

# Intention in criminal law: why is it so difficult to find?

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In *Woollin*<sup>2</sup> the House of Lords attempted to clarify the law of indirect intent by holding that if a consequence is a virtually certain result of an act and the actor foresaw it as such then that result *may be found* by a jury to be intended, even though it was not the actor's purpose to cause it. This article will examine the case law leading to *Woollin* and consider whether the House was right to leave a question of law (the meaning of intention) to be decided by a jury as an issue of fact.

## What is the meaning of intention in criminal law?

There is one meaning of intention that is agreed upon and that is where a defendant wants something to happen as a result of his conduct. For example, the defendant wants to kill the victim and to do so he puts a gun to the victim's head and pulls the trigger. This is known as direct intent as it is the defendant's purpose to kill the victim. In such cases, the prosecution must prove beyond reasonable doubt that the defendant wanted, when he pulled the trigger, to kill the victim, ie he had malice aforethought—an intention to kill the victim.<sup>3</sup> The prosecution will do this by calling evidence, for example, a witness testifies that he saw the defendant put the gun to the victim's head and pull the trigger. This is direct evidence that the defendant killed the victim and circumstantial evidence that the defendant intended to kill.<sup>4</sup> It is immaterial that the chances of the result occurring were low, for example, the defendant was half a mile away from the victim when he

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<sup>2</sup> [1998] 4 All ER 103.

<sup>3</sup> Malice aforethought is also present if the defendant has an intention to cause grievous bodily harm. *Cunningham* [1982] AC 566.

<sup>4</sup> See Smith JC, *Criminal Evidence*, Sweet & Maxwell, 1995 p 5.

fired the gun. The defendant still intended to kill because that is what he wanted to do.<sup>5</sup> In such cases a judge should refrain from giving a jury guidance as what intention means,<sup>6</sup> other than to tell them, it is a question of fact for the jury to decide whether a defendant intended a result,<sup>7</sup> and in doing so they must use their common sense based on all the relevant circumstances given in evidence.

In addition to this meaning of intention based on purpose or desire, the courts have put forward a second meaning to intention where the actor's purpose is not to cause a result, but he realises that by his act that result is very likely. This is because a single act can have two quite separate outcomes, for example, the actor insures the cargo on an aeroplane and places a bomb on it timed to go off when the plane is in flight. The actor's purpose is to claim the insurance money but he foresees it as very likely that aircrew will be killed. In this example, a distinction can be made between his direct intent to claim the insurance money, and his indirect (or oblique) intent (based on foresight) to kill the aircrew. The question the courts have struggled with is whether such an actor is guilty of murder.

One possible starting point of an examination of the decisions that attempt to deal with the problem of indirect intent is the House of Lords decision in *Hyam v DPP*.<sup>8</sup> In *Hyam*, Mrs Hyam's lover, a Mr Jones, discarded her in favour of a Mrs Booth. Mrs Hyam's reaction was to pour petrol through the letterbox of her rival's house which she ignited by using a newspaper and a match. Two of Mrs Booth's children died as the result of asphyxia caused by the fumes generated by the fire. Mrs Hyam maintained that she had not wanted to kill anyone, but rather that she merely wanted to frighten her rival away from Jones. The House, by a majority of three to two, upheld Mrs Hyam's conviction for murder. Lord Diplock stated:

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<sup>5</sup> A defendant can only intend a result if he believes it is achievable. However the prosecution could point out that if the result is objectively possible then it is very likely that the defendant intended it.

<sup>6</sup> *Fallon* [1994] CrimLR519; *Smith* [1998] CrimLR896.

<sup>7</sup> Section 8 Criminal Justice Act 1967.

<sup>8</sup> [1974] 2 All ER 41.

‘[N]o 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.’<sup>9</sup>

In *Lemon*<sup>10</sup> Lord Diplock further stated

‘It is by now well-settled law that both states of mind constitute “intention” in the sense in which that expression is used in the definition of a crime whether at common law or in a statute. Any doubts on this matter were finally laid to rest by the decision of this House in *Regina v Hyam* [1975] AC 55.’<sup>11</sup>

This means intention is present, first where an actor wants or desires a consequence to occur—it is the purpose of his action and, second, where a result is not wanted or desired but the actor does the act ‘knowing full well’ that the consequence is ‘likely’, ie foresight of a highly probable consequence can amount to intention.

In the nineteen eighties there were three further decisions of House of Lords in which the House was again faced with murder and the problem of defining intention. In *Moloney*<sup>12</sup> there had been a family party at which the appellant and his stepfather were present. Both had been drinking heavily and when the other members of the family had gone to bed, they participated in a gun loading contest which the appellant won. The stepfather then challenged the appellant to pull the trigger which he did, killing the stepfather. The appellant said ‘I didn’t

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<sup>9</sup> *ibid* at p 63.

<sup>10</sup> [1979] AC 617.

<sup>11</sup> *ibid* at p 638. Contrast Smith JC, “A majority of the House in *Hyam* was certainly of the opinion that this was the law but the actual decision was that foresight of high probability of serious harm was a sufficient *mens rea* for murder, not that such a state of mind necessarily amounted to an intention to cause serious bodily harm” Smith&Hogan *Criminal Law* (9th ed) p 54.

<sup>12</sup> [1985] 1 All ER 1025.

want to kill him. It was kill or be killed. I loved him, I adored him.<sup>13</sup> In *Hancock and Shankland*<sup>14</sup> two striking miners, Hancock and Shankland, dropped a concrete block and a concrete post from a motorway bridge killing a taxi driver who was taking a working miner to work. The appellants maintained they had no intention to kill or to inflict harm of any kind, but rather their intention was to frighten the working miner into stopping work. The trial judges in both cases directed the jury in terms of the second meaning of intention given in *Hyam* and in both the jury convicted of murder. In *Moloney* the House quashed the conviction for murder substituting one of manslaughter instead, whilst in *Hancock and Shankland* the House dismissed the Crown's appeal, confirming the Court of Appeal's decision to quash the murder conviction and to substitute one of manslaughter.

In *Moloney* Lord Bridge stated:

'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.'<sup>15</sup>

It can be argued that if a person foresees a consequence, that is sufficient evidence that that consequence is wanted or desired. But Lord Bridge appeared to rule this out when he stated, with reference to indirect intent, that 'intention is something quite distinct from motive or desire.'<sup>16</sup> Lord Bridge's reasoning (which was supported in *Hancock and Shankland*) accepts the first meaning of intention - purpose, but does not accept the second meaning, given in *Hyam*, ie foresight of a highly probable consequence. Rather foresight is merely evidence from which intention can be *inferred* by a jury. The problem is that when a jury so inferred intention it had no meaning as Lord Bridge rules out purpose.

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<sup>13</sup> *ibid* at p 1028.

<sup>14</sup> [1986] 1 All ER 641.

<sup>15</sup> n12 at p 1038.

<sup>16</sup> n12 at p 1037.

This leads to the question as to when can a jury infer intention from foresight? In *Moloney* Lord Bridge stated in the rare cases when a jury has to be directed in terms of foresight of consequences it should be invited 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? Second, 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.’<sup>17</sup>

However, in *Hancock and Shankland* this approach was found to be misleading by Lord Scarman because neither question directly referred to probability so that a jury would concentrate on the causal link between the act and its consequence—the unlawful killing of a human being. This would extend the number of cases in which an inference could be made, because a result could still be a natural consequence even though there was a low probability of it occurring.<sup>18</sup> Lord Scarman went on to say that model directions should be used sparingly and be limited to cases of real difficulty. ‘If it is done, the guidelines should avoid generalisation so far as is possible and encourage the jury to exercise their common sense in reaching what is their decision on the facts.’<sup>19</sup>

Initially the Court of Appeal favoured this approach, even in cases of indirect intent, thus leaving juries to infer intention from foresight ‘by considering all the relevant circumstances and in particular what [the defendant] did and what he said about it.’<sup>20</sup> However, in *Nedrick*<sup>21</sup> the

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<sup>17</sup> n12 at p 1039.

<sup>18</sup> n14 at p 650.

<sup>19</sup> n14 at p 651.

<sup>20</sup> *Purcell* (1986) 83 Cr App Rep 45 at p 48 per Lord Lane.

<sup>21</sup> [1986] 3 All ER 1.

Court of Appeal acknowledged that cases of indirect intent were ones of real difficulty and returned to a model direction. The facts of *Nedrick* were very similar to those of *Hyam*. The appellant had a grudge against a woman called Viola Foreshaw, as a result of which, after threats that he would ‘burn her out’, he went to her house and poured paraffin through the letter box and onto the front door and set it alight. He gave no warning. The house was burnt down and one of Viola Foreshaw’s children died of asphyxiation and burns. The Court of Appeal quashed the murder conviction and substituted one of manslaughter. It is interesting to note that had *Nedrick* been tried before the decisions in *Moloney* and *Hancock and Shankland* it is likely that he would have been convicted of murder and therefore he was temporally fortunate in comparison to Mrs Hyam. Thus *Nedrick* did avoid the label of murderer, although he did receive a fifteen year prison sentence which is probably what would have been served had he been convicted of murder. Lord Lane CJ took the opportunity to give a direction to be used in cases of indirect intent only:<sup>22</sup>

‘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 the defendant’s actions and that the defendant appreciated that such was the case.’<sup>23</sup>

This judgment has been very valuable to juries because it gives clear guidance as to when they can infer intention from foresight. In particular, foresight of a natural consequence, required in *Moloney*, is not enough for there to be an inference of intention. Rather there has to be foresight of a virtual certainty, which is a much narrower concept. This limited the overlap with subjective recklessness so that there was a reduction in the scope of the law of murder. However, the Court of

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<sup>22</sup> n6.

<sup>23</sup> n21 at p 4.

Appeal was bound by the House of Lords decisions, so was unable to say foresight of a virtual certain result is a second meaning of intention, although Lord Lane subsequently admitted that he would have liked to give intention that second meaning.<sup>24</sup> Thus it remained the case that intention, when inferred from foresight of virtual certain result, still had no meaning.<sup>25</sup>

It was not until the late nineteen nineties that House of Lords, in *Woollin*,<sup>26</sup> again considered the law of indirect intent. In *Woollin* the appellant lost his temper and threw his three-month son on to a hard surface. The son sustained a fractured skull and died. The appellant was charged with murder. The prosecution did not contend that the appellant desired to kill his son or to cause him serious injury. The issue was whether the appellant nevertheless had the intention to cause serious harm. The appellant denied that he had any such intention. The trial judge had initially given the *Nedrick* direction but, after an overnight adjournment, he instead directed the jury in terms of a substantial risk which is wider than virtual certainty, because an inference of intention could be inferred from foresight of a lower risk. The appellant was convicted of murder and his conviction was confirmed by the Court of Appeal. The House of Lords in an unanimous decision<sup>27</sup> quashed the appellant's conviction and substituted one of manslaughter. Lord Steyn stated that the decision in *Hyam* had resulted in the law of murder being in a state of disarray,<sup>28</sup> but later his judgment does partially agree with

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<sup>24</sup> See Smith & Hogan *Criminal Law* (9th ed) Smith JC, p 55.

<sup>25</sup> Contrast Clarkson and Keating "Presumably, as foresight of a virtual certainty is not itself intention, but something from which intention may be inferred, intention, as a matter of substantive law, must mean direct intention. It is difficult to see what else it could mean." Clarkson C and Keating H, *Criminal Law Text and Materials* (4th ed) p140. See also Halpin AKW, "Intended Consequences and Unintentional Fallacies" (1987) 7 OJLS 104.

<sup>26</sup> n2.

<sup>27</sup> It may or may not be significant that Lords Browne-Wilkinson and Hoffmann "assented" and agreed that *the appeal should be allowed* but, rather pointedly, did not express the usual agreement (see Lord Nolan) with Lord Steyn's and Lord Hope's speeches. One might infer (but not find!) that two of their Lordships were a little reluctant; so possibly the majority were going as far as was compatible with unanimity—which is particularly important in the criminal law. But this is speculation! JC Smith commentary to *Woollin* [1998] Crim LR 890 at 892.

<sup>28</sup> n2 at p 108.

*Hyam* when he states '[t]he effect of the critical [*Nedrick*] direction is that a result foreseen as virtually certain is an intended result.'<sup>29</sup> The difference is in the degree of foresight. The *Nedrick* direction is confirmed as being 'simple and clear'<sup>30</sup> and

'I am satisfied that the *Nedrick* test, which was squarely based on the decision of the House in *R v Moloney*, is pitched at the right level of foresight. It may be appropriate to give a direction in accordance with *R v Nedrick* in any case in which the defendant may not have desired the result of his act.'<sup>31</sup>

The direction given by the trial judge was a misdirection because by using the phrase 'substantial risk' it blurred the distinction between intention and subjective recklessness, 'and hence between murder and manslaughter. The misdirection enlarged the scope of the mental element required for murder.'<sup>32</sup> In confirming the *Nedrick* direction Lord Steyn substitutes the word 'find' for 'infer'<sup>33</sup> and this has received academic approval because 'it will and should get away from the strange and much criticised notion of inferring one state of mind from another.'<sup>34</sup> Thus intention to kill (or to cause grievous bodily harm) now has two meanings. First, where it is the actor's purpose to kill (or cause to grievous bodily harm) (direct intent); and second, where the actor's primary purpose is not to kill (or cause grievous bodily harm) but he foresees that result as a virtually certain consequence of his act (indirect intent).

Lord Steyn also states that 'It does not follow that "intent" necessarily has precisely the same meaning in every context in the criminal law. The focus of the present appeal is the crime of murder.'<sup>35</sup>

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<sup>29</sup> n2 at p 110.

<sup>30</sup> n2 at p 112.

<sup>31</sup> n2 at p 112.

<sup>32</sup> n2 at p 112.

<sup>33</sup> n2 at p 113.

<sup>34</sup> n27 at p 891.

<sup>35</sup> n2 at pp 107-108.

It is submitted that the above meaning applies all crimes of specific intent that are result crimes and to the law of attempt.<sup>36</sup>

## Discussion

The first question that needs to be considered is whether all the above cases involve indirect intent? It is submitted that *Moloney* and *Woollin* were in fact cases of direct intent and to give a direction in terms of foresight did not enable the jury to ask the right question about the facts of the case, ie had the prosecution satisfied them, beyond reasonable doubt, that the defendant's purpose was to kill or cause grievous bodily harm when he did the act that caused the *actus reus*? In *Moloney* Lord Bridge acknowledges this:

'[T]he issue for the jury was a short and simple one. If they were sure that, at the moment of pulling the trigger which discharged the live cartridge, the appellant realised that the gun was pointing straight at his stepfather's head, they were bound to convict him of murder. If, on the other hand, they thought it might be true that, in the appellant's drunken condition and in the context of this ridiculous challenge, it never entered the appellant's head when he pulled the trigger that the gun was pointing at his stepfather, he should be acquitted of murder and convicted of manslaughter.'<sup>37</sup>

The same reasoning could have been applied to appellant in *Woollin*, ie did the appellant have the purpose of killing or causing grievous bodily harm to his son when he threw him against a hard surface? As the prosecution did not allege such a purpose the jury, it must be assumed,<sup>38</sup> were prevented from asking that question.

If it is accepted that there are cases of indirect intent and, it is submitted, there are because in *Hyam*, *Hancock and Shankland* and

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<sup>36</sup> This means that the Court of Appeal decision in *Walker and Hayles* (1990) 90 Cr App R 226 that foresight of "a very high degree of probability" that death be caused would be enough for attempted murder is wrong.

<sup>37</sup> n12 at p 1030.

<sup>38</sup> Research into the deliberation of juries has not been allowed.

*Nedrick* the appellants' primary purpose was not to kill or cause grievous bodily harm, but rather to frighten, then a number of questions arise concerning the *Nedrick* or as it should now be called the *Woollin* direction. The first is that it has been argued that '[t]he decision of the House is important and most welcome in that it draws a fine line between intention and recklessness.'<sup>39</sup> But if subjective recklessness is defined in terms of foresight then foresight of a virtually certain result must encompass recklessness, but a jury is entitled to find intention. So the overlap is still present,<sup>40</sup> thus it is the degree of foresight that is important. Accordingly the meaning of 'virtually certain' must be clear to a jury, they must know that it is different (a higher level) from foresight of any degree of probability. Secondly the direction has an objective element 'unless [the jury] 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 it has been pointed out that this is an unnecessary element as '[t]he state of mind of a person who thinks he knows is the same as that of a person who actually knows.'<sup>41</sup> What should be proved is that the actor foresaw the result as virtually certain, and the fact it was objectively so, should be merely evidence of that foresight. As the law presently stands a jury may decide that the defendant foresaw a result as virtually certain but they will be unable to find intention because they conclude, objectively, that the result was not virtually certain. This would be a nonsense as intention should have a subjective meaning whether direct or indirect.

The third issue is the most difficult. Should the law of murder include cases of indirect intent? The answer seems to depend on whether the actor's primary purpose or motive is morally wrong or not. It has been argued that if a jury is satisfied, for example, that the defendant foresaw a death as virtually certain (and it was objectively so) then they *must* find an intention to kill otherwise a question of law will be left to be decided by as an issue of fact.<sup>42</sup> But it has also been pointed out

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<sup>39</sup> n27 at p 891.

<sup>40</sup> See n24 at pp 56-57 for the argument that in certain circumstances the overlap can be avoided.

<sup>41</sup> n24 at p 55. See also Textbook on Criminal Law, MJ Allen, (5th ed) p 64.

<sup>42</sup> n24 at p 55. See also Textbook on Criminal Law, MJ Allen, (5th ed) p 64.

that this would prevent a jury considering a moral dilemma that may exist in a case of indirect intent, which may lead a jury to conclude that they are entitled *not to find* intention.<sup>43</sup> There have been cases which have involved such a dilemma, for example, in *Steane*<sup>44</sup> where the appellant, a British subject, was employed as a film actor in Germany and, when war broke out, he was forced to broadcast German radio propaganda under the threat that if he did not do so his wife and children would be put in a concentration camp. After the war Steane was convicted of doing an act likely to assist the enemy with intent to do so. The Court of Criminal Appeal quashed his conviction on the basis that:

‘[I]f, on the totality of the evidence, there is room for more than one view as to the intent of the prisoner, the jury should be directed that it is for the prosecution to prove the intent of the prisoner and if, on a review of the whole evidence, they think that the intent did not exist or they are left in doubt as to the intent, the prisoner is entitled to be acquitted.’<sup>45</sup>

This judgment recognises there are cases where a jury should have the discretion to limit the meaning of intent to purpose, because that would recognise that Steane had a good motive for acting. This is Norrie’s argument ‘[t]he *moral* point in *Steane* was better achieved through a narrowing of the law of intention by recognising the moral threshold between the direct intent (saving the family) and the indirect intent (assisting the enemy).’<sup>46</sup> Similarly in *Gillick’s* case,<sup>47</sup> where it was held that a doctor did not intend to encourage a man to have unlawful sexual intercourse with a girl under 16, and thus was not an accomplice to that offence, when he gave contraceptive advice to such a girl because his primary purpose or motive was good, ie he wanted to protect the girl from an unwanted pregnancy. This reasoning has been

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<sup>43</sup> See Norrie A, “After *Woollin*”, [1999], Crim LR 532.

<sup>44</sup> [1947]1All ER 813.

<sup>45</sup> *ibid* at p 816 per Lord Goddard CJ.

<sup>46</sup> n43 at p 538.

<sup>47</sup> *Gillick v West Norfolk and Wisbech Area Health Authority* [1986] 3 All ER 402.

criticised because:

‘[I]t seems that the concept of intent is strained to do a job for which it is not fitted. Steane’s acquittal would more properly have been based on duress and the case envisaged by in *Gillick* seems to have been, in substance, one of necessity.’<sup>48</sup>

However, in the law of murder the defence of necessity (or duress of circumstances) is only available to medical doctors where it is known as the doctrine of double effect. So if a doctor gives his patient an injection of diamorphine with the primary purpose of relieving the patient’s great pain but realising that it is virtually certain that the injection will accelerate death, and it does so, then it has been accepted that the *mens rea* and *actus reus* are present but that the doctor has a defence.<sup>49</sup> But the same outcome could be achieved by recognising the moral dilemma between the doctor’s primary purpose or motive of relieving pain and the foresight of death, so that the meaning of intention would be limited, in such cases, to purpose. Only doctors who acted with the purpose of killing would be guilty of murder.<sup>50</sup> Such a discretion should be available to a jury otherwise the criminal law is inconsistent and unjust because the doctrine of double effect is not available to nurses or others (such as close relatives) who administer pain-relieving drugs in such circumstances. Without the discretion they will be guilty of murder even though there was the same morally good motive.

There are other circumstances where the discretion to consider the moral dilemma is necessary, for example, in the *Herald of Free Enterprise* disaster a man was blocking an escape ladder and refused to move, thus preventing the escape of others, so he was pushed off and drowned.<sup>51</sup> The defence of duress of circumstances does not extend to

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<sup>48</sup> n24 at p 57. See also Clarkson & Keating, *Criminal Law Text and Materials*, (4th ed) Clarkson C and Keating H, p 143.

<sup>49</sup> Arlidge A, *The Trial of Dr David Moor*, [2000], Crim LR 31; Smith JC, *A Comment on Moor’s Case*, [2000], Crim LR 41 at 42.

<sup>50</sup> As in *Cox* (1992) 12 BMLR 38 where Dr Cox killed his patient by administering a lethal dose of potassium chloride, a drug with no pain relieving properties so his primary purpose was to kill.

<sup>51</sup> See Smith JC, *Justification and Excuse in the Criminal Law*, 1989, at pp 73-74.

murder in these circumstances, so if the person who pushed him off had been charged with murder it is likely he would have been convicted unless a jury, following the *Woollin* direction, had exercised its discretion *not to find* intention, thus recognising the moral dilemma between the person's primary purpose of saving others and his foresight of the man's virtually certain death by drowning.

## Conclusion

It is submitted that, by entitling a jury to *find or not to find* intention in cases of indirect intent, the result of the *Woollin* direction is that a question of law (the meaning of intention) will be decided as an issue of fact. But the decision to give a jury such a discretion is right as it enables any moral dilemma to be taken into account. If the House had held that a jury *must* find intention in cases of indirect intent, where they decide that the defendant foresaw a result as virtually certain and it was objectively so, then consideration of any moral dilemma would be excluded. Of course it may be that juries already consider these moral dilemmas and would continue to do so despite such a direction—it is difficult to know as research into the deliberations of juries is not allowed. However it is 'virtually certain' that the result of a direction in terms of *must* find would result in more murder convictions.<sup>52</sup> From the 2 October 2000 'Convention rights' established by the European Convention of Human Rights and its protocols (the Convention) become part of domestic law in England and Wales<sup>53</sup> and courts are public authorities which obliges them to act in accordance the Convention. A defendant convicted of murder, by a court which did not allow consideration of any moral dilemma, may argue that this breached his convention right under Article 6—the right to a fair trial and thus have a

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<sup>52</sup> The writer once sat on a jury and the verdict was directly influenced by the direction of law given by the judge.

<sup>53</sup> Human Rights Act 1998 section 1.

ground for an appeal.<sup>54</sup> So the House was right to allow consideration of any moral dilemma in cases of indirect intent. One very important consequence of this discretion, given to juries in cases of indirect intent, is identified by Professor J C Smith:

‘If the “moral threshold” test is to be applied to “oblique” intention so as to save hard cases from conviction, why should it not also be applied to direct intention, ie purpose? The typical mercy killer acts with the purpose of killing—and his may be the hardest case of all.’<sup>55</sup>

The answer appears to be that, as a result of Convention rights, any moral dilemma will have to be considered in such cases, and thus *mens rea* (certainly for result crimes) may have to be redefined to take motive into consideration. Also the currently accepted draft definition of intention<sup>56</sup> is defined in terms of *must* and may need to be redefined to allow consideration of any moral dilemma.<sup>57</sup> In Canada sections of the Canadian Criminal Code have been set aside as incompatible with the Canadian Charter of Rights and Freedoms.<sup>58</sup> The Higher Courts in England and Wales do not have the power to set aside legislation, but they do have the power to make a declaration of incompatibility with the Convention.<sup>59</sup> Thus any legislation containing the current draft definition

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<sup>54</sup> Because by section 6 of the Human Rights Act 1998 a court is bound to act so as to ensure compatibility with Convention rights.

<sup>55</sup> Note 49 at p 43.

<sup>56</sup> 14(1) A person acts intentionally with respect to a result if –

(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.

<sup>57</sup> Attached to *Violence: Reforming the Offences Against the Person Act 1861* (Home Office, February 1998).

<sup>58</sup> For example, in *Martineau* [1990] 2 S.C.R. 633 s 213 (a) of the Canadian Criminal Code (constructive murder) was set aside as violating section 7 (the right to a fair trial) of the Canadian Charter of Rights and Freedoms.

<sup>59</sup> n53 section 4.

of intention may receive such a declaration. One possible result of the coming into force of the Human Rights Act 1998 is that it may mean that the time has come to accept that an assessment of moral guilt depends on a consideration of all the circumstances and not only on the presence or absence of a particular mental state such as foresight of a risk.<sup>60</sup>

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n58 at p 657 per L'Heureux-Dube J quoting Gordon GH, Subjective and Objective Mens Rea, [1975] 17 CrimLQ 355, at 389-390.