definition, the other based upon the existing common law approach established in *Nedrick* and *Woollin*. Most of the work has gone into the former of these two approaches, though the Commission state that it sees competing values in both. While the definitional approach has the attraction of certainty, it has the disadvantage of rigidity. While the common law approach allows for flexibility and "moral elbow room", it has the countervailing disadvantage of a lack of certainty (para. 4.1). Overall, however, the discussion is coloured by one major issue, the relationship between a cognitivist account of the mental state of intention and the moral work it must do in the law of murder...

The common law approach

The second approach is based upon the existing case law, and in particular the failure to provide a common law definition of intention. Instead of providing such, the drift of the cases from *Moloney* onwards has been towards the creation and refinement of a set of guidelines to a jury as to when it may find intention. In its post-*Woollin* form this involves the notion that a jury is not entitled to find intention unless they feel sure that:

"death or serious bodily harm was a virtual certainty (barring some unforeseen intervention) as a result of D's actions, and D appreciated that such was the case" (*Nedrick*, as amended, para. 4.64).

The second Law Commission proposal takes this formula up without alteration as a means of finding indirect intent, while direct intent is defined, as in the definitional approach, as acting in order to bring a result about. The argument in support of this approach is that it takes all the strain out of the first proposal. The fact-finder is not required to reach a particular conclusion, but is permitted "the freedom to find, or not to find, intent, in the way the common law does at present" (para. 4.65), and it therefore avoids "creating the difficulty which calls for the development of a proviso" (para. 4.66).

In a sense there is nothing new here, and therefore perhaps less to discuss. However, it is worth thinking about the precise status of the "entitled to find" formula within the law. The Law Commission clearly think that this formula is the means whereby "moral elbow room" is permitted in the law, but I wonder whether this is really the case. It is true that the cases culminating in *Woollin* and *Matthews and Alleyne* have as their

direct ancestor Lord Scarman's observations in favour of a jury's judgment in the earlier *Hancock and Shankland*, but is it the case that this formula makes a genuine moral difference in subsequent cases? ... in the trial of Dr Moor, a case of injecting drugs which would have the anticipated effect of shortening life, it is reported that the trial judge finessed the issue by instructing the jury in terms of two alternatives, one based on direct intention, the other on recklessness, avoiding consideration of the virtual certainty formula and the possibility of the jury being "entitled to find" intention. In other cases involving doctors who kill, the formula of "primary purpose" and the possibility of double effect have been called into service rather than "entitled to find", though admittedly these cases predate *Woollin* and much of the speculation about how the law works. There is nonetheless an element of speculation in academic writing as to how, or if, "entitled to find" works, though this is aligned with appreciation of a real problem in the law: that it needs to find a way to deal with cases involving "good motive". Academics have put two and two together, but I am unsure that the judges have said that this makes four.'

section summary

- *Intention is the only type of MR required by crimes of specific or ulterior intent. It has two meanings: direct and indirect/oblique;*
- *A directly intended result is the desired aim/purpose of D;*
- *An obliquely intended result is not desired but is one which is:*
 - *A pre-requisite or condition to the achievement of D's purpose or*
 - *A virtually certain result of D's primary purpose for acting and which he knows or foresees will occur as a virtual certainty;*
- *The test of intention is subjective by virtue of s8 Criminal Justice Act 1967;*
- *Intention is distinct from motive but recall Steane;*
- *Doctors acting with good motives who kill will either have no intention (Steane) or an innocent intent.*

3.1.14 Transferred Malice

Where D's MR for one crime causes the AR of the same crime but either mistakenly or accidentally causes an unintended consequence, MR can be transferred. For example, A intends to kill B and sets out to do so but mistakenly attacks and kills C instead. The mistaken identity of C makes no difference because the requirements of the offence of murder are satisfied: the intentional killing of a live person. The intention or malice with which the act was performed is transferred to the actual, albeit mistaken, victim of the murder. Therefore, provided MR required by the offence definition exists, it can be transferred.

Malice can only be transferred within the same offence. Suppose that in attacking C, A had thrown a brick at him which missed C and went straight through a nearby window. The intention to kill or cause GBH to C could not be transferred to criminal damage. There is no equivalence between the MR for murder (intention to kill or cause GBH) and criminal damage (intention or recklessness to damage/destroy property) and thus no transference is possible.

There are three cases relevant to transferred malice. The most recent, *AG's Reference (No 3 of 1994)* concerned the issue of whether intention to seriously injure a pregnant woman could be transferred to her premature child born alive but which then died after a short period of time. The transferred malice aspects of the judgment are considered below. The homicide aspects will be dealt with in Chapter 6:

● **Attorney-General's Reference (No 3 of 1994)** [1997] 3 All ER 936 House of Lords

D, the boyfriend of a young woman who was 22–24 weeks' pregnant, quarrelled with her and stabbed her in the face, back and abdomen with a long-bladed kitchen knife. It was clear that he intended to cause GBH. The mother survived but gave birth 17 days later. The baby (S) was born alive but grossly premature. The chance of survival was 50%. The baby lived for 121 days but then succumbed to bronchial infection from the effects of premature birth. After her birth it was discovered that one of the knife cuts had penetrated her lower abdomen. The wound needed surgical repair, but it was agreed that this made no contribution to her death. D had been sentenced to four years' imprisonment for wounding the mother with intent to cause GBH. Following the baby's death, he was charged with murder and pleaded not guilty. At his trial a submission was advanced that on the evidence no criminal offence relating to the baby was proved. The judge ruled in his favour D appealed.

Lord Mustill:

'The gist of the ruling lay in the law, and was to the effect that both the physical and the mental elements of murder were absent. There was no relevant actus reus, for the foetus was not a live person; and the cause of the death was the wounding of the mother, not of S. As to mens rea again there was none. When B stabbed the mother he had no intent to kill or do serious harm to any live person other than the mother, or to do any harm at all to the foetus. The Crown could not make good this deficiency by reliance on the concept of "transferred malice", for this operates only where the mens rea of one crime causes the actus reus of the same crime, albeit the result is in some respects unintended. Here, the intent to stab the mother (a live person) could not be transferred to the foetus (not a live person), an organism which could not be V of a crime of murder.

As to the alternative verdict of manslaughter the judge was at first exercised by the possibility that since the stabbing of M was an unlawful and dangerous act which led to the death of S a conviction could be sustained even though the act was not aimed at the ultimate victim: see *R. v. Mitchell* [1983] Q.B. 741. In the end, however, he was persuaded that this approach could not be sustained where there was at the material time no victim capable of dying as a direct and immediate result. Accordingly, the trial judge directed the jury to acquit D...'

'What explanation is left: for explanation there must be, since the "transferred malice" concept is agreed on both sides to be sound law today? The sources in more recent centuries are few. Of the two most frequently cited the earlier is *R. v. Pembliton* (1874) L.R. 2 C.C.R. 119. In the course of a fight D threw a stone at others which missed and broke a window. He was indicted for that he "unlawfully and maliciously did commit damage, injury, and spoil upon a window..." The jury found that he did not intend to break the window. On a case stated to the Court for Crown Cases Reserved it was argued for the prosecution that "directly it is proved that he threw the stone... without just cause, the offence is established." The ancient origins of this argument need no elaboration, and indeed the report of the argument as it developed showed that it was based on a conception of general malice... The conviction was quashed. [Blackburn J (at 122) was quoted where he said that if D had been reckless as to damaging the window the conviction might have been sound but he was not.]

This decision was distinguished in *R. v. Latimer* (1886) 17 Q.B.D. 359. Two men quarrelled in a public house. One of them struck at the other with his belt. The glancing blow bounced off and struck the prosecutrix, wounding her severely. The assailant was prosecuted and convicted for having unlawfully and maliciously wounded her, contrary to section 20 of the Offences Against the Person Act 1861. Counsel for D relied on *Pembliton*. In his judgment Lord Coleridge C.J. said, at p. 361,

"It is common knowledge that a man who has an unlawful and malicious intent against another, and, in attempting to carry it out, injures a third person, is guilty of what the law deems malice against the person injured, because the person is doing an unlawful act, and has that which the judges call general malice, and that is enough."

...

My Lords, I find it hard to base a modern law of murder on these two cases. The court in *Latimer* was, I believe, entirely justified in finding a distinction between their statutory backgrounds and one can well accept that the answers given, one for acquittal, the other for conviction, would be the same today. But the harking back to a concept of general malice, which amounts to no more than this, that a wrongful act displays a malevolence which can be attached to any adverse consequence, has long been out of date. And to speak of a particular malice which is “transferred” simply disguises the problem by idiomatic language. D’s malice is directed at one objective, and when after the event the court treats it as directed at another object it is not recognising a “transfer” but creating a new malice which never existed before. As Dr. Glanville Williams pointed out (*Criminal Law*, the General Part 2nd Ed. (1961), p. 184) the doctrine is “rather an arbitrary exception to general principles.” Like many of its kind this is useful enough to yield rough justice, in particular cases, and it can sensibly be retained notwithstanding its lack of any sound intellectual basis. But it is another matter to build a new rule upon it.

I pause to distinguish the case of indiscriminate malice from those already discussed, although even now it is sometimes confused with them. The terrorist who hides a bomb in an aircraft provides an example. This is not a case of “general malice” where under the old law any wrongful act sufficed to prove the evil disposition which was taken to supply the necessary intent for homicide. Nor is it transferred malice, for there is no need of a transfer. The intention is already aimed directly at the class of potential victims of which the actual victim forms part. The intent and the *actus reus* completed by the explosion are joined from the start, even though the identity of the ultimate victim is not yet fixed. So also with the shots fired indiscriminately into a crowd. No ancient fictions are needed to make these cases of murder.

My Lords, the purpose of this enquiry has been to see whether the existing rules are based on principles sound enough to justify their extension to a case where D acts without an intent to injure either the foetus or the child which it will become. In my opinion they are not. To give an affirmative answer requires a double “transfer” of intent: first from the mother to the foetus and then from the foetus to the child as yet unborn. Then one would have to deploy the fiction (or at least the doctrine) which converts an intention to commit serious harm into the *mens rea* of murder. For me, this is too much. If one could find any logic in the rules I would follow it from one fiction to another, but whatever grounds there may once have been have long since disappeared. I am willing to follow old laws until they are overturned, but not to make a new law on a basis for which there is no principle.

Moreover, even on a narrower approach the argument breaks down. The effect of transferred malice, as I understand it, is that the intended victim and the actual victim are treated as if they were one, so that what was intended to happen to the first person (but did not happen) is added to what actually did happen to the second person (but was not intended to happen), with the result that what was intended and what happened are married to make a notionally intended and actually consummated crime. The cases are treated as if the actual victim had been the intended victim from the start. To make any sense of this process there must, as it seems to me, be some compatibility between the original intention and the actual occurrence, and this is, indeed, what one finds in the cases. There is no such compatibility here. D intended to commit and did commit an immediate crime of violence to the mother. He committed no relevant violence to the foetus, which was not a person, either at the time or in the future, and intended no harm to the foetus or to the human person which it would become. If fictions are useful, as they can be, they are only damaged by straining them beyond their limits. I would not overstrain the idea of transferred malice by trying to make it fit the present case....’

Lord Mustill went on to dismiss the application of transferred malice to the offence of unlawful act manslaughter for the same reasons he had dismissed it to murder. However, involuntary and gross negligence manslaughter can be committed without any violent intent towards V and thus he thought that problems of transferred malice could be avoided by this route. The trial judge had dismissed this possibility because the violence must be directed towards another person and the foetus is not a person.

'... All that it is needed, once causation is established, is an act creating a risk to *anyone*; and such a risk is obviously established in the case of any violent assault by the risk to the person of V herself (or himself). In a case such as the present, therefore, responsibility for manslaughter would automatically be established, once causation has been shown, simply by proving a violent attack even if (which cannot have been the case here) the attacker had no idea that the woman was pregnant.'

NOTE

There is no concept of 'general malice' which would make D guilty of every type of prohibited harm resulting from his actions. He will only be responsible for accidental harm where the MR of the offence committed is satisfied by the intention accompanying the preceding act so that it can be transferred from one intentional result to another.



Thinking point 3.5

1. Which two cases were cited by Lord Mustill with reference to transferred malice? (*Latimer & Pembliton*).
2. Which provided authority for the doctrine? (*Pembliton*).
3. Did Lord Mustill approve of the doctrine of transferred malice?
4. Is transferred malice necessary to convict a terrorist who kills by exploding a bomb?
5. Why did Lord Mustill not apply the doctrine of transferred malice in this case?

There are arguments for and against the doctrine of transferred malice. The most contentious issue is what is called 'remoteness'. Consider the example below:

example

D strikes a match whilst sitting in a library in order to light a cigarette. This is now an offence. The whole box of matches explodes and the vibrations cause a nearby priceless sculpture to fall from its pedestal and shatter.

D's intended offence was criminal damage. The result was criminal damage but the sculpture was not only unintentionally harmed but it was also harmed in an unintentional way. Should there be full liability for criminal damage, or an attempt, or no liability at all on the basis that liability was too remote? There is no real agreement on this.

Reform: The draft Criminal Law Bill, cl 32 confirms that intention or awareness can be transferred within offences, including defences.

3.2

Recklessness

- Introduction
- Definitions
- The Current Legal Definition: Subjective/Advertent Recklessness: The Conscious Taking of an Unjustified Risk
- Previous Law: *Caldwell* Recklessness

key cases

- Subjective Recklessness is now restored throughout the criminal law
- Was the House of Lords in *R v G* Right to Reverse *Caldwell*?
- How to Distinguish Recklessness from Intention
- How to Distinguish Recklessness from Negligence
- Reform
- Evaluation and Conclusion

Cunningham [1957] 2 QB 396 – subjective recklessness: the conscious taking of an unreasonable risk;

Parker [1977] 1 WLR 600 – subjective recklessness includes closing one's mind to risk;

Caldwell [1982] AC 341 – objective recklessness: where D fails to think about a serious and obvious risk of harm;

Elliott v C [1983] 77 Cr App R 103 – objective recklessness takes no account of inability to foresee risk;

R v G [2003] UKHL 50 – objective recklessness abolished.

3.2.1 Introduction

Recklessness = Unreasonable risk-taking:

- Subjective or Advertent Recklessness: *Cunningham* Recklessness

This is the current test, defined as the conscious (or advertent) taking of an unjustified or unreasonable risk of harm.

Recklessness is concerned with causing harm through taking risks. In the hierarchy of MR, recklessness is second only to intention, but is not as culpable. It appears in offences ranging in gravity from manslaughter at the top end of the scale to criminal damage and a range of statutory offences at the bottom. Here we shall examine recklessness relating to *results*, for example, criminal damage or personal injury, as opposed to the reckless disregard of *circumstances or conduct*. For instance, recklessness can be used in an offence as a description of conduct such as reckless driving. You can *intend* to drive recklessly but you cannot be both intentional and reckless in relation to *results*. The two mental states are quite different.

Offences involving recklessness are called offences of **basic intent**. We can contrast them with offences requiring proof of intention alone which are called offences of **specific** or **ulterior** intent. Recklessness can be distinguished from intention in that the latter is defined as aim or purpose (direct intent) or requires foresight as to a virtually certain result (oblique intent) whereas recklessness is concerned with foresight of lower degrees of risk.

A **basic intent offence** is an offence requiring proof of either recklessness or intention. This means that in reality the prosecution need only prove recklessness which will usually be less onerous than proof of intention, eg:

Criminal Damage Act 1971

1. Destroying or damaging property

- (1) A person who without lawful excuse destroys or damages any property belonging to another intending to destroy or damage any such property or being reckless as to whether any such property would be destroyed or damaged shall be guilty of an offence.

- (2) A person who without lawful excuse destroys or damages any property, whether belonging to himself or another –
- (a) intending to destroy or damage any property or being reckless as to whether any property would be destroyed or damaged; and
 - (b) intending to by the destruction or damage to endanger the life of another or being reckless as to whether the life of another would be thereby endangered; shall be guilty of an offence.
- (3) An offence committed under this section by destroying or damaging property by fire shall be charged as arson.

Common Assault

Any act by which D, intentionally or recklessly, causes V to apprehend immediate and unlawful personal violence.

Between 1982 and 2003 recklessness was defined in two different ways: *subjectively* (*Cunningham* recklessness) and *objectively* (*Caldwell* recklessness), but each applied to different offences. Recklessness now has only one meaning and is **subjectively** assessed. The House of Lords in *R v G* [2003] UKHL 50 abolished objective recklessness (below).

3.2.2 Definitions

The ordinary meaning of recklessness: creating a risk of harm without thinking

Most people would consider a person to be reckless when he acts without thinking, perhaps with a lack of care or indifference to the risk of causing harm to another's safety or property. Such a person may be impulsive, angry or intoxicated and thus not immediately aware of any immediate risk. They would probably be considered reckless in ordinary language provided they were, apart from their behaviour, otherwise normal individuals. We might also apply the terms 'thoughtless', 'stupid', 'callous' to the person who acts with disregard for the interests of other people. Someone who fails to consider the risk he is causing to other people may be thought to deserve moral censure and punishment on the grounds that he is just as blameworthy as the conscious risk-taker. We might say that he ought to have known better than to act in such a way and is therefore reckless. In ordinary language therefore recklessness represents both being aware and being unaware of causing an unreasonable risk of harm.

3.2.3 The Current Legal Definition: Subjective/Advertent Recklessness: The Conscious Taking of an Unjustified Risk

Recklessness in the legal sense is concerned with unreasonable risk-taking. Today, it is assessed subjectively, as is intention, and is confined to the conscious taking of an unjustified risk of harm. This means that to be reckless, one needs to be *aware* of an *unreasonable* risk of harmful consequences.

Whether a risk is unreasonable involves a value judgment. Many areas of life require us to take risks. Everyday activities involve a routine risk-assessment exercise of which we are barely aware: crossing a busy road for example. Others in which we engage less often require a more conscious assessment in which we weigh up the risk and compare it to the rewards. Travel, sport, surgery, for example, may carry a small risk but if we figure that the benefit outweighs the risk, then it is a risk worth taking. The risks we choose to assume and which

are incidental to everyday living are justifiable and perfectly reasonable because they have social value, even where the risk of harm is high. It is not until risk-taking loses its social value or utility that we would call it unreasonable. It will always be unreasonable and seldom justifiable to take a risk with another's personal safety or property.

You may have acted recklessly in the current legal sense of the word when, for example, overtaking on the road in risky circumstances, *conscious* that you may be endangering safety or property. Here you know that you are taking an unreasonable risk. This is subjective recklessness.

Foresight is an essential element of subjective recklessness, just as it is with oblique intention. The risk of harm may be high or low but provided D perceives or foresees some degree of risk then he will be reckless. The type of harm in relation to which recklessness must be proved depends on the offence definition.

Objective *Caldwell* recklessness, which no longer exists but which applied to some important offences between 1982 and 2003, concerned the *unconscious/inadvertent* creation of a serious and obvious risk of harm. One could be objectively reckless even though completely unaware of any risk created. This caused injustice and gave rise to a great deal of criticism.



Thinking point 3.6

List the AR/MR elements of criminal damage and assault defined above.

Is the interpretation of recklessness clear? (ie subjective/objective).

D slams a shop door so hard on leaving a shop that the plate glass window shatters. Identify his state of mind in the following:

- a) *He wanted the window to break.*
- b) *He did not want it to break but knew damage was virtually certain.*
- c) *He thought it probable that the window would break.*
- d) *He was unaware of any risk of damage.*

You will probably have known that the first three examples were descriptions of a) direct intent, b) oblique intent and c) subjective recklessness. The answer to d) is that today D would not be reckless and would be innocent of criminal damage. Until the House of Lords decision in *R v G* [2003] UKHL 50 however, D would have been considered objectively reckless and guilty.

This is the leading case on subjective recklessness:

● **R v Cunningham** [1957] 2 QB 396 Court of Appeal

A building had been divided into two. D's prospective mother in law lived in one part and D and his future wife were to live in the other. He one day entered the cellar of the empty part, wrenched a coin-operated gas meter away from a coal-gas pipe to steal the money inside and caused the pipe to fracture. Gas escaped and seeped through the cellar wall into the adjoining part of the house where it was inhaled by a sleeping woman who was partially suffocated. D was charged under s23 Offences Against the Person Act 1861 where MR was defined, not as recklessness, but as *maliciously*:

'Whosoever shall unlawfully and maliciously administer to or cause to be administered a noxious thing, so as thereby to endanger the life of such person, or so as thereby to inflict upon such person any grievous bodily harm, shall be guilty of felony ...'

D did not give evidence at his trial but the judge told the jury that he must have known the gas would escape to the neighbouring house. On the meaning of 'maliciously' the judge directed the jury to find D guilty if he had acted in such a way as to be wicked. D was convicted and appealed.

The Court of Appeal adopted a subjective approach to MR and asked two questions:

1. Did D foresee the possibility of the harmful consequences? A person may be held liable if he foresaw any degree of risk however slight.
2. Was it unjustifiable or unreasonable for D to take the risk?

If D did perceive or foresee the possibility of harm then he would be reckless even though he assessed the risk of harm as small. Whether the risk is reasonable or unreasonable will require an objective assessment and the jury will lay down the required standard of care. It will depend on the social utility of the activity. Taking a known risk with another person's body or property is not justifiable.

The Court overruled the judge's direction on the interpretation of maliciousness, approving an earlier definition. It stated that in any statutory definition of a crime '*maliciously*' should be defined as requiring either:

1. An actual intention to do the particular harm that was done or
2. Recklessness as to whether such harm should occur or not.

Byrne J said: 'In our opinion the word "maliciously" in a statutory crime postulates foresight of the consequences'.

Following *Cunningham*, the courts decided that a D who *deliberately closes his mind* to risk could be considered subjectively reckless. In *R v Parker (Daryl)* [1977] 1 WLR 600, D in a fit of temper broke a telephone by smashing the handset violently down on to the telephone unit. He was convicted under section 1(1) of the Criminal Damage Act 1971. The Court of Appeal held that a man is reckless in the sense required when he carries out a deliberate act *knowing or closing his mind* to the obvious fact that there is some risk of damage resulting from that act but nevertheless continues in the performance of that act. The rationale was to draw a distinction between culpable inadvertence and mere negligence or oversight.



Thinking point 3.7

1. If Mr. Cunningham had failed to think about any risk to others would he have been reckless?
2. After Parker, would Cunningham have been considered subjectively reckless if he had failed to think of any risk because he was impulsive or angry?
3. Would you re-consider your answer if he genuinely did not think there was any risk for some innocent reason or carelessness?

Subjectivity takes account of individual characteristics

A subjective approach to MR means that account can be taken of D's individual characteristics. Therefore if D's ability to perceive a risk is less than that of a reasonable person, a subjective approach will be fairer. The next case demonstrates the justice of this approach.

● R v Stephenson [1979] 1 QB 695 Court of Appeal

The appellant crawled into a hollow in the side of a large haystack and feeling cold lit a small fire from twigs which got out of control and damaged the hay at a value of £3500. He was charged with arson contrary to s1(1) Criminal Damage Act 1971.

D was convicted on the grounds that he had 'closed his mind' to the obvious risk of fire. However, he was a schizophrenic and the judge held that his schizophrenia was the reason why he had closed his mind to the risk. He was therefore reckless. The Court of Appeal allowed his appeal and overturned the conviction. Schizophrenia was on the evidence something which might have prevented the idea of danger even entering the appellant's mind at all. Even if he had stopped to think about the risk it is possible that his condition would have prevented him from being aware of it.

Lord Lane:

'What then must the prosecution prove in order to bring home the charge of arson in circumstances such as the present? They must prove that (1) D deliberately committed some act which caused the damage to property alleged or part of such damage; (2) D had no excuse for the causing the damage; these two requirements will in the ordinary case not be in issue; (3) D either (a) intended to cause the damage to the property, or (b) was reckless as to whether the property was damaged or not. A man is reckless when he carries out the deliberate act appreciating that there is a risk that damage to property may result from his act. It is however not the taking of every risk which could properly be classed as reckless. The risk must be one which it is in all the circumstances unreasonable for him to take.

Proof of the requisite knowledge in the mind of D will in most cases present little difficulty. The fact that the risk of some damage would have been obvious to anyone in his right mind in the position of D is not conclusive proof of D's knowledge, but it may well be and in many cases doubtless will be a matter which will drive the jury to the conclusion that D himself must have appreciated the risk. The fact that he may have been in a temper at the time would not normally deprive him of knowledge or foresight of the risk. If he had the necessary knowledge or foresight and his bad temper merely caused him to disregard it or put it to the back of his mind not caring whether the risk materialised, or if it merely deprived him of the self-control necessary to prevent him from taking the risk of which he was aware, then his bad temper will not avail him. This was the concept which the court in *R. v Parker (Daryl)* [1977] 1 W.L.R. 600, 604 was trying to express when it used the words "or closing his mind to the obvious fact that there is some risk of damage resulting from that act..."

The Criminal Damage Act 1971 had replaced the Malicious Damage Act 1861, where MR had been defined as 'maliciously.' Recklessness was not defined in the new Act but the Court of Appeal in *Stephenson* gave it the same subjective interpretation as 'maliciously' under the previous legislation, ie foresight of a risk of damage.



Thinking point 3.8

D borrows X's mobile phone to make an urgent call. The phone has run out of credit. D slams down the phone so hard on a table that it breaks.

1. What offence would D be charged with?
2. Would he be considered reckless if the reason for his conduct was:
 - a) to see how much force the phone could withstand?
 - b) temper or impulse?
 - c) momentary distraction?
 - d) young age or mental incapacity?

**section
summary**

- Recklessness is concerned with unreasonable risk-taking.
- It is a definition of MR found in crimes of basic intent.
- Subjective recklessness is now the only type of recklessness following *R v G*;
- Liability depends on foresight: the conscious taking of an unjustified risk;
- Not all unconscious risk-takers will be acquitted if they have closed their minds to the risk of harm (*Parker*).
- This will ensure the conviction of those who are culpable but not the negligent risk-taker.

3.2.4 Previous Law: *Caldwell* Recklessness

(THIS TYPE OF RECKLESSNESS NO LONGER EXISTS AND WAS OVERRULED BY THE HOUSE OF LORDS IN *R v G* [2003] BELOW. IT WAS A VERY PROBLEMATIC AREA OF LAW AND IS SET OUT HERE TO ASSIST YOU TO UNDERSTAND LORD BINGHAM'S REASONS IN *R v G* FOR OVERRULING IT. *R v G* FOLLOWS THIS SECTION.)

In 1982 the law on subjective recklessness relating to criminal damage was changed by the House of Lords:

● **R v Caldwell** [1982] AC 341 House of Lords

The respondent had done some work in a hotel as a result of which he had quarrelled with the owner, got drunk and set fire to the building. The fire was extinguished before serious damage occurred and anyone was injured. The respondent had been charged with two counts of arson. The first and more serious count was under section 1(2) of the 1971 Act, the second count under section 1(1). He pleaded guilty to the second count but defended the first on the ground of self-induced intoxication: that he was so drunk that the thought there might be people in the hotel had never crossed his mind. His conviction under count 1 was set aside by the Court of Appeal which certified the following question for the House of Lords:

'Whether evidence of self-induced intoxication can be relevant to the following questions – (a) Whether D intended to endanger the life of another; and (b) whether D was reckless as to whether the life of another would be endangered, within the meaning of section 1(2)(b) of the Criminal Damage Act 1971.'

Held:

1. *Intoxication*

The House of Lords confirmed that drunkenness was no defence to a crime of basic intent and upheld the conviction. You will see in Chapter 8 that intoxication is rarely a defence under the criminal law.

Lord Diplock thought that D's unawareness, owing to his drunkenness, of the risk of endangering life was no defence if that risk would have been obvious to him had he been sober. Evidence of self-induced intoxication was relevant to a s1(2) charge based on intention but not recklessness.

2. Recklessness

The significance of this case concerns not only intoxication but primarily recklessness. Lord Diplock gave the leading judgment with which Lord Keith and Lord Roskill agreed. There were two dissenting judgments from Lord Wilberforce and Lord Edmund-Davies.

Lord Diplock stated that it was no less blameworthy for a man whose mind was affected by a rage, excitement or drink to fail to give thought to the risk of damaging property and a man whose mind was similarly affected but who had appreciated the risk, but not its seriousness. Recklessness should be given its dictionary meaning of 'careless, regardless, heedless of the consequences.'

He saw no reason to assume that the 1971 Act, which was intended to revise the law of damage to property, meant 'reckless' to be interpreted as 'maliciously' had been. He preferred the ordinary meaning of reckless:

'[which] surely includes not only deciding to ignore the risk of harmful consequences resulting from one's acts that one has recognised as existing, but also failing to give any thought to whether or not there is any such risk in circumstances where, if any thought were given to the matter, it would be obvious that there was. If one is attaching labels, the latter state of mind is neither more nor less "subjective" than the first. But the label solves nothing. It is a statement of the obvious; mens rea means, by definition, a state of mind of the accused himself at the time he did the physical act that constitutes the actus reus of the offence; it cannot be the mental state of some nonexistent hypothetical person.'

Therefore the mind of 'the ordinary prudent individual' should be considered.

'Nevertheless, to decide whether someone has been "reckless" as to whether harmful consequences of a particular kind will result from his act, as distinguished from his actually intending such harmful consequences to follow, does call for some consideration of how the mind of the ordinary prudent individual would have reacted to a similar situation. If there was nothing in the circumstances that ought to have drawn the attention of an ordinary prudent individual to the possibility of that kind of harmful consequence, the accused would not be described as "reckless" in the natural meaning of that word for failing to address his mind to the possibility; nor, if the risk of the harmful consequences was so slight that the ordinary prudent individual upon due consideration of the risk would not be deterred from treating it as negligible, could the accused be described as reckless in its ordinary sense if, having considered the risk, he decided to ignore it. [In this connection the gravity of the possible harmful consequences would be an important factor. To endanger life must be one of the most grave.] So to this extent, even if one ascribes to "reckless" only the restricted meaning, adopted by the Court of Appeal in *R v Stephenson* [1979] and *R v Briggs* [1977], of foreseeing that a particular kind of harm might happen and yet going on to take the risk of it, it involves a test that would be described in part as "objective." In current legal jargon questions of criminal liability are seldom solved by simply asking whether the test is subjective or objective.'

Lord Diplock proposed what came to be a model direction known as ***the model direction or Caldwell test***:

'... a person charged with an offence under s1(1) Criminal Damage Act 1971 is reckless as to whether or not property would be destroyed or damaged if—

- (a) he does an act which in fact creates an obvious risk that property will be destroyed or damaged and
- (b) when he does that act he either has not given any thought to the possibility of any such risk or has recognised that there was some risk involved and has nonetheless gone on to do it.'

3. This complicated test combined both *Cunningham* subjective recklessness as well as objective recklessness. What was new was the first limb of the test which states that D will be reckless where *he fails to give thought to an obvious risk*.

4. The two states of mind, both subjective and objective, were equally blameworthy. In other words, the new test would catch those who deserved to be punished for their harmful actions even though the idea of risk may not have been in the forefront of their minds at the time of acting. *Stephenson* was overruled.

5. Lord Diplock considered that there were two problems with the subjective test:

- First, that it was under-inclusive in that it would exclude the impulsive risk-taker who acts rashly in the heat of the moment and the person who acts without thinking.
- Secondly, the 'couldn't care less' state of mind was problematic in that one might not be subjectively aware of the risk if one did not care whether there was a risk or not.
- Finally, if D was preoccupied and had not given thought to the risk then such a person would escape liability.

Therefore, no enquiry as to a state of mind was necessary under the new test.

You may wonder why any change to the law was necessary since *Parker* and *Stephenson* had already decided that the unaware/unconscious risk-taker who had closed his mind to an obvious risk of damage was subjectively reckless.

6. Wherever a statute used the word '*reckless*' the new objective test applied. Therefore it was not the case that subjective *Cunningham* recklessness was completely replaced. It continued to apply to older statutory offences defined by 'maliciously', principally offences against the person. Objective recklessness was extended to the offences of causing death by reckless driving (*Lawrence* [1982] AC 510) and manslaughter (*Seymour* [1983] 2 AC 493). In 1994 the House of Lords in *Adomako* [1995] 1 AC 171 overturned *Caldwell* in respect of manslaughter reverting MR to subjective recklessness or gross negligence for that offence. It was some years before the courts decided that *Caldwell* did not apply to common law assault. The two tests of recklessness led to some illogical results:

example

A resident of a caravan park (D) was involved in a dispute with the owner over rent. D went on a rampage with a mechanical digger, destroying the house of the park owner whilst she and her husband were inside and two cars. The owner also suffered damage to her eye from flying debris. D suffered from psychological problems. Criminal damage to the house and cars: *Caldwell* recklessness – guilty. D's state of mind would be irrelevant. Assault/ABH on the woman: *Cunningham* recklessness – this would depend on D's awareness of risk. Lack of mental capacity might have afforded a defence.

Recklessness in the context of rape was held to be somewhere between *Caldwell* and *Cunningham* recklessness, expressed as an attitude of 'couldn't care less' or 'indifference' to risk, not caring one way or the other whether the complainant was consenting and disregarding her wishes (*R v Satnam and Kewal* (1983) 78 Cr App R 140). Reckless rape has now been abolished (Chapter 11).

The effect of an objective approach to MR is that everyone is judged according to the standard of a reasonable adult whether they happen to be 'reasonable', 'normal', adult or not. Thus, young or mentally disabled people or those who are too ill or exhausted to think carefully would be judged by reasonable standards. Objective liability makes no concessions to disability, age or health. What if D was not ordinary because of an

incapacitating condition which might interfere with the ability to perceive a risk? This was the case with the schizophrenic defendant in *Stephenson* but Lord Diplock expressly overruled this case. A rigid interpretation of the *Caldwell* test could lead to injustice. See the next case:

● **Elliott v C (A minor)** [1983] 77 Cr App R 103 Divisional Court

D was a young girl aged 14 of low intelligence who had spent a night out without sleeping. She wandered into a shed, poured white spirit on the floor and ignited it. The resulting fire destroyed the shed. D was charged with criminal damage under s1(1) Criminal Damage Act 1971. The defence was that she was not reckless because she did not know that white spirit was inflammable. It was found as a fact that she was unaware of the risk of fire and that she would not have appreciated the danger had she stopped to think about it. The justices acquitted her because they interpreted the *Caldwell* test as indicating that the risk had to be obvious to the particular defendant. The prosecution appealed.

Held: Appeal allowed. It was accepted that the risk was one which had to be obvious to a reasonably prudent person and therefore once it was proved that D gave no thought to the possibility of there being such a risk, low intelligence or exhaustion was not a defence. Lord Goff expressed his unhappiness at this decision which the court was obliged to make in deference to *Caldwell*.

You might consider that a test of recklessness which convicted a child with learning difficulties was punitive. Such inflexibility was again illustrated in three further cases:

● **R v Bell** [1984] 3 All ER 842 Court of Appeal

D was schizophrenic and used his car to attack various targets which he regarded as evil. He was charged with criminal damage and convicted because he had failed to foresee an obvious risk of damage despite the fact that he was unable to appreciate such risk. It was held that his mental condition was irrelevant to recklessness but might have been relevant to insanity.

In *Stephen Malcolm R* (1984) 79 Cr App R 334 the conviction of a 15-year-old boy for arson was confirmed on the basis of recklessness under s1(2) 1971 Act. *Caldwell* applied, the court remarking that even if a comparison had been made with a boy of D's age, the outcome would have been the same.

In *Reid* [1992] 1 WLR 793 the House of Lords accepted the possibility of exceptions or a proviso to the objective test, where ignorance of the risk arose due to incapacity such as age, mental deficiency, illness or shock, reasonable misunderstanding, sudden disability or emergency. But later courts were not sympathetic to the argument. The conviction of another 15-year-old boy for arson was confirmed in *Coles* [1995] 1 Cr App R 157 where the Court of Appeal dismissed his application to introduce expert psychiatric evidence on the basis that *Caldwell* recklessness should take account of the reduced ability of a 15-year-old to perceive risk.

You might wonder whether there was any point in punishing those who had not chosen, in a rational sense, to do wrong. *Caldwell* recklessness was 'over inclusive' in the sense that it extended the boundaries of MR beyond what most people might consider to be the proper limits of responsibility for inadvertent risk-taking. There were no exceptions for incapacity. The young defendant in *Elliott* may have been foolish but to convict on the basis of recklessness was unjust to say the least.

The test was also very complex and gave rise to a theoretical argument called 'the *Caldwell* loophole', a particular anomaly that might have provided a defence if the courts had ever

accepted the argument: *Caldwell* recklessness applied to a defendant who had *failed to give thought* to a serious and obvious risk of harm in certain offences. But if D *had thought* about the risk and had wrongly concluded there was none, he would not be reckless in the *Caldwell* sense. Neither would subjective recklessness apply for D was not taking a known risk, having just dismissed it. D would therefore fall between the two tests and would simply be negligent on the basis of a mistake about a serious and obvious risk.

Although the argument was acknowledged in two appeal cases, the *Caldwell* loophole never succeeded. For example, in *Chief Constable of Avon & Somerset v Shimmen* (1987) 84 Cr App R 7 a green and yellow belt expert in a martial art, Tae Kwon Do, had attempted to show his friend how close he could kick to a shop plate glass window without breaking it. He put his foot through the window and was charged with criminal damage. He was acquitted at trial using the loophole argument but on appeal the Divisional Court remitted the case back to the magistrates with a direction to convict because D had in effect admitted to being reckless when he said that he had tried to eliminate as much risk as possible in stopping short by two inches rather than eliminating all risk completely. He had still foreseen some risk and was therefore reckless.

Understandably, there were many other criticisms of *Caldwell* recklessness which was overturned by *R v G* to which we now turn:

Subjective recklessness restored

● **R v G and Another** [2003] UKHL 50 House of Lords

Two boys aged 11 and 12 went camping one night without their parents' permission. They entered the back yard of the Co-op shop in Newport Pagnell. They found bundles of newspapers which they opened up to read and then lit some of them with a lighter. They threw some of the lit newspaper under a large plastic wheelie-bin and left the yard without putting out the burning papers. The bin caught fire and the fire spread to the bin next to the shop wall. From there it spread to an overhanging eave, then to the guttering, fascia and up into the roof space of the shop until the roof and neighbouring buildings caught fire. The roof collapsed and approximately one million pounds worth of damage was caused. The appellants stated at trial that they expected the newspapers to extinguish themselves on the concrete floor of the yard. Neither of them thought there was a risk that the fire would spread. They were charged with arson contrary to ss1(1) and (3) Criminal Damage Act 1971.

On conviction by the Crown Court the boys had received a one year supervision order, the judge having reluctantly given the jury a direction on the *Caldwell* definition of recklessness to assess the actions of the children by the standard of the ordinary reasonable bystander. The appellants appealed to the Court of Appeal which was unable to depart from *Caldwell*. The matter was referred to the House of Lords and the issue was whether the *Caldwell* objective approach to recklessness in criminal damage was correct.

In this important judgment, you will see why the Lords disagreed with Lord Diplock in *Caldwell* and agreed with the dissenting judgment of Lord Edmund-Davies:

Lord Bingham gave the leading judgment:

'The task confronting the House in this appeal is, first of all, one of statutory construction: what did Parliament mean when it used the word "reckless" in section 1(1) and (2) of the 1971 Act? In so expressing the question I mean to make it as plain as I can that I am not addressing the meaning of "reckless" in any other statutory or common law context. In particular, but perhaps needlessly since "recklessly" has now been banished from the

lexicon of driving offences, I would wish to throw no doubt on the decisions of the House in *R v Lawrence* [1982] AC 510 and *R v Reid* [1992] 1 WLR 793.

Since a statute is always speaking, the context or application of a statutory expression may change over time, but the meaning of the expression itself cannot change. So the starting point is to ascertain what Parliament meant by “reckless” in 1971. As noted above in paragraph 13, section 1 as enacted followed, subject to an immaterial addition, the draft proposed by the Law Commission. It cannot be supposed that by “reckless” Parliament meant anything different from the Law Commission. The Law Commission’s meaning was made plain both in its Report (Law Com No 29) and in Working Paper No 23 which preceded it. These materials (not, it would seem, placed before the House in *R v Caldwell*) reveal a very plain intention to replace the old-fashioned and misleading expression “maliciously” by the more familiar expression “reckless” but to give the latter expression the meaning which *R v Cunningham* [1957] 2 QB 396 and Professor Kenny had given to the former. In treating this authority as irrelevant to the construction of “reckless” the majority fell into understandable but clearly demonstrable error. No relevant change in the mens rea necessary for proof of the offence was intended, and in holding otherwise the majority misconstrued section 1 of the Act.

That conclusion is by no means determinative of this appeal. For the decision in *R v Caldwell* was made more than 20 years ago. Its essential reasoning was unanimously approved by the House in *R v Lawrence* [1982] AC 510. Invitations to reconsider that reasoning have been rejected. The principles laid down have been applied on many occasions, by Crown Court judges and, even more frequently, by justices. In the submission of the Crown, the ruling of the House works well and causes no injustice in practice. If Parliament had wished to give effect to the intention of the Law Commission it has had many opportunities, which it has not taken, to do so. Despite its power under *Practice Statement (Judicial Precedent)* [1966] 1 WLR 1234 to depart from its earlier decisions, the House should be very slow to do so, not least in a context such as this.’

Lord Bingham gave four reasons to depart from *Caldwell*:

‘First, it is a salutary principle that conviction of serious crime should depend on proof not simply that D caused (by act or omission) an injurious result to another but that his state of mind when so acting was culpable. This, after all, is the meaning of the familiar rule *actus non facit reum nisi mens sit rea*. The most obviously culpable state of mind is no doubt an intention to cause the injurious result, but knowing disregard of an appreciated and unacceptable risk of causing an injurious result or a deliberate closing of the mind to such risk would be readily accepted as culpable also. It is clearly blameworthy to take an obvious and significant risk of causing injury to another. But it is not clearly blameworthy to do something involving a risk of injury to another if (for reasons other than self-induced intoxication: *R v Majewski* [1977] AC 443) one genuinely does not perceive the risk. Such a person may fairly be accused of stupidity or lack of imagination, but neither of those failings should expose him to conviction of serious crime or the risk of punishment.

Secondly, the present case shows, more clearly than any other reported case since *R v Caldwell*, that the model direction formulated by Lord Diplock (see paragraph 18 above) is capable of leading to obvious unfairness. As the excerpts quoted in paragraphs 6–7 reveal, the trial judge regretted the direction he (quite rightly) felt compelled to give, and it is evident that this direction offended the jury’s sense of fairness. The sense of fairness of 12 representative citizens sitting as a jury (or of a smaller group of lay justices sitting as a bench of magistrates) is the bedrock on which the administration of criminal justice in this country is built. A law which runs counter to that sense must cause concern. Here, the appellants could have been charged under section 1(1) with recklessly damaging one or both of the wheelie-bins, and they would have had little defence. As it was, jury might have inferred that boys of the appellants’ age would have appreciated the risk to the building of what they did, but it seems clear that such was not their conclusion (nor, it would appear, the judge’s either). On that basis the jury thought it unfair to convict them. I share their sense of unease. It is neither moral nor just to convict a defendant (least of all a child) on the strength of what someone else would have apprehended if D himself had no such apprehension. Nor, D having been convicted, is the problem cured by imposition of a nominal penalty.

Thirdly, I do not think the criticism of *R v Caldwell* expressed by academics, judges and practitioners should be ignored. A decision is not, of course, to be overruled or departed from simply because it meets with disfavour in the learned journals. But a decision which attracts reasoned and outspoken criticism by the leading scholars of the day, respected as authorities in the field, must command attention. One need only cite (among many other examples) the observations of Professor John Smith ([1981] Crim LR 392, 393–396) and Professor Glanville Williams (“Recklessness Redefined” [1981] 40 CLJ 252). This criticism carries greater weight when voiced also by judges as authoritative as Lord Edmund-Davies and Lord Wilberforce in *R v Caldwell* itself, Robert Goff LJ in *Elliott v C* [1983] 1 WLR 939 and Ackner LJ in *R v Stephen Malcolm R* [1984] 79 CrApp R 334. The reservations expressed by the trial judge in the present case are widely shared. The shopfloor response to *R v Caldwell* may be gauged from the editors’ commentary, to be found in the 41st edition of *Archbold* [1982]: paragraph 17–25, pages 1009–1010. The editors suggested that remedial legislation was urgently required.

Fourthly, the majority’s interpretation of “recklessly” in section 1 of the 1971 Act was, as already shown, a misinterpretation. If it were a misinterpretation that offended no principle and gave rise to no injustice there would be strong grounds for adhering to the misinterpretation and leaving Parliament to correct it if it chose. But this misinterpretation is offensive to principle and is apt to cause injustice. That being so, the need to correct the misinterpretation is compelling...

In the course of argument before the House it was suggested that the rule in *R v Caldwell* might be modified, in cases involving children, by requiring comparison not with normal reasonable adults but with normal reasonable children of the same age. This is a suggestion with some attractions but it is open to four compelling objections. First, even this modification would offend the principle that conviction should depend on proving the state of mind of the individual defendant to be culpable. Second, if the rule were modified in relation to children on grounds of their immaturity it would be anomalous if it were not also modified in relation to the mentally handicapped on grounds of their limited understanding. Third, any modification along these lines would open the door to difficult and contentious argument concerning the qualities and characteristics to be taken into account for purposes of the comparison. Fourth, to adopt this modification would be to substitute one misinterpretation of section 1 for another. There is no warrant in the Act or in the *travaux préparatoires* which preceded it for such an interpretation.

A further refinement, advanced by Professor Glanville Williams in his article “Recklessness Redefined” [1981] 40 CLJ 252, 270–271, adopted by the justices in *Elliott v C* [1983] 1 WLR 939 and commented upon by Robert Goff LJ in that case is that a defendant should only be regarded as having acted recklessly by virtue of his failure to give any thought to an obvious risk that property would be destroyed or damaged, where such risk would have been obvious to him if he had given any thought to the matter. This refinement also has attractions, although it does not meet the objection of principle and does not represent a correct interpretation of the section. It is, in my opinion, open to the further objection of over-complicating the task of the jury (or bench of justices). It is one thing to decide whether a defendant can be believed when he says that the thought of a given risk never crossed his mind. It is another, and much more speculative, task to decide whether the risk would have been obvious to him if the thought had crossed his mind. The simpler the jury’s task, the more likely is its verdict to be reliable. Robert Goff LJ’s reason for rejecting this refinement was somewhat similar [*Elliott v C*, page 950]...’

Lord Bingham agreed with the Law Commission’s definition of recklessness in clause 18(b) of the Criminal Code Bill annexed by the Law Commission to ‘A Criminal Code for England and Wales Volume 1: Report and Draft Criminal Code Bill’ (Law Com No 177, April 1989):

A person acts—

(b) ‘recklessly’ with respect to —

- (i) a circumstance, when he is aware of a risk that it exists or will exist, and
- (ii) a result when he is aware of a risk that it will occur,

and it is unreasonable, having regard to the circumstances known to him, to take that risk...

NOTE

Lord Bingham's four reasons for departing from *Caldwell* can be summarized as follows:

1. **The Intention of Parliament and Law Commission Recommendations.** The majority's interpretation of 'recklessly' in section 1 of the 1971 Act was a misinterpretation causing offence to principle and justice. He asked what Parliament had meant in using the word 'reckless' in section 1(1) and (2) of the 1971 Act. Since a statute is always speaking, the context or application of a statutory expression may change over time but its meaning cannot. The Law Commission clearly meant recklessness to mean the same as maliciousness and Parliament cannot have meant anything different from the Law Commission. In treating *Cunningham* as irrelevant, the majority in *Caldwell* fell into 'understandable but demonstrable error.'
2. **In serious crimes, D's state of mind should be culpable.** No one should be convicted of a serious crime without culpability. But *Cunningham* recklessness was not as underinclusive as Lord Diplock had thought in *Caldwell*. Not only intention but 'knowing disregard' of a known and unacceptable risk or a deliberate closing of the mind to such risk are culpable. Lord Bingham approved the dissenting judgment of Lord Edmund-Davies in *Caldwell* where he had said that a man cannot close his mind to risk unless he first realizes that there is a risk, in which case he is subjectively reckless as had already been decided in *Parker (Daryl)* [1977] 1 WLR 600.
3. **The model direction in *Caldwell* leads to unfairness,** as in *Elliott* above and clearly in this case it offended the jury's sense of fairness. The context of *Caldwell* did not require consideration of the young or mentally handicapped. No modification of *Caldwell* could correct its inherent injustice or error. *Caldwell* had swallowed up large parts of what we would normally call negligence. A lapse of care due to incapacity, absent-mindedness or foolishness would be negligent whereas if it was due to excitability or rage it might be reckless. But none of the Ds in *Elliott*, *Bell*, *Malcolm* or *Coles* had chosen to commit harm in a rational sense.
4. **The academic criticism of *Caldwell* could not be ignored.** Lord Bingham referred to a great deal of academic criticism of *Caldwell*. Here are some examples: JC Smith, commentary to *Caldwell* in [1981] Crim LR at 392:

'The present decision ... plainly defeats the intention of the Law Commission which was responsible for the drafting of the [Criminal Damage Act 1971] and whose recommendations were accepted by parliament; and it conflicts with the proposals of the Criminal Law Revision Committee in their report on the law of offences against the person. It sets back the law concerning the mental element in criminal damage, in theory to before 1861, and in practice probably to before Kenny formulated the law in the first edition of his *Outlines of Criminal law* in 1902 and certainly to before the decision in *Cunningham* in 1957.... What has the majority to offer against this overwhelming evidence as to Parliament's actual intentions? Lord Diplock points out that the purpose of the Criminal Damage Act, as stated in its long titled, was "to revise the law"... and he could "see no reason why parliament when it decided to revise the law... should go out of its way to perpetuate fine and impracticable distinctions..." With all possible respect, this is a pathetically inadequate reason for ignoring the readily available evidence.... Beyond any doubt, the intention of the framers was correctly interpreted by *Briggs*, *Stephenson* and Lords Wilberforce and Edmund-Davies and is defeated by the decision of the majority.'

And in 'The unresolved problem of recklessness' G. Williams in (1988) 8 Legal Studies at 74 states:

'We seem to be stuck fast over recklessness. The model direction in *Caldwell* is almost universally deployed, particularly in respect of its operation in cases like *Elliott v C*

and *R (Stephen Malcolm)*, but the lords show no sign of repenting, even though in both of the cases last cited expressions of disapproval ascended to them from a Divisional Court....

Although the subjective definition requires the jury (or magistrates) to find whether D knew of the risk he was creating, this does not mean that they must rely entirely on his own account of his state of mind. The jury may (and generally should) find that he knew of a risk of which everyone would have known – provided that there is nothing in the facts to indicate that D did not know it.

However, anyone who supposes that subjective recklessness is too narrow a concept to be workable labours under a misconception. At least four rules can be used by a judge to give it reasonable width.

(i) First, on a charge of recklessly causing injury to the person or damage to property, all that the prosecution generally have to show is that D must have realised that he was creating a very small risk of the harm in question... This is because it is generally unjustified to create even a small known risk... for other people....

(ii) The situation where D seeks to show that he has a low IQ, for the purpose of negating foresight, is a second area of difficulty... The proper rule would be that defendant can always prove his below-average IQ [including mental impairment], with the aid of expert evidence or otherwise, in the hope of gaining an acquittal... If an impaired person has accidentally set fire to a house, not realising, because he was stupid, that what he did was dangerous, he can safely be set at large if the accident is not likely to be repeated. The prosecution and conviction of Miss C, the ESN girl who accidentally destroyed a shed, were scandalous....

The argument from preoccupation may be used by way of defence in all kinds of cases if subjective recklessness is in issue, but it may often be countered by inviting the jury to consider D's knowledge not only when he was committing the crime but when he was planning it and even after committing it... To that extent, at least, knowledge must be regarded as a continuing state of mind.

A second difficult case for subjective recklessness is that of the man who says that he was acting in a blind rage. One may doubt whether there is in fact any such thing as a blind rage: what rage does is to destroy self control, not awareness. Anyway, rage, like intoxication, is a common concomitant of aggression, and the law cannot look with sympathy on a defence that "I was so angry I didn't know what I was doing."

Furthermore, it was thought that the difficulty perceived by Lord Diplock arose from use of the language of foresight (*knowledge* or *cognition*) to represent recklessness. Professor D. Birch in 'The Foresight Saga: The Biggest Mistake of All?' [1988] Crim LR 4 argued that *attitude* (eg stupidity, callousness, indifference) would have been a better approach:

'Suppose that D, to impress his friends, vaults over a seaside breakwater without looking before he leaps. The seashore is crowded with holiday makers and their possessions, and it is entirely predictable that he will land on something or someone and cause damage or injury. He lands on a sunbather and causes painful bruising. A jury might well find it plausible that the thought of causing such harm never entered D's head, but in so far as his conduct suggests the indifference to others of one who "couldn't care less," and who would have jumped even if he had been fully apprised of the risk, they might well itch to convict him. By what moral principle should they be prevented from doing so?

If the answer is none, then we should have a second means of proving recklessness with an equal claim to recognition along with foresight, and perhaps a superior one, because the attitude of D, if it can be proved, may be a more reliable guide to moral fault than a momentary awareness of risk.'

These authors shared the view that failure to think about a risk through anger or indifference would be no defence to recklessness subjectively defined and the law had been changed unnecessarily. On the other hand, failure to think because of preoccupation or lack of ability would amount to a negligent mistake and thus would be a defence.'

Lord Steyn in *R v G* gave three reasons for allowing the appeal:

1. The majority in *Caldwell* ignored the fact that before 1971 foresight of consequences was an essential element in recklessness in the context of criminal damage.
2. The purpose of section 1 of the Act was to replace the wording of the *Malicious Damage Act 1861* but not its meaning.
3. *Caldwell* was potentially unjust and contrary to the UN Convention on the Rights of the Child in force in the UK in September 1999. Article 40.1 provides:

'States Parties recognise the right of every child alleged as, accused of, or recognised as having infringed the penal law to be treated in a manner consistent with the promotion of the child's sense of dignity and worth, which reinforces the child's respect for the human rights and fundamental freedoms of others and *which takes into account the child's age* and the desirability of promoting the child's reintegration and the child's assuming a constructive role in society.' (Emphasis added).

Subjective standards in MR mean that the special requirements of children and the mentally incapacitated should be respected. *Caldwell* took a wrong turn from the general subjective development of mens rea.

Doubts concerning the majority's view of *Caldwell* were expressed by Lord Rodger but he lent his support to the decision of the House. He was concerned about the subjectivist stance of academics and law reformers. Other views had been legitimately adopted by English judges at different times over the centuries and *Cunningham* may not provide the best solution in all circumstances. *Caldwell* might have been erroneous in so far as the Criminal Damage Act was concerned, but it does not follow that it was bad policy for other offences such as reckless driving.

3.2.5 Subjective Recklessness is now restored throughout the criminal law

It now seems that, although the ratio of *R v G* was concerned with criminal damage, *Caldwell* recklessness has been effectively ousted in any offence of recklessness. *AG's Reference (No 3 of 2003)* [2004] EWCA Crim 868 confirms that objective liability no longer applies to statutory offences at all. The case concerned the offence of misconduct in a public office against police officers who had acted in a grossly negligent way in respect of the death of a citizen in police custody. It was held that recklessness must be subjective, that it excludes 'indifference' and the fact that the offence was a conduct not a result crime, in the context of a duty, made no difference. Offences of wilful neglect or misconduct were to be determined subjectively and this was so in so far as awareness of the duty was concerned.

3.2.6 Was the House of Lords in *R v G* Right to Reverse *Caldwell*?

The court might have modified the *Caldwell* test instead of departing from it but for various reasons declined to do so. Read the following extract from 'Inadvertent Recklessness in Criminal Law' by D. Kimel (2004) 120 LQR 548–554:

'Lord Bingham's first and most substantial reason for departing from *R. v Caldwell* is captured in the simple statement that whereas "it is clearly blameworthy to take an obvious and significant risk of causing injury to another... it is not clearly blameworthy to do something involving a risk of injury to another if... one genuinely does not perceive the risk. Such a person may fairly be accused of stupidity or lack of imagination, but neither of those failings should expose him to conviction of serious crime or the risk of punishment" (at [32]). This cursory statement is clearly unsatisfactory. The precise nature of the personal flaw revealed through the failure [by a person of sound cognitive faculties] to perceive an obvious risk of injury to another, depends entirely on the risk in question, the actions that brought it about, and the surrounding circumstances. In certain cases the flaw may indeed amount to stupidity or dull imagination, but in others far more serious vices may be at stake: a genuine disregard for the safety of others, a glaring insensitivity to others' legitimate interests or well-being, and the like. Even those who may balk at the suggestion that the two states of mind in question are always equally blameworthy, should eschew the notion that a failure to advert to an obvious risk is always, or even on most occasions, blameless. Indeed, a failure, even if entirely genuine to advert to the obvious risk that a person does not consent to the sexual advances of another, can hardly ever be dismissed as being owed to no more than stupidity on the part of the latter; and it is precisely that notion which informed the revised offence of rape in the recently enacted Sexual Offences Act 2003.

Lord Bingham's only other substantive reason for departing from *R. v Caldwell* touches on the "obvious unfairness" it is capable of generating, and the corresponding sense of unease experienced by juries when asked to apply the model direction formulated in it (at [33]). Both the unfairness and the unease, however, are acute features of those cases where D's capacity to appreciate risks is inherently inferior to that attributable to the ordinary, prudent person. Thus, this reason only begs the question why not modify or limit the scope of application of the *Caldwell* rule, e.g. along the very lines offered in the certified question before the House, while leaving the rule in place otherwise. One of Lord Bingham's reasons for not doing so was that a modification of the rule so as to prevent it from applying to children would suggest the need to modify it also in relation to other defendants whose relevant cognitive skills may be limited, such as the mentally-handicapped. But rather than serve as a reason against modification, this consideration merely indicates what kind of modification was needed from the outset: namely, that D should only be regarded as having acted recklessly where the risk to which she had failed to give thought would have been obvious to her had she given thought to it. Lord Bingham expressed the concern that such a modification would over-complicate the task of the jury, by rendering it more speculative (at [33]). His point here is sound. It is not clear, however, that such a task would be any more complicated than – or, possibly, as complicated as – various other, somewhat similar tasks juries are routinely invited to perform in criminal cases (e.g. in relation to the defences of provocation and duress, or to "dishonesty" under the Theft Act 1968, or indeed, in future, with regard to recklessness for the purposes of rape under the Sexual Offences Act 2003).

...

Lord Rodger, by contrast, at least hinted at a more balanced approach to the underlying normative issue. Having recognised that the decision in *R. v Caldwell* involved a "legitimate choice between two legal policies", that the *Caldwell* approach "may be better suited to some offences than to others", and that "an alternative way to allow the appeal by re-analysing Lord Diplock's speech and overruling *Elliott v C*... might well have been found" (at [70]), he concluded that, in light of the fact that the decision in *R. v Caldwell* could not be defended as a legitimate interpretation in light of the original intention of Parliament, it should be overruled, leaving it to Parliament to restore inadvertent reckless under the 1971 Act if it thinks preferable. (Lord Rodger was alone in describing the decision in *R. v G* as one that overrules *R. v Caldwell*, whereas Lord Bingham and Lord Steyn both used the phrase "departing from". The latter formulation is the more accurate: since the decision in *Caldwell* concerned evidence of intoxication, which was not at issue in *R. v G*, departing from its interpretation of "recklessness" does not, technically

speaking, amount to overruling it: the case on its facts would still be decided the same way today.)

By way of conclusion, two ironies need to be pointed out. The first has already surfaced. Within one month of the decision in *R. v G*, the Sexual Offences Act 2003 received Royal Assent. One of the elements of the new offence of rape, according to s.1(1)(c), is that D does not reasonably believe that V consents. The “reasonableness” requirement was intended to overrule *D.P.P. v Morgan* [1976] A.C. 182, incidentally one of the decisions Lord Steyn mentioned in support of his contention that departing from *R. v Caldwell* and restoring the narrower, “subjective” interpretation of recklessness for the purposes of the 1971 Act, “would fit in with the general tendency in modern times of our criminal law” [at [55]]. Instead, through the new Sexual Offences Act, inadvertent recklessness has made a swift return into our criminal law, and, at that, in the context of a rather more serious offence than criminal damage to property....’

The author identifies a new objective approach to MR in rape. As we shall see, this is a requirement of reasonableness as to consent, a *circumstance* not a result. Consent might be considered easy to ascertain the context of sexual conduct. It is submitted that it is therefore not unfair to require D to take reasonable steps to obtain it. Do you agree with the author that the *Caldwell* test might have been more appropriately amended rather than overturned?

3.2.7 How to Distinguish Recklessness from Intention

This distinction can be difficult to define especially in murder cases on the basis of oblique intention. Oblique intention consists of foresight of a virtually certain result. Recklessness is concerned with foresight of lower degrees of risk ranging from high to low probabilities but not certainties. As we saw in the last section, the distinction between oblique intention and recklessness in homicide cases will mean the difference between murder and manslaughter. Recklessness is often easier to prove than intention since it does not require proof of purpose or foresight of a virtual certainty.

3.2.8 How to Distinguish Recklessness from Negligence

A negligent person foresees no risk at all and is simply forgetful or careless about an ordinary, minor matter. Negligence is not generally considered to be so culpable as to attract criminal liability. It is a fault element of civil liability involving, for example, road accidents and personal injury claims. Whilst recklessness requires foresight of an unreasonable risk, a person who lacks foresight but whose standard of conduct is unreasonable by ordinary standards may be negligent.

3.2.9 Reform

Subjective recklessness is recommended in clause 18(b) of the Criminal Code Bill annexed by the Law Commission in ‘A Criminal Code for England and Wales Volume 1: Report and Draft Criminal Code Bill’ (Law Com No 177, April 1989) (see *R v G* above) and the Law Commission’s report on offences against the person: ‘Legislating the Criminal Code: Offences Against the Person and General Principles’ (Law Com No 218, 1993). Clause 1 states that:

‘A person is defined as acting “recklessly” in relation to a result if he is aware of a risk that it will occur, and it is unreasonable, having regard to all the circumstances known to him, to take that risk.’

3.2.10 Evaluation and Conclusion

Caldwell raised the issue of how far the criminal law should go in punishing people for their harmful conduct. It drew a critical response from academics and, ultimately, judges: the boundaries of the criminal law were over-extended, catching many people who ought never to have been labelled criminal. A. Ashworth in *Principles of Criminal Law*, 5th ed, oxford, stated that the *Caldwell* test could be seen as a more accurate representation of a social judgment of blame. You might or might not agree with *Caldwell*. Here are some of the arguments for and against objective liability.

Subjectivist theory

This philosophy rests on the principle that moral guilt and criminal liability should only be imposed on people who have chosen to do wrong. Individuals are autonomous and have the capacity and freedom to decide how to behave. Therefore, a person's state of mind at the time of the offence is significant. MR reflects the principle that liability should be imposed on those who intended or knew of the risks of their behaviour.

Utilitarianism/the welfare principle

The contrasting view is that of utilitarianism which emphasizes social needs before those of the individual. Hence, punishment may be necessary to protect society or deter wrong-doing despite the absence of choice on the part of the individual. Subjectivist theory has been subject to criticism over the years on the grounds that it portrays a simplistic view of what constitutes knowledge or awareness of risk. Utilitarianism states that the boundaries between these two states of mind are not clear cut and therefore there may be justification in classifying inadvertence as MR in some offences. One can deservedly be punished for failing to consider the consequences of one's actions where the harm risked is serious and the unawareness is culpable.

Read the following extract from R.A. Duff, 'Recklessness' [1980] Crim LR 282:

'[There is a] view that inadvertence, however negligent, cannot constitute *mens rea* since we cannot blame a man for what he does not know. That view has been convincingly demolished: whether I notice some aspect of my action or its context may depend on the attention I pay to what I am doing, and be thus within my control; failures of attention may be as "voluntary" and culpable as other omissions...

... to say that I forgot or did not realise something is to admit that I thought it unimportant, and thus to convict myself of a serious lack of concern for it (which is why a bridegroom would hardly mitigate his offence of missing his wedding by the plea that he forgot it). If, as I have suggested, an agent is reckless to the extent that his actions manifest a serious kind of "practical indifference," a "willingness" to bring about some harm, then such recklessness, indifference, and willingness can be exhibited as much in his failure to notice obvious and important aspects of his action as in his conscious risk-taking.'

R v G favours a subjectivist approach to recklessness but it also recognizes that a defendant's state of mind may not be easily described as either advertent or inadvertent. There are some situations where, if one is deliberately blind to an obvious risk of harm, one might still 'know' of the risk and ought to be liable for failing to appreciate it at the time of acting. The decision was also informed by society's more widely held respect for the individual human rights of children and the mentally ill.

Most people would agree that punishment should extend to people who knowingly choose to take a risk of serious harm with others' safety and property. They would also probably agree that, although not necessarily fully aware of the risk of harm at the moment of acting, a person still knows they are creating a risk if they would have been able to realize it given a

moment's reflection. *R v G* demonstrates that a subjective test of recklessness should be able to include both of these states of mind.

The fact that it took so long for *Caldwell* to be reversed is surprising but tells us two important things about the law. Parliament can change the law whenever it pleases but the common law evolves slowly on a case by case basis because lower courts are bound by precedent. It took many years for the right case to reach the House of Lords, by which time judicial attitudes had evolved to reflect contemporary morality. Secondly, the courts, like the rest of us, are capable of making mistakes but once made, until Parliament intervenes, the timing of an about turn is very much a matter of chance.

section summary

- *Recklessness is now subjective and is defined according to Cunningham [1957] as the conscious taking of an unjustified risk;*
- *Caldwell [1982] objective recklessness applied to criminal damage until it was overturned by R v G [2003];*
- *Caldwell also applied to manslaughter until Adomako [1995];*
- *R v G overturned Caldwell because:*
 - *Caldwell had wrongly changed the interpretation of recklessness in the Criminal Damage Act 1971;*
 - *Caldwell led to injustice in respect of children and the mentally ill;*
 - *No-one should be convicted of a serious crime unless their mind is guilty;*
 - *Academic criticism of Caldwell could not be ignored.*

3.3

Negligence and Gross Negligence

- Negligence
- Negligent Mistake
- The Distinction between Negligence and Recklessness
- Should Negligence be a Basis of Fault?
- Gross Negligence
- Reform

key cases

Bateman (1925) 19 Cr App R 8 – test of gross negligence in manslaughter;
Adomako [1995] 1 AC 171 – Bateman test of gross negligence confirmed in manslaughter.

3.3.1 Negligence

Negligence relates not to a state of mind but to an unreasonable standard of conduct which we might in ordinary language call 'stupid,' 'absent-minded,' 'inadvertent,' an 'error of judgment' or a 'simple mistake.' Here, D's behaviour will fall below an objective standard of conduct.

Negligence is not a form of MR and generally falls outside of criminal liability as we saw in the last section. However, it is relevant to many *conduct* crimes. Some are minor statutory offences such as driving without due care and attention:

Section 3 Road Traffic Act 1988, as substituted by s2 Road Traffic Act 1991:

If a person drives a mechanically propelled vehicle on a road or other public place without due care and attention, or without reasonable consideration for other persons using the road or place, he is guilty of an offence.

Other offences of negligence may be more serious, such as harassment:

Section 1(1)(b) Protection from Harassment Act 1997:

- (1) A person must not pursue a course of conduct –
- (a) which amounts to harassment of another, and
 - (b) which he knows or ought to know amounts to harassment of the other.

A defendant *ought* to know... if a *reasonable* person in possession of the same information would think the course of conduct amounted to harassment...

Recent reforms to sexual offences include elements requiring a *reasonable belief* by D as to consent or age:

Section 1 Sexual Offences Act 2003:

- (1) A person (A) commits an offence if–
- (a) he intentionally penetrates the vagina, anus or mouth of another person (B) with his penis,
 - (b) B does not consent to the penetration, and
 - (c) A does not *reasonably* believe that B consents.
- (2) Whether a belief is reasonable is to be determined having regard to all the circumstances, including any steps A has taken to ascertain whether B consents.

3.3.2 Negligent Mistake

In the context of rape, the requirement of reasonable belief also raises the possibility that D might argue he has made a mistake. As we shall see in Chapter 9, mistake is a general defence which does not usually need to be reasonable. The offence of rape and other sexual offences now require reasonableness where D relies upon a mistake. In other words, negligent belief by D as to age or consent is a fault element of sexual offences.

Mistake has also arisen in the context of other statutory crimes such as bigamy which is committed under **s57 Offences Against the Person Act 1861** where a person:

‘being married, shall marry any other person during the life of the former husband or wife.’ A reasonable belief (or absence of negligence) that the first spouse is dead will be a defence.

In addition, offences of strict liability will occasionally provide a defence based on the absence of negligence. For example:

Section 28 Misuse of Drugs Act 1971:

- (2) Subject to subsection (3) below, in any proceedings for an offence to which this section applies it shall be a defence for the accused to prove that he neither knew of nor suspected nor had reason to suspect the existence of some fact alleged by the prosecution which it is necessary for the prosecution to prove if he is to be convicted of the offence charged.

3.3.3 The Distinction between Negligence and Recklessness

This was not an entirely easy question to answer whilst *Caldwell* recklessness was in existence because it was possible to be objectively reckless through the negligent oversight of a serious and obvious risk. Negligence was reserved for taking a less serious but obvious risk either with or without foresight. The distinction is now more straightforward:

- *Cunningham/subjective* recklessness involves the conscious taking of an unjustifiable risk of harm or damage. The risk should be serious though need not be obvious to the ordinary person provided it is perceived by D.
- After *R v G*, subjective recklessness includes the person who has deliberately closed his mind to all risk through, for example, temper.
- Negligence involves unreasonable conduct which creates an obvious risk of harm or damage through genuine inadvertence. Negligence applies to the unconscious risk-taker who does not appreciate the risk. Risk may never have entered the mind of D at all.

The question arises as to whether the risk needs to be obvious to a reasonable person or to the particular defendant. Opinion seems to favour the more objective position so that even if D lacks the capacity to perceive what might be obvious to an ordinary prudent individual, he will still be negligent. However, in *RSPCA v C* [2006] EWHC 1069, the High Court held that whether a young girl of 15 was negligent in failing to take an injured cat to the vet should be judged according to the standards of a reasonable girl of *her* age.

3.3.4 Should Negligence be a Basis of Fault?

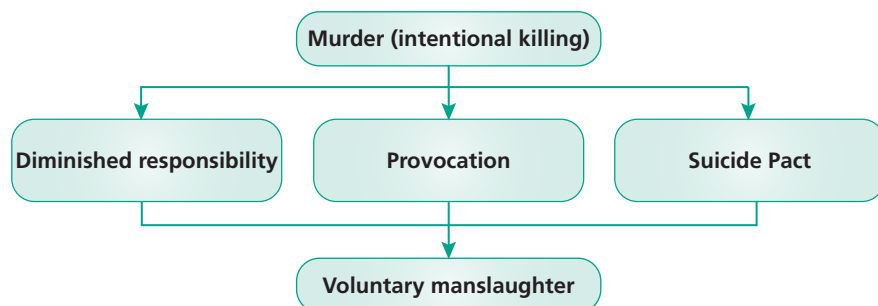
There are arguments both ways. The main argument against making people liable for negligence is that negligence, involving a low or unreasonable standard of conduct, is simply not as culpable as conscious risk-taking or recklessness. Negligence takes the form of a mistake and is unconscious. There is therefore no point in punishing people for their mistakes because no conscious decision was involved that might be deterred next time. On the other hand, it can be said that penalizing negligence will force people to be more careful, to stop and think and take precautions next time.

3.3.5 Gross Negligence

This MR concept is relevant only to manslaughter by gross negligence and we will return to it in Chapter 7. Briefly, as we shall see, manslaughter consists of two types (voluntary and involuntary). Voluntary manslaughter consists of intentional killing in the presence of either of the partial defences to murder: provocation or diminished responsibility.

Diagram 3.6

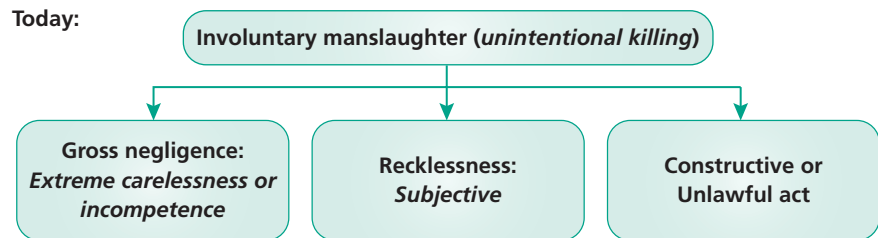
Voluntary manslaughter



Involuntary manslaughter consists of unintentional killing. There are now three types: gross negligence, reckless and constructive/unlawful and dangerous act. From 1983–1994 there was only manslaughter by *Caldwell/Lawrence* recklessness and manslaughter by constructive/unlawful act.

Diagram 3.7

Involuntary manslaughter



Here we will examine the definition of gross negligence as a form of MR. Historically, where death had occurred as a result of serious neglect, manslaughter could be committed by subjective recklessness or by 'gross' negligence, the term 'gross' indicating that a higher degree of fault was required than that which was sufficient for civil liability for negligence. The definition of gross negligence was given in *R v Bateman* (1925) 19 Cr App R 8, where a doctor had killed a pregnant woman giving birth. It had been necessary for him to insert his hand into the womb in order to physically turn the unborn child which was in the wrong position for birth, a procedure known as 'manual version'.

He mistakenly ruptured part of the uterus and ruptured her bladder as a consequence of which she died. The doctor was convicted of manslaughter but was acquitted on appeal. The Court of Criminal Appeal held that gross negligence manslaughter involved the following elements:

1. A duty owed by D towards V to take care;
2. Breach of this duty;
3. The breach must cause V's death;
4. D's negligence must be gross in showing such disregard for the life and safety of others as to amount to a crime and deserve punishment.

The Bateman test of Gross Negligence

Lord Heward CJ:

'In explaining to juries the test to be applied, many epithets such as culpable, criminal, gross, wicked, clear and complete have been used. . . In order to establish criminal liability the facts must be such that in the opinion of the jury the negligence of the Accused went beyond a mere matter of compensation between subjects and showed such disregard for the life and safety of others as to amount to a crime against the state and conduct deserving of punishment.'

This test makes clear that gross negligence involved not a state of mind but a serious form of negligent conduct. However, it was difficult to be precise about the exact type of negligence required for all occasions and therefore left the matter to the jury. It led to the criticism that the definition was circular in that the jury could only convict if the negligence was criminal but the designation 'criminal' was up to them.

The lack of a clear definition could lead to inconsistency. However, it had the advantage of flexibility in that all the surrounding circumstances could be taken into account.

In order to convey the high degree of negligence required, juries began to be directed by reference to the term 'reckless' which was simply one way of describing gross negligence. Over time, it was not altogether clear if gross negligence was still an independent form of MR or a form of recklessness. Sometimes, it was the term used to describe the very high degree of recklessness applicable to manslaughter. You may recall that in *R v Stone & Dobinson* [1977] the MR for involuntary manslaughter was explained as being either gross negligence or recklessness.

In 1982, recklessness became objective in relation to criminal damage and the following year *Caldwell/Lawrence* recklessness was applied to motor manslaughter by the House of Lords in the case of *Seymour* [1983] 2 AC 493 in which gross negligence was effectively absorbed by objective recklessness. Motor manslaughter was the name given to a killing by the driver of a vehicle.

In *Seymour*, Lord Roskill held that for motor manslaughter and for all cases of gross negligence manslaughter *Caldwell* recklessness should henceforth prevail. However, the risk of death created by the manner of D's driving must be very high as opposed to simply serious and obvious as in *Stone*. He said that a single meaning of recklessness should apply generally throughout the criminal law unless Parliament decides otherwise.

The difficulty about this was that *Seymour* seemed to have widened the scope of manslaughter beyond gross negligence. As we have seen, the *Caldwell/Lawrence* test applied to inadvertent risk taking. The reason for inadvertence might have been culpable, such as a deliberate failure to think, but it might also have been less culpable, such as inadvertence, carelessness or an error of judgment, in other words, mere negligence. Reckless manslaughter under *Seymour* could therefore potentially include recklessness, gross negligence and ordinary negligence. That objective MR in any form should apply to such a serious offence was seen as unjust. It was not until 1994 that the *Caldwell/Lawrence* test in relation to manslaughter was overturned by the House of Lords in the case of *Adomako*.

● **R v Adomako** [1995] 1 AC 171 House of Lords

This appeal first appeared in the Court of Appeal under the name *R v Sulman, Prentice, Adomako & Holloway* [1994] QB 304:

Four defendants, all professionals, had been convicted of reckless manslaughter in three separate cases. They all appealed and since the identical point of law was raised by each, the appeals were conjoined. Doctors Sulman and Prentice had been convicted of manslaughter following the death of a leukaemia patient to whom they had administered an injection in the wrong part of the body (directly into the spine instead of into a muscle). Both were junior doctors. Neither knew the correct procedure but each thought the other did. There was no supervision at the time of the injection. The box containing the drug had been put on the lumbar puncture trolley instead of the 'cytotoxic trolley'. Mr. Holloway was a central heating engineer who had been convicted of manslaughter following the faulty installation of a central heating system. He had left bare wires touching a metal sink which became live when the heating was switched on and which fatally electrocuted a person who used the sink. Dr. Adomako was an anaesthetist during the later stages of an eye operation on a patient. During the operation, the tube from the ventilator supplying the patient with oxygen became disconnected. The appellant failed to notice the disconnection for nine minutes as a result of which the patient suffered a cardiac arrest and died. He had trained in Russia and although he was in his late forties, his career had consisted entirely of six-month contracts. He worked during the week at one hospital and at another at the weekends. He had had only three and a half hours' sleep before the morning on which the offence was committed. He was supposed to have had an assistant during the operation but none was present. Expert evidence at the

trial indicated that a competent anaesthetist would have detected the problem in 15 seconds. In the trials of all apart from Dr. Adomako, the juries had received directions on objective recklessness following *Caldwell/Lawrence*, not gross negligence.

At Dr. Adomako's trial, negligence had been admitted but the issue was whether he had been criminally negligent. The judge directed the jury to apply a test of gross negligence. This was not the test adopted in *Seymour*.

The Court of Appeal considered that gross negligence had survived *Caldwell*. It applied to one type of involuntary manslaughter described as breach of duty manslaughter. Motor manslaughter was excluded by virtue of the precedent of *Seymour* in which the House of Lords had applied *Caldwell* recklessness.

Lord Taylor LCJ had given the leading judgment in the Court of Appeal the main points of which were as follows:

1. In *Andrews v DPP* [1937] (a case of motor manslaughter) Lord Aitkin had introduced the word reckless to denote the degree of negligence required. But recklessness was not exhaustive and there was still scope for manslaughter by a high degree of negligence described as a criminal disregard for the safety of others. Examples would be the grossest ignorance or the most criminal inattention. This was to be contrasted with mere inadvertence, which, in a duty situation may give rise to civil liability. This had never been disapproved or overruled. *Stone & Dobinson* was an example where the quest was for the appropriate definition of the requisite degree of negligence.

2. The basic premise of *Caldwell* recklessness was that D himself created the serious and obvious risk. This may be correct in criminal damage and driving but not in medical cases where the risk to the health of the patient comes not from the doctor but from illness. The risk causes the doctor to assume a duty of care with consent.

3. Again, the risk had to be obvious to the reasonable man, but this could not apply in expert fields for the reasonable man would have no knowledge by which to judge the actions of the expert. Therefore, the doctor who recognizes the existence of a risk but who deals with it in a grossly negligent way would not be reckless but may fall within Lord Aitkin's test of gross negligence.

4. The elements of involuntary manslaughter by breach of duty were confirmed as above. Gross negligence was described as one of four states of mind, mainly objective, which might justify a finding of gross negligence involving indifference, foresight of or inadvertence to an obvious risk of injury to health. All could be distinguished from *Cunningham* recklessness.

However, the problem with these mental descriptions was that they were very wide, particularly the inadvertent risk to *health*. It was thought after this case that it might be easier to prosecute professionals for manslaughter than an ordinary person. The concept of breach of duty in criminal law was new and no-one knew how far it would extend. The case gave great scope to juries to determine guilt because gross negligence left much to be determined by a jury. A further problem was that Lord Taylor's four 'states of mind' were mainly descriptions of conduct and reference to states of mind could be confusing. There was criticism of this on the grounds that manslaughter should require a mental element because it is a wide ranging crime with a potentially heavy penalty.

It followed that the convictions of the junior doctors and Mr. Holloway were wrong. The Crown did not appeal in those cases. Dr. Adomako's conviction was confirmed. The Court of Appeal certified the following question for the House of Lords:

'[I]n cases of manslaughter by criminal negligence not involving driving but involving a breach of duty is it a sufficient direction to the jury to adopt the gross negligence test

set out in the Court of Appeal in [*Prentice*] 1994 QB 304 . . . , without reference to the test of . . . [*Caldwell* recklessness] or as adapted to the circumstances of the case?’

Lord Mackay LC:

‘. . . In my opinion the law as stated in these two authorities [*R v Bateman* (1925) and *Andrews v DPP* [1937]] is satisfactory as providing a proper basis for describing the crime of involuntary manslaughter. Since the decision in *Andrews v DPP* [1937] 2 All ER 552, [1937] AC 576 was a decision of your Lordships’ house, it remains the most authoritative statement of the present law which I have been able to find and although its relationship to *R v Seymour* [1983] 2 All ER 1058, [1983] 2 AC 493 is a matter to which I shall have to return, it is a decision which has not been departed from. On this basis in my opinion the ordinary principles of the law of negligence apply to ascertain whether or not D has been in breach of a duty of care towards V who has died. If such breach of duty is established the next question is whether that breach of duty caused the death of V. If so, the jury must go on to consider whether that breach of duty should be characterised as gross negligence and therefore as a crime. This will depend on the seriousness of the breach of duty committed by D in all the circumstances in which D was placed when it occurred. The jury will have to consider whether the extent to which D’s conduct departed from the proper standard of care incumbent upon him, involving as it must have done a risk of death to the patient, was such that it should be judged criminal.

It is true that to a certain extent this involves an element of circularity, but in this branch of the law I do not believe that is fatal to its being correct as a test of how far conduct must depart from accepted standards to be characterised as criminal. This is necessarily a question of degree and an attempt to specify that degree more closely is I think likely to achieve only a spurious precision. The essence of the matter, which is supremely a jury question, is whether, having regard to the risk of death involved, the conduct of D was so bad in all the circumstances as to amount in their judgment to a criminal act or omission.’

NOTE

1. *Bateman* gross negligence was the appropriate test of MR in manslaughter cases involving a breach of duty. Gross negligence is a purely objective test. It was described as:
 - A breach of a duty of care. The ordinary principles of the law of negligence apply to ascertain whether or not D has been in breach of a duty of care.
 - The breach must involve a risk of death and not health or welfare. This is an objective test.
 - Did that breach cause death? D’s conduct must have fallen below the standard to be expected of a reasonable doctor, driver, whatever the case might be.
 - Should that breach be characterized as gross negligence and therefore a crime? The question of whether D’s conduct had departed from the proper standard of care involving a risk of death so as to be judged criminal is a jury one.
2. Manslaughter by breach of duty applies to everyone not just professionals. We are all under a duty not to risk someone’s life.
3. The case of *Seymour* was effectively overruled. Motor manslaughter was no longer a separate form of manslaughter. *Lawrence* recklessness no longer applied to manslaughter. Recklessness would be subjective. Manslaughter would now become both reckless and by gross negligence.

Gross negligence is more favourable to D than recklessness

The jury must ask themselves whether D's conduct was so bad as to become a crime. *Caldwell* recklessness was too wide and inflexible for manslaughter and caught undeserving people. In this case it had convicted at first instance the junior doctors and the central heating engineer. Gross negligence requires juries to ask one further question in addition to whether D had failed to think about a serious and obvious risk: was the negligence so bad in all the circumstances as to be deserving of criminal punishment? Gross negligence is therefore more favourable to D than recklessness.

Circularity

The circularity of the *Bateman* test is preserved by *Adomako*. A question of law as to the definition of gross negligence is left to the jury. This could lead to inconsistency of verdicts on similar facts and evidence. As you will see in Chapter 7, gross negligence has been held not to violate the certainty or predictability required by Article 7 ECHR (*Misra* [2004] EWCA Crim 2375).

Gross negligence and mere negligence

Lord Mackay stated that the ordinary principles of negligence apply to ascertain whether or not D has been in breach of a duty of care towards a victim who has died. This is unclear in a criminal law context for two reasons.

First, a tortious duty of care is undoubtedly wider than any duty existing under the criminal law. There are established but limited duty situations in criminal law relating to liability for omissions, eg:

- by relationship between parent and child, doctor and patient, etc;
- by an assumption of responsibility;
- a contractual duty to assume the safety of others;
- by the creation of a dangerous situation.

Beyond these categories, the law is uncertain. A. Ashworth in *Principles of the Criminal Law* considers that the criminal law imposes general duties of care upon drivers towards road users and upon anyone in possession of a firearm. J.C. Smith said in *Smith & Hogan* that where a negligent act is alleged, the existence of a duty is unlikely to cause a problem; we must all be under a duty not to do acts endangering the lives of others in the absence of a defence. However, L.H. Leigh in 'Liability for inadvertence: A Lordly Legacy?' (1995) 58 MLR 457 argued that:

'Whatever be the basis of punishment, a body of rules which required us all to be careful in all aspects of our daily lives on pain of punishment would seem totalitarian. It would seem an extreme assertion of the right to punish in order to uphold social values... Whether or not one believes that punishment can be justified on educative grounds, it must surely be admitted that at most it can only ever apply in particular situations of obvious and grave danger which are singled out as presenting obvious risks.'

Secondly, the ordinary principles of negligence in the context of manslaughter are very uncertain. It has been argued by the Law Commission in '*Legislating the Criminal Code: Involuntary Manslaughter*', Law Com No 237 p 25, that negligence here may mean no more than carelessness. In *Adomako*, the anaesthetist was careless in relation to a positive act towards V. But in cases of manslaughter by omission, the criminal law appears to be wider than the law of negligence (eg one can remove oneself from a duty to care for another in tort by abandoning

all efforts but not in the criminal law: *Stone & Dobinson*). S. Gardner in 'Manslaughter by Gross Negligence' (1995) 111 LQR 22 states that:

'The test [that there was a breach of a duty of care] probably originated in lawyers finding it helpful to conceive gross, criminal, negligence by contrasting it with ordinary, tortious, negligence. But since juries will be equally, if not more, unfamiliar with the latter, they will not be helped, and may even be confused, by being told to consider it.'

Degree of risk

It follows that the degree of risk involved in gross negligence is uncertain. Although Lord Mackay stated that it should be a risk of death reference was also made to a possible risk of injury.

Incapacity

If gross negligence is an objective test, does this mean that individual mental incapacity, such as would deprive D of the ability to perceive an obvious risk, is no defence as would be the case with recklessness? The answer appears to be that there would be no defence here but some writers argue that some parts of Lord Mackay's judgment can be seen as indicating that the risk of death must be obvious to D.

Relationship of gross negligence to recklessness

The test under *Bateman* and *Adomako*, by requiring the jury to ask an additional question of whether the conduct was so bad as to be a crime, although objective, is more favourable than recklessness. But the difficulty is that this question does not indicate that a very serious level of neglect should be required for manslaughter.

3.3.6 Reform

In the section on recklessness we reviewed the criticisms of objective recklessness: that it worked harshly against those who lacked capacity. Can this objection be overcome in relation to manslaughter? Arguably so where the conduct in question poses a very high risk of death and the jury question in *Adomako* exists as a safeguard against penalizing people for carelessness. The Law Commission in 'Legislating the Criminal Code: Involuntary Manslaughter', Law Com No 237 suggests that it may be justifiable to impose criminal liability for the unforeseen consequences of a person's acts where the harm risked is great and the actor's failure to advert to this risk is *culpable*. It has recommended that *gross carelessness* should apply to manslaughter where the risk of death or serious injury would have been obvious to a reasonable person in the accused's position: Involuntary Homicide Bill, cl 2(1)(a) annexed to Law Com No 237. In addition, the accused must have been capable of appreciating the risk at the material time.



Thinking point 3.9

Consider the examples below (taken from the Law Commission report, No 237, at p 36). Would each fall within the *Bateman/Adomako* test of gross negligence?

In each case you need to identify:

- A duty of care;
- Breach of that duty involving an obvious risk of death;

- *That the breach caused death;*
- *Whether the breach was accompanied by gross negligence which was so bad as to be regarded as criminal.*

1. *D is an anaesthetist who causes her patient V's death because she fails to notice that a ventilation tube has become disconnected and that V has turned blue.*

2. *D, an adult of average intelligence, in the course of a fight hits V over the head with a spanner. In the heat of the moment, D does not realize that death or serious injury may result; but the blow cracks V's skull and causes her death.*

3. *D, in the course of a fight, slaps V once across the face. V loses her balance and falls to the floor, cracks her skull, and dies.*

We will return to gross negligence in Chapter 7

We have now looked at the three most important mental states in criminal law: intention, recklessness and gross negligence. Here is an illustration which might help you to see the difference between them all. The following scenarios were adapted from an example given by G. Williams in 'Recklessness Refined':

example

D parks his car on a busy road and opens the driver's door which collides with a cyclist V who was passing D's car at that moment. V is thrown off his bicycle, falls under the wheels of a bus and dies.

Identify the offence and relevant state of mind in the following:

1. D knows V is at that spot and wishes to cause V serious bodily harm.
2. D does not wish to injure V but does wish to win a £100 bet that he has the nerve to knock a cyclist off his bicycle. He knew serious injury to V was a virtual certainty.
3. D does not wish to injure V but D's purpose was to quickly escape from his car which had just burst into flames. He knew serious injury to V was a virtual certainty.
4. D wishes to give V a fright by opening the door, thinking he will probably suffer injury.
5. D did not look in the mirror to see if it was safe to open the car door because he was angry and drunk.
6. D had learning difficulties and did not know it was necessary to check the mirror before opening the car door.
7. D opens the car door and, without looking, flings a large hammer into the road which hits V and throws him off his bicycle and under the bus.
8. D was in a rush and completely forgot to look in the mirror before opening the door.
9. The police discover during the subsequent investigation that the car's rear brake lights were not working.

Answers:

1. Murder: direct intent
2. Murder: oblique intent
3. Murder oblique intent. Under the *Nedrick Direction* the jury may find that D was more culpable in 2 than 3 and may exercise their discretion in 3 to convict of reckless manslaughter.

4. Manslaughter: Subjective recklessness *R v G*
5. Manslaughter: Subjective recklessness *R v Parker/R v G*
6. Negligence. No liability for any serious criminal offence.
7. Manslaughter: gross negligence
8. Negligence. No liability for any serious criminal offence.
9. Section 2 Road Traffic Act 1991 (Driving without due care and attention) – negligence.

What you should have learnt from this chapter:

Intention has two meanings:

- Direct intent: desired aim or purpose and
- Oblique intent as defined in the amended *Nedrick Direction*: a result which is not desired but which is either a pre-requisite to D's primary purpose or one which is virtually certain to occur (barring some unforeseen intervention) and which is, in either case, foreseen as such.
- The jury may but does not have to find intention using this test.
- Whether *Nedrick/Woollin* provides a definition or evidence of intention is undecided.

Recklessness has one meaning:

- Recklessness is now subjective and is defined according to *Cunningham* [1957] as the conscious taking of an unjustified risk;
- *Caldwell* [1982] objective recklessness applied to manslaughter until *Adomako* [1995] and criminal damage until it was overturned by *R v G* [2003];
- After *R v G*, subjective recklessness includes the person who has deliberately closed his mind to all risk through, for example, temper.

Negligence is defined as:

- unreasonable conduct which creates an obvious risk of harm or damage through genuine inadvertence. Risk may never have entered the mind of D at all.

Gross negligence is defined according to:

- *Bateman* and *Adomako* as an extremely high degree of negligence so as to deserve criminal punishment. It only applies to manslaughter.



Problem solving

D is an anti-capitalist protestor. He telephones a television company and threatens to release a toxic gas into the underground rail system of a city within thirty minutes unless the government

agrees to his demands. Twenty minutes later, D releases poisonous gas at a busy station. V dies within minutes. D later claims that he only wanted to make a political point.

A witnesses V's death. She is 14 years old. In shock, she spends a night out and, wanders into a neighbour's shed. To keep warm, she pours paraffin onto old wood and ignites it. The fire burns down the shed. B, the neighbour, suffers burns whilst attempting to put out the fire.

Consider any offences that D and A might have committed, paying particular attention to MR.

Remember:

I: Identify relevant issues

D: Define offences/defences

E: Explain/evaluate the law

A: Apply law to facts.

A NOTE ON PROBLEM SOLVING

Answering essay questions

Problem questions on recklessness have been simplified because of the decision in *R v G*. Questions now invariably take the form of essays in which the legal development of recklessness requires evaluation. For example:

'Analyse whether the House of Lords in *R v G and Another* [2003] was correct to hold that a defendant who lacks the capacity for foresight of a risk of destruction or damage to property is not reckless for the purposes of s1 Criminal Damage Act 1971?'

Here, the headings of this section should be used as a guide:

- The difference between a subjective and objective test of recklessness and the development of each illustrated by reference to authorities, particularly *Cunningham* and *Caldwell*
- Lord Diplock's reasons for changing the law in *Caldwell* and the minority judgment of Lord Edmund-Davies
- Problems of the objective approach by reference to authorities
- Discussion of facts and analysis of *R v G*, in particular the judgments of Lord Bingham and Lord Steyn with reference to the criticism of *Caldwell*
- Analysis of judgment of Lord Rodgers
- Arguments for and against the decision in *R v G* and reform.

Extra marks would be awarded for including academic criticism of the topic with appropriate references. Exactly the same approach should be adopted when answering essay questions in relation to intention or gross negligence.

Answering problem questions

MR is fundamental to criminal liability and it is always necessary to remember that no matter what problem you are answering, the AR/MR of relevant offences will need to be defined, whatever the offence.

It is not uncommon to hear students make an easy mistake about recklessness: 'D didn't mean to be reckless.' This involves a confusion between recklessness as to a result (eg criminal damage) and reckless conduct, which can be intentional. To say, 'I intend to drive recklessly tonight,' makes sense but here one is not talking about MR in relation to a *result* but to a type of *conduct*. Intention and recklessness as to results are quite separate forms of MR and should not be confused.

Whereas recklessness problem questions before 2003 were aimed at getting the student to identify the appropriate tests of recklessness for different offences, as well as the loophole, now the aim will be to test whether you can recognize various mental states which might, or might not, fall within the subjective test as defined in *R v G*.



Further reading

INTENTION

M. Kaveny, 'Inferring intention from foresight' (2004) 120 LQR 81, 86

RECKLESSNESS

K. Amirthalingam, '*Caldwell* Recklessness is Dead, Long Live Mens Rea's Fecklessness' [2004] 63 MLR 491

H. Keating, 'Reckless Children' [2007] Crim LR 546

Law Commission, 'Legislating the Criminal Code: Involuntary Manslaughter' (Report No 237, 1996)