Asif Tufal

CASES ON MENS REA

INTENTION

Hyam v DPP [1975] AC 55

The defendant, in order to frighten Mrs Booth, her rival for the affections of Mr X, put burning newspaper through the letterbox of Booth's house and caused the death of two of her children. She claimed that she had not meant to kill but had foreseen death or grievous bodily harm as a highly probable result of her actions. Ackner J directed the jury that the defendant was guilty if she knew that it was highly probable that her act would cause at least serious bodily harm.

Although Lord Hailsham LC stated that he did not think that foresight of a high degree of probability is at all the same thing as intention, and it is not foresight but intention which constitiutes the mental element in murder, the House of Lords (by a 3-2 majority), held that foresight on the part of the defendant that his actions were likely, or highly likely, to cause death or grievous bodily harm was sufficient *mens rea* for murder.

R v Moloney [1985] 1 All ER 1025

The defendant and his stepfather drank a large quantity of alcohol at a dinner party. A few hours later they had a discussion about firearms, and had a shooting contest to see who could load and fire a shotgun faster. The defendant won but his stepfather challenged him to fire a live bullet. The defendant, who was unaware the gun was pointing at the victim, did this and killed his stepfather. The defendant was charged with murder. The trial judge directed the jury that the defendant had the necessary *mens rea* for murder if he foresaw death or real serious injury as a probable consequence of his actions, even if he did not desire it; and he was convicted.

On appeal the House of Lords quashed the murder conviction and substituted a verdict of manslaughter, on the ground that only intent to kill or cause really serious injury would be sufficient *mens rea* for murder. Lord Bridge said that the jury should be directed to ask themselves whether death or grievous bodily harm was the natural consequence of the defendant's act, and further whether the defendant foresaw death or grievous bodily harm as the natural consequence of his act. If the jury answered both questions in the affirmative they were entitled to infer that the defendant had intended the consequences of his acts.

R v Hancock and Shankland [1986] 2 WLR 257.

The defendants were striking miners who threw a concrete block from a bridge onto the motorway below. It struck a taxi that was carrying a working miner and killed the driver. The defendants argued that they only intended to block the road but not to kill or cause grievous bodily harm. The trial judge directed the jury on the basis of Lord Bridge's statements in *Moloney* (ie, was death or grievous bodily harm a natural consequence of what was done, and did the defendants foresee that consequence as a natural consequence?) and the defendants were convicted of murder.

On appeal a verdict of manslaughter was substituted by the House of Lords who reaffirmed that the prosecution has to establish an intention to kill or do grievous bodily harm on the part of the defendant. Lord Scarman felt that the *Moloney* guidelines on the relationship between foresight and intention were unsatisfactory as they were likely to mislead a jury. Lord Scarman expressed the view that intention was not to be equated with foresight of consequences, but that intention could be established if there was evidence of foresight. The jury should therefore consider whether the defendant foresaw a consequence. It should be explained to the jury that the greater the probability of a

consequence occurring, the more likely that it was foreseen, and the more likely that it was foreseen, the more likely it is that it was intended. In short, foresight was to be regarded as evidence of intention, not as an alternative form of it.

R v Nedrick (1986) 83 Cr App 267.

A child had burned to death in a house where the defendant had, without warning, put a petrol bomb through the letter box. He admitted to starting the fire but stated that he only wanted to frighten the owner of the house. The Court of Appeal overturned the murder conviction and substituted a verdict of manslaughter as the judge had misdirected the jury.

Lord Lane CJ provided a model direction for a jury about intent in a murder case where the defendant did a manifestly dangerous act and someone died as a result. Lord Lane CJ suggested that when determining whether the defendant had the necessary intent, it might be helpful for a jury to ask themselves two questions: (1) How probable was the consequence which resulted from the defendant's voluntary act? (2) Did he foresee that consequence?

* If he did not appreciate that death or serious bodily harm was likely to result from his act, he cannot have intended to bring it about.
* If he did, but thought that the risk to which he was exposing the person killed was only slight, then it might be easy for the jury to conclude that he did not intend to bring about the result.
* On the other hand, if the jury were satisfied that at the material time the defendant recognised that death or serious bodily harm would be virtually certain (barring some unforeseen intervention) to result from his voluntary act, then that is a fact from which they may find it easy to infer that he intended to kill or do serious bodily harm, even though he may not have had any desire to achieve that result.

R v Walker and Hayles (1990) 90 Cr App R 226.

The defendants threw their victim from a third floor balcony. At their trial for attempted murder the trial judge directed the jury that they could infer intention if there was a high degree of probability that the victim would be killed and if the defendants knew "quite well that in doing that there was a high degree of probability" that the victim would be killed. The defendants appealed on the ground that the trial judge was confusing foresight of death with an intention to kill and should have directed the jury in the *Nedrick* terms of "virtual certainty".

The Court of Appeal did not accept that the reference to "very high degree of probability" was a misdirection. However, Lloyd LJ stated that in the rare cases where an expanded direction is required in terms of foresight, courts should continue to use virtual certainty as the test, rather than high probability

R v Scalley [1995] Crim LR 504.

The defendant was alleged to have murdered a 5 year old boy by setting fire to a house in which the defendant had once lived. The defendant was convicted of murder following the trial judge's direction to the jury to the effect thy could convict if they were sure that the defendant intended death or grievous bodily harm in the sense that he foresaw either consequence as virtually certain to result from his actions.

The Court of Appeal quashed the conviction and substituted a conviction for manslaughter. The direction did not make it clear that foresight of the virtual certainty of death or serious injury is not intention but merely evidence from which the jury are entitled to infer intention. The jury should have been told that if they were satisfied that the defendant ***did*** see either death or serious injury as virtually certain, then they ***could*** go on to infer intention but were not obliged to do so.

R v Woollin [1998] 4 All ER 103.

The defendant lost his temper and threw his three-month-old-son on to a hard surface. His son sustained a fractured skull and died. Woollin was charged with murder. He denied that he had an intention to cause serious harm. The trial judge summed up using the phrases, virtual certainty and substantial risk. The defendant was convicted of murder and appealed against the use of the term of substantial risk.

The House of Lords held that, having regard to the mental element in murder, a jury were required to determine whether the defendant had intended to kill or do serious bodily harm. Where that simple direction was not enough, the jury should be further directed that they were not entitled to infer the necessary intention unless they felt sure that death or serious bodily harm was a virtually certain result of the defendant's action (barring some unforeseen intervention) and that the defendant had appreciated that fact. The judge had misdirected the jury: by using the phrase 'substantial risk' the judge had blurred the line between intention and recklessness, and hence between murder and manslaughter, and had in effect enlarged the scope of the mental element required for murder. The conviction for murder was quashed and a conviction for manslaughter substituted.

See further, the comments on *Nedrick* at pp113-114 of the All ER.

RECKLESSNESS

R v Cunningham [1957] 2 QB 396.

The defendant had broken a gas meter to steal the money in it with the result that gas escaped into the next-door house. The victim became ill and her life was endangered. The defendant was charged under s23 of the Offences Against the Person Act 1861 with "maliciously administering a noxious thing so as to endanger life". The Court of Appeal, allowing the defendant's appeal held that for a defendant to have acted "maliciously" there had to be proof that he intended to cause the harm in question, or had been reckless as to whether such harm would be caused. In this context recklessness involved the defendant in being aware of the risk that his actions might cause the prohibited consequence.

MPC v Caldwell [1982] AC 341.

The defendant, who had been sacked from his employment at an hotel, became drunk and returned at night to the hotel, setting it on fire. There were ten people resident in the hotel at the time, but the fire was discovered and extinguished before any serious harm could be caused. The defendant pleaded guilty to criminal damage but pleaded not guilty to the more serious charge of criminal damage with intent to endanger life or recklessness as to whether life would be endangered. he argued that due to his drunken state it had never crossed his mind that lives might be endangered by his actions, he had simply set fire to the hotel because of his grudge against his former employer.

The House of Lords re-affirmed *Cunningham* as a form of recklessness in criminal law, but introduced an alternative form of recklessness based upon the defendant's failure to advert to a risk which would have been obvious to the reasonable person. Lord Diplock held that a defendant was reckless as to whether he damaged property if he created a risk of damage which would have been obvious to the reasonable man and either-

* had not given any thought to the possibility of such a risk when he carried out the act in question, or
* had recognised that there was some risk involved and nonetheless went on to carry it out.

Elliot v C [1983] 1 WLR 939.

The defendant, an educationally subnormal 14-year-old schoolgirl, had entered a neighbour's garden shed, poured white spirit on the floor and ignited it. The defendant then fled as the shed burst into flames. The magistrates dismissed the charge of criminal damage on the basis that she gave no thought to the risk of damage, and that even if she had, she would not have been capable of appreciating it. The prosecution appealed and the Divisional Court, allowing the appeal, held that this was irrelevant to the issue of recklessness. When the court in Caldwell had talked about an "obvious" risk, they had meant obvious to the reasonable man if he had thought about it, and not obvious to the defendant if he had thought about it.

R v Coles [1994] Crim LR 820.

The defendant, aged 15 at the time of the offence and of lower than average mental capacity, had been playing in a hay barn with other children. The evidence was that he had tried to set fire to the hay whilst other children were in the barn. The children escaped unhurt. The defendant was charged with arson, being reckless as to whether the lives of others would be endangered. During the trial it was submitted that the *Caldwell* direction should be amended so that the assessment of whether or not the appellant had, by his actions, created an obvious risk of harm, should be made more subjective. The trial judge rejected this submission stating that the test was whether or not the risk would have been obvious to the reasonable prudent adult person.

The Court of Appeal dismissed the defendant's appeal. It was held that the first limb of the *Caldwell* direction was objective and the state of mind of the accused was irrelevant to the question of whether or not he had, by his act or omission, created an obvious risk of harm to persons or property. On appeal, the argument put forward on behalf of the appellant had been broadened to encompass the proposition that the second limb of the Caldwell test should have some regard to the defendant's capacity to foresee risk. The appeal court took the view that such an argument had failed in *Elliot v C* [1983] 1 WLR 939 and that that decision had been confirmed by the Court of Appeal *in R v R (Stephen Malcolm)* (1984) 79 Cr App R 334. It was not predisposed to depart from its own previous decision.

Chief Constable of Avon and Somerset v Shimmen (1987) 84 Cr App R 7.

The defendant was a martial arts expert who was demonstrating his skill to friends by performing a move which he anticipated would bring his foot within inches of a shop window. He had miscalculated the risk, and he broke the window. The argument that he was not reckless because he had given thought to the risk but mistakenly believed that he had minimised it, was rejected by the Divisional Court because he knew there was some risk. The defendant was found guilty of causing criminal damage.

R v Reid [1992] 3 All ER 673.

The defendant was driving a car with a passenger in the front seat. He attempted to overtake another car whilst still in the nearside lane. A taxi drivers' rest hut protruded some six feet into the nearside lane. The defendant's car struck this hut whilst overtaking, the collision resulting in the death of his passenger. The defendant was convicted of causing death by reckless driving, contrary to s1 of the Road Traffic Act 1972 (now replaced with causing death by dangerous driving).

The House of Lords recognised that there were three situations where the exact form of words used by Lord Diplock may require some alteration to take account of the unusual facts of a particular case. First, where the driver acted under some understandable or excusable mistake of fact (eg, where the driver of a powerful car attempts an apparently safe manoeuvre that becomes dangerous because of a wholly unexpected fuel line blockage). Secondly,

where the driver's capacity to appreciate risk had been adversely affected by some condition (eg, illness or shock) arising otherwise than through the fault of the driver. Thirdly, where the driver takes evasive action in an emergency situation.

Lord Browne-Wilkinson stated:

"As to the so called "loophole" or "lacuna" in Lord Diplock's direction, I specifically agree with what my noble and learned friends, Lord Goff and Lord Ackner, say. There may be cases where, despite the defendant being aware of the risk and deciding to take it, he does so because of a reasonable misunderstanding, sudden disability or emergency which render it inappropriate to characterise his conduct as being reckless. Lord Diplock in *Lawrence* was not seeking to lay down a test applicable to all cases and the facts in the present case do not fall within this special category."

R v Merrick [1996] 1 Cr App R 130.

The defendant visited householders and offered to remove certain old cable TV cabling if they were not being paid wayleave payments by the owner of the cables with whom he had fallen out. When the defendant removed the cable he inevitably damaged it. He also inevitably left a live cable exposed for a short time until he could make it safe (about six minutes). He was charged with intentionally damaging property being reckless as to whether life was endangered thereby. At his trial, he argued that he knew that it would have been dangerous to leave the cable exposed, that he had come with materials to make it safe and that he did not believe that there was any risk of endangering life whilst he was doing so. The judge ruled that precautions to eliminate the risk of endangering life must be taken before the damage was caused.

On appeal the defendant argued that he was not reckless since he fell within the lacuna as having thought about it and decided thatthere was no risk. The Court of Appeal dismissed the appeal and held that there is a difference between (a) avoiding a risk and (b) taking steps to remedy one which has already been created. The defendant could only have succeeded if he had done or believed he had done the former rather than the latter.

R v Lawrence [1981] AC 510.

The defendant motor cyclist, who had collided with and killed a pedestrian, was charged with causing death by reckless driving. The House of Lords held that the test of recklessness was the same for reckless driving as for criminal damage, but used the words, based on an "obvious and serious risk" (as opposed to an "obvious risk" in *Caldwell*).

R v Seymour [1983] 2 AC 493.

The defendant had an argument with his common law wife. In an effort to move her car out of his way by pushing it with his truck, he had jammed her body between his truck and her car, as a result of which she sustained severe injuries from which she later died. The prosecution brought a charge of common law manslaughter and the defendant was convicted. The trial judge had directed the jury that they should convict if they were satisfied that the defendant had caused the death, and had been reckless in so doing, recklessness here having the meaning attributed to it by the House of Lords in Lawrence. The House of Lords held that the conviction should stand. Thus Caldwell recklessness applied to manslaughter.

NEGLIGENCE

McCrone v Riding [1938] 1 All ER 157.

A learner-driver was convicted of driving without due care and attention, despite the fact that it was accepted by the court that he was “exercising all the skill and attention to be expected from a person with his short experience" because he had failed to attain the required standard.

MENS REA 2

TRANSFERRED MALICE

R v Latimer (1886) 17 QBD 359.

The defendant struck a blow with his belt at Horace Chapple which recoiled off him, severely injuring an innocent bystander. The defendant was convicted of maliciously wounding the victim, and appealed on the ground that it had never been his intention to hurt her. The court held that the conviction would be affirmed. The defendant had committed the *actus reus* of the offence with the necessary *mens rea*, ie he had acted maliciously. There was no requirement in the relevant act that his *mens rea* should relate to a named victim. Thus, Latimer's malice was transferred from his intended to his unintended victim.

R v Pembliton (1874) LR 2 CCR 119.

The defendant threw a stone at another person during an argument. The stone missed the intended victim, but instead broke a nearby window. He was charged with malicious damage to property and was convicted. The court, in quashing the conviction held, that the doctrine of transferred malice was inapplicable where the defendant's intention had not been to cause the type of harm that actually occurred. His intention to assault another person could not be used as the *mens rea* for the damage that he had caused to the window.

COINCIDENCE OF ACTUS REUS AND MENS REA

Fagan v MPC [1969] 1 QB 439.

The defendant accidentally drove his car on to a policeman's foot and when he realised, he refused to remove it immediately. It was held that the *actus reus* of the assault was a continuing act which, while started without *mens rea*, was still in progress at the time the *mens rea* was formed and so there was a coincidence of *actus reus* and *mens rea* sufficient to found criminal liability.

Kaitamaki v R [1985] AC 147.

The defendant was charged with rape. His defence was that when he penetrated the woman he thought she was consenting. When he realised that she objected he did not withdraw. The Privy Council held that the *actus reus* of rape was a continuing act, and when he realised that she did not consent (and he therefore formed the *mens rea*) the *actus reus* was still in progress and there could therefore be coincidence.

Thabo Meli v R [1954] 1 WLR 228.

The defendants had taken their intended victim to a hut and plied him with drink so that he became intoxicated. They then hit the victim around the head, intending to kill him. In fact the defendants only succeeded in knocking him unconscious, but believing the victim to be dead, they threw his body over a cliff. The victim survived but died of exposure some time later. The defendants were convicted of murder, and appealed to the Privy Council on the ground that there had been no coincidence of the *mens rea* and *actus reus* of murder.

The Privy Council held that the correct view of what the defendants had done was to treat the chain of events as a continuing *actus reus*. The *actus reus* of causing death started with the victim being struck on the head and continued until he died of exposure. It was sufficient for the prosecution to establish that at some time during that chain of events the defendants had acted with the requisite *mens rea*.

R v Church [1966] 1 QB 59.

The same reasoning was applied in this case even though there was no pre conceived plan. The defendant had gone to his van with a woman for sexual purposes. She had mocked his impotence and he had attacked her, knocking her out. The defendant panicked, and wrongly thinking he had killed her, threw her unconscious body into a river, where she drowned. The defendant's appeal against his conviction for manslaughter was dismissed by the Court of Appeal.

R v Le Brun [1991] 3 WLR 653.

The defendant punched his wife on the chin knocking her unconscious. He did not intend to cause her serious harm. The defendant attempted to move her body, and in the course of so doing dropped her, causing her head to strike the pavement. His wife sustained fractures to the skull that proved fatal. The defendant's appeal against his conviction for manslaughter was dismissed by the Court of Appeal. Lord Lane CJ said:

“It seems to us that where the unlawful application of force and the eventual act causing death are parts of the same sequence of events, the same transaction, the fact that there is an appreciable interval of time between the two does not serve to exonerate the defendant from liability. That is certainly so where the appellant's subsequent actions which caused death, after the initial unlawful blow, are designed to conceal his commission of the original unlawful assault.”