

## **'Foresight of consequences is not the same as intent'. Discuss**

### **Introduction**

The burden of proof is on the prosecution to prove that the defendant is guilty "beyond all reasonable doubt" as confirmed in the case of Woolmington v DPP (1935). A crime requires two elements: an *actus reus* and a *mens rea*. Once the *actus reus* is established by the Crown Prosecution Service (CPS), the *mens rea* must then be proven. There are four main types of *mens rea*: intention (specific intention), recklessness, negligence and knowledge.

I will primarily look at foresight of consequences in relation to the offence of murder. For the purpose of this essay, I will only focus on intent as the *mens rea*. With murder, the *mens rea* is stated under s.18 of the Offence Against a Person Act 1961 as the intent to kill (express malice) or cause grievous bodily harm (GBH) (implied malice) as per Moloney (1985).

I will look at foresight of consequences and intent in order to establish the difference between the two and therefore show that foresight of consequences is *not* the same as intent.

### **Intention**

Intention (specific intent) has no statutory definition; therefore it is necessary to look at case law. In Mohan (1975) the court gave a definition to 'intention' stating that it was "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." Thus meaning that a defendant's motive/reason for the act is irrelevant but the fact that the defendant decided to bring about the prohibited consequence is.

Intent can be divided into two kinds as direct intent and oblique intent.

### **Direct Intent**

Direct intent refers to a defendant's aim, purpose or desire as it is where the defendant intends for the specific consequence to occur. For example, if a defendant loads a gun, walks up to the victim and shoots them in the head at point blank, the defendant clearly has direct intent to kill. In the case of Byrne (1960), the defendant was a sadistic psychopath who enjoyed torturing and killing people. He strangled his victim to death then cut up the body. Again there is a direct intent to kill regardless of the defendant's mental condition.

### **Oblique Intent**

Oblique intent is sometimes referred to as indirect intent; it is much more complex than direct intent. It is where the defendant intends one thing but the consequences of their action/s are another thing.

DPP v Smith (1961) was the case authority that intention should be assessed objectively by reference to the foresight of a reasonable man and not by proof that the defendant actually foresaw the particular consequence of his actions. The facts of the case were that a police officer directed Smith to leave his car which contained stolen goods. The defendant sped off instead of stopping and the police officer grabbed onto the car. The defendant then swerved the car in an attempt to get the police officer off the car which led to him being thrown off into the path of another which resulted in his death. Smith was charged and convicted of murder; however he appealed declaring that he had no intention to kill the police officer. The case reached the House of Lords where a unanimous decision was given upholding the conviction. Lord Parker of Waddington, the Lord Chancellor at the time stated that: "If in doing what he did, he must as a reasonable man have contemplated that serious harm was likely to occur, then was guilty of murder." Lord Denning said that: "No doubt Smith had no desire to kill him: and it was not his purpose to kill him. But must he not be aware that there was a very high probability that the policeman would suffer grievous bodily harm? And if so, was he not guilty of murder? The judge so directed the jury: and the jury so found. And the House of Lords have said the direction was right." Therefore, according to DPP v Smith (1961), foresight of consequences is the same as intent. However the decision gained a lot of criticism from many academics and judges. The problem was referred to the Law Commission who wrote a report entitled *Imputed Criminal Intent: DPP v Smith*, Law Com 10 which eventually led Parliament to enact the Criminal Justice Act 1967 and reverse the decision of DPP v Smith (1961).

It is necessary to look at s.8 of the Criminal Justice Act 1967 when looking at intent. It states that "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 only 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 inferences from the facts as appear proper in the circumstances." This means that a subjective approach, opposed to an objective approach, has been created and thus reversed the decision of the House of Lords in DPP v Smith (1961), therefore, foresight of consequences is clearly not the same as intent.

In the case of Hyam v DPP (1975) the defendant was jealous when another woman took her place in the affections of her male friend. During the early hours of the morning, the defendant poured petrol through the woman's letterbox and set fire to it which resulted in the death of two children. The defendant appealed all the way to the House of Lords arguing that she had not intended to kill, only to frighten the woman whom she was jealous of. The judges rejected her appeal. However, the judges reasoning varied. Lord Diplock and Lord Kilbrandon gave dissenting judgments which gave the view that intention was established if it was shown that the defendant foresaw the result as highly probable. Lord Diplock stated: "...that... no distinction is to be drawn...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."

However Lord Hailsham disagreed with the view held by Lord Diplock and Lord Kilbrandon that foresight of consequence established intent and stated that: "I do not consider that the fact that a state of affairs is correctly foreseen as a highly probable consequence of what is done is the same thing as the fact that the state of affairs is intended." Lord Hailsham was of the view that only evidence that the accused foresaw the consequence as a 'moral certainty' would be sufficient evidence from which to conclude that she intended that consequence. The Court of Appeal in the cases of Mohan (1975) and Belfon (1976) (both being non-fatal injury cases) held Lord Hailsham's view and used his words.

In the case of Mohan (1975) it was decided that motive was not the same as intention and that it was irrelevant in deciding if the defendant had intention. Additionally, James LJ stated that: "...evidence of knowledge of likely consequences, or from which knowledge of likely consequences can be inferred, is evidence by which intent may be established but it is not...to be equated with intent. If they jury find such knowledge established they may and using common sense, they probably will find intent proved, but it is not the case that they must do so." Similarly, in the case of Belfon (1976), Wien J stated that: "...we do not find...in any of the speeches of their Lordships in Hyam's case anything which obliges us to hold that the 'intent' in wounding with intent is proved by foresight that serious injury is *likely* to result from a deliberate act."

In summary, the judges in Mohan and Belfon held that the mere foresight that death or personal injury was highly probable was not the same as having the intention to cause the act in question. Instead, it was merely evidence for the jury to look at when deciding whether an intention was present. Therefore the statement that 'foresight of consequences is not the same as intent' is correct as foresight of consequences is merely evidence.

### **The Moloney Guidelines (1985)**

The case of Moloney (1985), the meaning/definition of intention arose again before the courts. The defendant and his step-father had consumed a large amount of alcohol at a wedding anniversary celebration. Afterwards the pair were heard talking and laughing and both were on good terms. A shot was fired and the defendant alerted the police stating that he had just murdered his step-father. The defendant said that they had been seeing who could load and fire a shotgun the fastest. The defendant won, his step-father told him that he hadn't got "the guts" to pull the trigger. However, the defendant did pull the trigger and shot his father dead but claimed "I didn't aim the gun. I just pulled the trigger and he was dead." The defendant was charged and convicted of murder but his conviction was quashed on appeal and substituted with manslaughter.

While the case was on appeal to the House of Lords, the panel of judges were given direction from Stephen Brown J who stated to the jury with regards to establishing intent: "When the law requires that something must be proved to have been done with a particular intent, it means this: a man intends the consequence 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, when he desires it or not.”

Lord Bridge who delivered the main judgment responded to Stephen Brown J’s direction as “unsatisfactory” and “potentially misleading” and stated that: “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...some further explanation or elaboration is strictly necessary to avoid misunderstandings.”

Lord Bridge went on further to state that: “In the rare cases in which it is necessary for the judge 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 the defendant’s voluntary act? Secondly, did the defendant foresee that consequence as being a natural consequence of his act? The jury should then be told that if they answer yes to both questions it is a proper inference for them to draw that he intended that consequence.”

If the jury answered “yes” to the questions, then it would be accepted that the defendant had the necessary intent required for the offence.

This became known as the Moloney Guidelines; however they are no longer part of English law anymore. Nevertheless before I move on, it is also important to note that in his judgment, Lord Bridge stated 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 ...” This confirms the statement that ‘foresight of consequences is not the same as intent’ as foresight of consequence is merely evidence unlike intention which is substantive law.

### **Hancock and Shankland (1986)**

Hancock and Shankland were both minders on strike. A worker was being driven to work in a taxi and in an attempt to prevent him from going to work, the defendant’s dropped a concrete block onto the road he was travelling on. The block collided with the taxi hitting the front screen and killing the driver. The trial judge used the Moloney Guidelines when directing the jury and the defendant’s were found guilty of murder. However the pair appealed and the Court of Appeal quashed their convictions and replaced them with manslaughter. The case reached the House of Lords where Lord Scarman who agreed with the Court of Appeal’s belief that the Moloney Guidelines were deficient and “unsafe and misleading” as they omitted any reference to the probability of death or serious harm occurring. He stated that: “I agree with the Court of Appeal that the probability of a consequence is a factor of sufficient importance to be drawn specifically to the attention of the issue of intent by reference to foresight of the

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 casual link between the act and its consequence.” This means that the greater the probability of a consequence the more likely it is that the consequence is foreseen, so if the consequence is foreseen then it is more likely to have been intended. If this is not taken into consideration and the focus is on the act and the consequence, the intent is not truly considered and thus this would be erroneous, particularly in specific intent offences.

Lord Scarman then went on to say that: “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.”

Thus Hancock and Shankland (1986) overruled Moloney (1985) and established that the Moloney Guidelines no longer be used.

### **R v Nedrick (1986)**

With Moloney no longer being the guidelines to be followed, the Court of Appeal had to establish new guidelines which were clearer and this was done in the case of Nedrick (1986). The facts of the case were that the defendant had a grudge against a woman. The defendant decided to pour paraffin through the woman’s letterbox and set it alight. As a result of his actions, a child died in the fire. He was convicted of murder but the Court of Appeal quashed his conviction and substituted it with manslaughter.

The Court of Appeal in an attempt to make the law in Moloney (1985), Hancock and Shankland (1986) and Nedrick (1986) clearer and easier for the jury to understand, the Court of Appeal decided that the jury ought to ask themselves two questions:

1. How probable was the consequence which resulted from the defendant’s voluntary act?
2. Did the defendant foresee that consequence?

Lord Lane CJ decided that the correct direction to the jurors should be to tell them that: “if they are satisfied that at the material time the defendant recognised that death or serious injury 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 some serious bodily harm, even though he may not have had any desire to achieve that result.” Lord Lane CJ went on to state that: ‘Where the charge is murder and in the rare cases where the simple direction [on intent] is not enough, the jury should be directed that they were 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 the defendant's actions and that the defendant realised 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 consideration of all the evidence."

From Nedrick we can clearly see that 'foresight of consequences is not the same as intent' as foresight, even of a virtually certain consequence, was simply evidence to be taken into consideration along with other evidence, thus foresight is evidence and therefore not the same as intention.

### **Woollin (1998)**

The law in Nedrick (1986) remained until 1998 when the House of Lords became involved in 'intent' again after feeling that the Court of Appeal's views in Nedrick were insufficient. In the case of Woollin (1998), the defendant lost his temper with his three month old baby and picked him up and began to shake him violently and choke him, after which the defendant then threw the baby towards his pram, which was approximately 4-5 feet away, with force. The baby hit the wall and sustained a fracture to his skull from which the baby died from. Although the defendant accepted that there was a risk of injury, he "did not think it would kill him". The trial judge followed the model direction in Nedrick to the jury and went on to state that "if they were satisfied that when the defendant threw the child he appreciated that there was a substantial risk that he would cause serious harm to it". The defendant was found guilty but appealed on the basis of the judge's use of "substantial risk" which was a test of recklessness instead of intent, which required the phrasing of "virtual certainty". The Court of Appeal dismissed the Appeal but the House of Lords disagreed and unanimously reversed the Court of Appeal decision and quashing the defendant's murder charge and substituting it for a manslaughter one.

The Law Lords decided that the two questions in Nedrick were unhelpful but they agreed that the direction from Nedrick was correct, however, it would be slightly altered with the words "to infer" being changed to "to find" as it would be easier for a jury to understand. So now, the model direction from Nedrick is: "the jury should be directed that they are not entitled to *find* 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 the defendant's actions and that the defendant appreciated that such was the case."

Thus, from Woollin, it is clear that foresight of consequences, particularly virtually certain consequences, is not the same as intention, it is only evidence which the jury may use to find it.

### **Problems in the law**

Despite the decision in Woollin (1998) clearing up some of the misunderstandings in the law, it is still apparent that Woollin causes some problems. One of the major problems created by Woollin is the fact that Lord Steyn replaced the word “infer” to “find”. Under s.8 of the Criminal Justice Act 1967 the word “infer” is used and it is because of this it is presumed to be the reason for “infer” being used in Nedrick (1986) in the first place. Thus, it gives rise to the question of whether or not the change in words was for the best in bringing about clarity in the law.

In addition, some academics hold the belief that the House of Lords accepted the view that foresight that a consequence is a virtual certainty actually equates to intention. In support of this belief, they would focus on the fact that Lord Steyn quoted from Nedrick that “A result foreseen as virtually certain is an intended result.” Along with this, Professor Glanville Williams stated that: “The proper view is that intention includes not only desire of consequence (purpose) but also foresight of certainty of the consequence, as a matter of legal definition. Sir John Smith also held the same view stating that: “...the only question for the jury is ‘Did the defendant 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. Lord Steyn also made note of the fact that in Moloney (1985) Lord Bridge stated that if a person foresees the probability of a consequence as high, then it would “suffice to establish the necessary intent”, while saying this, Lord Steyn emphasised the use of “establish” thus implying that foresight of consequences is the same as intent despite the fact that Moloney clearly states the opposite, foresight of consequences is not the same as intent.

Furthermore after Woollin confliction still occurred, as seen in the cases of Walker and Hayles (1998) and the civil case of Re A (2000).

### **Matthews and Alleyne (2003)**

Another case came before the courts presenting them the chance to clear up the law and make apparent that foresight of consequences is not the same as intent. In Matthews and Alleyne (2003) the defendants threw the victim 25 feet down into a river despite the fact that the victim had informed them he could not swim. They then watched him “dog paddle” towards the bank but left before he had reached the bank safely. The victim did not make it to the bank and drowned. The defendant’s claimed that they had no intention to kill him, however the trial judge directed the jury that the defendant’s intention to kill could be proved if “drowning was a virtual certainty and [the defendants] appreciated that...they must have had the intention of killing him.” The defendants appealed on the basis that the judge’s direction went beyond what was permitted by Nedrick and Woollin and equated foresight with intention. Despite the fact that the judge had actually gone further than he was permitted, the Court of Appeal dismissed the appeal on the basis of the facts of the case. If the jury were sure that the defendant’s appreciated the virtual certainty of death if they did not attempt to save the victim and that at the time of throwing the victim off the bridge they had no intention of saving him, then it was impossible to see how the jury could have not found the defendants intended for the victim to die. From this case it was affirmed that Woollin meant that foresight of consequences was not

the same as intention and that it was merely a rule of evidence. If a jury finds that the defendant foresaw the virtual certainty of death or serious injury then they are entitled to find intention but they do not have to do so. Thus, the statement that 'foresight of consequences is not the same as intent' is correct.

## **Reforms**

There have over the years been proposals and suggestions for reform to the law of intention due to the complicity of the area. The Law Commission's *Draft Criminal Code* (1989) on *Murder and Life Imprisonment* defined intention as:

"A person acts intentionally with respect to a result when:

(a) it is his purpose to cause it; or

(b) 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."

It is important to note though that this definition is only for non-fatal offences against the person but it is argued that it should be used to define all offences as suggested by the Draft Criminal Code. However the phrasing of "in the ordinary course of events" is a broad term, even broader than Nedrick/Woollin test of "virtual certainty". How do we know what the ordinary course of events is all the time? Additionally under this definition we could see an increase in the number of convictions as a result of people being convicted of offences which they did not directly intend to commit and in some circumstances, this can lead to an unfair and unjust result.

## **Conclusion**

There have been several cases involving foresight of consequences and intention as we have seen: DPP v Smith (1961), Hyam v DPP (1975), Moloney (1985), Hancock and Shankland (1986), Nedrick (1986), Woollin (1998) and finally Matthews and Alleyne (2003). The law as it stands states that foresight of consequences is not the same as intent and that it is merely evidence from which the jury may use to find the necessary intent if they believe that the defendant foresaw the virtual certainty of death or serious injury. Therefore, in conclusion, the statement that "foresight of consequences is not the same as intent" has evidently been proven to be correct. Foresight of consequences and intention are both clearly different and should not be equated in order to avoid further confusion in an area of law which has already demonstrated such complexity. There have been problems in this area of law however the fact that foresight of consequences is not the same as intent has remained the law and therefore we must accept it and follow it.