

## Answers to Exam questions

### Chapter 3

#### Question 1

The law on intention has caused much confusion in the courts. To what extent is the law now certain and clear? Refer to case law in your answer.

#### Bullets

- You should begin by addressing the question directly. The question refers to the confusion that the meaning of intention has caused and asks you to consider the extent to which the law is now “certain and clear”.
- There is no clear definition of intention laid down by the courts. Consider why it is important to have a clear definition of intention: precise definitions are necessary for the legislature to use in defining offences; so that the trial judge can explain the meaning of intention confidently to a jury; it is important that the law is accessible, clear and certain.
- Conviction carries serious consequences for individuals. In many cases, a defendant’s liberty is at stake. Where a defendant is charged with murder, where the *mens rea* requires proof of intention to kill or cause GBH, a defendant will be subject to a mandatory life sentence if convicted.
- In the majority of cases, the jury are not directed as to the meaning of intention. You should briefly explain the difference between direct and oblique (or indirect) intent.
- In exploring the development of the law, you should address the problems with the decision in *DPP v. Smith* [1961], HL. The House laid down an objective test – what the ordinary reasonable man would have seen as the natural and probable consequences. Irrebuttable presumption. This objective approach was criticised because where the offence is so serious, the “blameworthy state of mind” should depend upon the subjective state of mind of the actual defendant. The case was ‘overruled’ by s.8, Criminal Justice Act 1967.
- In *Hyam v. DPP* [1975], HL, it was held that intention could be established if the defendant foresaw death or GBH as a highly probable result. It was not necessary for D to actually desire that consequence. You should explain why this decision was also criticised: opinions in judgments differed; caused confusion; too broad; artificial and unnatural meaning to an everyday concept not acceptable; sounds too close to recklessness; significant moral difference between wanting a result to occur and merely foreseeing it at highly probable.

- The House of Lords retreated from *Hyam* in *Moloney* [1985], HL. Explain Lord Bridge's guidelines: the golden rule is that in directing a jury on the mental element in a crime of specific intent, the judge should avoid any elaboration and leave it to the jury's good sense, unless the judge is convinced that some further explanation was necessary. Foresight of consequences belongs not to the substantive law, but to the law of evidence: foresight is merely evidence of intention.
- "First, was death or really serious injury in a murder 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."
- However, *Moloney* was criticised by Lord Scarman in *Hancock & Shankland* [1986], HL it was held that "... 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".
- Further clarification was needed and this led to the Court of Appeal decision in *Nedrick* [1986], CA – "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" (per Lord Lance CJ).
- You should offer an evaluation of the differing tests: *Nedrick* (virtual certainty) lays down a narrower test than *Hyam* (highly probable). *Nedrick* adds some clarity by moving the meaning of oblique intent away from that of recklessness.
- This test was affirmed in *Woollin* [1998], HL. The House approved of *Nedrick*, but altered one word in the direction, changing "infer" to "find". The House of Lords held that the trial judge should not have departed from *Nedrick* – "substantial risk" was wider than "virtual certainty". Lord Steyn stated that: "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".

- You should conclude by summarising whether or not the law is clearer and more certain now. There is a much clearer distinction now between intention and recklessness.

## Question 2

To what extent has the case of *R v G and another* [2003] UKHL 50 clarified the law on recklessness? Refer to case law in your answer.

### Bullets

- Students are expected to discuss the legal position prior to *R v G*, the problems inherent within the old law, then explore how *R v G* changed the law and comment on whether or not the law has improved.
- Previously there were two tests of recklessness – *Cunningham* provided a subjective test of recklessness, while *Caldwell* provided an objective test for recklessness in criminal damage.
- You should discuss why *Caldwell* was heavily criticised. It was a harsh test for children or those of lower intelligence – capacity (eg, *Elliott v C*; *Cole*).
- Having two tests for recklessness was illogical – recklessness should have one meaning.
- Having two tests was also confusing for juries – if a defendant was charged with criminal damage and a non-fatal offence against the person, two competing standards would have to be applied. This was illogical and confusing for juries.
- The higher standard of recklessness was applied to non-fatal offences against the person, while the lower standard was applied to property offences, specifically criminal damage. This meant that people were better protected than property.
- The objective standard of recklessness is akin to negligence. An objective test of recklessness overlaps with negligence, to which a test of “reasonableness” is applied.
- You should explain how the law was changed by the House of Lords decision in *R v G*. The House overruled its previous decision in *Caldwell* and held that a subjective test of recklessness should be applied to criminal damage.

- Conclude by discussing how this has improved the law as the criticisms levelled at the objective test above are now redundant and the law is much simpler.