Iryna Marchuk

The Fundamental Concept of Crime in International Criminal Law

A Comparative Law Analysis

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ISBN 978-3-642-28245-4 ISBN 978-3-642-28246-1 (eBook)
DOI 10.1007/978-3-642-28246-1
Springer Heidelberg New York Dordrecht London

Library of Congress Control Number: 2013945860

Printed on acid-free paper

Springer is part of Springer Science+Business Media (www.springer.com)

Acknowledgements

I would like to thank everybody who made the publication of this book possible. The book is a substantially revised and expanded version of my Ph.D. thesis entitled "*Reconciliation of Major Legal Systems Under The Umbrella of International Criminal Law: A Study on the Law on Mens Rea*" that was successfully defended in January 2011. My gratitude goes to the host institution—Faculty of Law, University of Copenhagen. It has been a great pleasure to have earned my Ph.D. degree within the walls of the University where at the moment I work as an associate professor. The thesis was written under the thoughtful supervision of Professor Jørn Vestergaard whose comments on the early drafts were invaluable. I am immensely grateful for his continuous support, encouragement and belief in the success of my work. I could not wish for a better supervisor.

I would also like to thank Dr Christoffer Wong for his feedback and comments during the seminar on the preliminary evaluation of my thesis in early 2010. I extend my special thanks to the members of my Ph.D. evaluation committee, Professor William Schabas (National University of Ireland/currently Middlesex University), Dr Mohamed Elewa Badar (Brunel University) and Professor Jens Elo Rytter (University of Copenhagen). The written assessment as well as feedback during the public defence of the thesis determined to a great extent the structure and contents of this book.

The significant part of this project was carried out during my research stay at the Lauterpacht Centre for International Law in Cambridge from September 2009 until February 2010. My gratitude extends to everybody who made my stay at the Centre most convivial. Some parts of this book were heavily edited and re-written during my stay as a Visiting Professional with the Appeals Division of the Chambers of the International Criminal Court in May-September 2012, which gave me a unique opportunity to get an invaluable insight into the workings of the Court.

My gratitude goes to *The Finneske Legat* for the financial contribution that made the publication of this book a reality. My special thanks go to my research assistant Aloka Wanigasuriya who helped me to polish the overall language of the book and brought to my attention mistakes and internal inconsistencies, which I was not able to notice myself.

This book would have never materialised without the support and love of my parents, Vitaliy and Svitlana. Being a role model, my father has instilled into me the desire to learn and achieve my goals. I am very fortunate to have received strong support of my family behind every important step of my life.

Copenhagen, Denmark Iryna Marchuk
March 1, 2013

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Chapter 1
Introduction

For the last two decades, a fairly young discipline of international criminal law has been experiencing a dramatic development triggered and sustained by the establishment and work of international criminal courts and tribunals.[1] Although international criminal law remains to some extent a conflicting and fragmented field of law, this fairly new discipline is in a way a product of convergence and cooperation of the world's major legal systems in combating core international crimes such as genocide, war crimes and crimes against humanity. In practical terms, the result of such cooperation is an interfusion of criminal laws originating from various legal systems into the jurisprudence of international criminal courts and tribunals. The existing jurisprudence demonstrates that the incorporation by the ad hoc tribunals and the International Criminal Court[2] of national approaches to international criminal law appears to be more of a technical transposition of concepts rather than the result of a meticulous comparative analysis. Consequently, the jurisprudence is replete with internal inconsistencies and lacunae as to the construal of the fundamental concept of a crime in international criminal law that this book endeavours to address.

[1] This book mostly deals with the practices and jurisprudence of the the International Criminal Tribunal for the Former Yugoslavia (hereinafter—ICTY), the International Criminal Tribunal for Rwanda (hereinafter—ICTR) and the International Criminal Court (hereinafter—ICC). In some parts, references are made to the jurispudence of the Special Court for Sierra Leone (hereinfater—SCSL).

[2] The Rome Statute of the ICC encompasses a set of Articles (Articles 22–33) that lay down a firm foundation for "general principles" in international criminal law.

I. Marchuk, *The Fundamental Concept of Crime in International Criminal Law*,
DOI 10.1007/978-3-642-28246-1_1, © Springer-Verlag Berlin Heidelberg 2014

1.1 Relevance and Significance of Comparative Method

The academic literature notes the increasing significance of comparative criminal law in furnishing international law through "general principles of law" identified in domestic criminal law.[3] The benefit of comparative law is enhanced through the implementation of the complementarity principle by States Parties to the Rome Statute which are tasked with a daunting task of harmonising their national laws and bringing them in conformity with internationally recognised standards. As it is rightly penned by *Bassiouni*, "such degree of cross-fertilisation between international and national criminal law contributes to the harmonisation of substantive and procedural laws both at the national and international levels".[4]

This book is concerned with the influence of comparative law on shaping the substantive part of international criminal law. The major finding of this study is that only careful incorporation of general principles originated from *many* world legal systems may compellingly demonstrate that international criminal law is rooted in "generally accepted standards rather than national idiosyncrasies or aberrations".[5] Despite all positive influences of comparative studies on the advancement of international criminal law, the most challenging exercise in the application of the comparative method is "attempting to reconcile, let alone combine, legal concepts pertinent to different legal systems under the umbrella of international criminal law".[6] The use of comparative law is not about "transplantation of one dominant model" into international criminal law, rather it is "hybridisation inspired by pluralism".[7] It is clear that during the drafting process of major international criminal law instruments the statutory language is influenced by the geographical representation of delegates that settle on the most suitable formulation of legal provisions. The judges of international criminal courts have a tendency to reinforce their national perceptions of criminal law, which is clearly visible in a number of the ICTY judgements. However, instead of attempting to bring along legal tradtions from own national jurisdictions into international criminal law, it is advisable to resort to a comprehensive comparative analysis that will underline the existence of commonly shared "universal values" across many legal jurisdictions.[8]

Being a field in its own right, international criminal law is a fascinating amalgam of international law, customary law, and general principles derivative from

[3] For the support of this position, see: Werle (2005), p. 91; Ambos (2006), pp. 660–673, at 661–662.

[4] Bassiouni (2008a), p. 6.

[5] Cryer (2005), p. 173.

[6] Bassiouni (2005a), p. 158.

[7] Delmas-Marty in Cassese (2009a), p. 99.

[8] Fletcher (2007), pp. 4–5.

domestic criminal law.[9] Given its unique nature, it is quintessential to lay down a solid theoretical framework of the fundamental concept of a crime as understood in domestic jurisdictions prior to distilling and channelling the substantive law doctrines (*actus reus*, *mens rea*, modes of liability, defences) through "general principles" to the field of international criminal law. As it is observed by *Delmas-Marty*, the use of comparative law should promote "progressive reconciliation between international and domestic law".[10]

1.2 Shaping International Criminal Law Through General Principles of Law Derivative from National Jurisdictions

General principles of law, which derive from domestic legal jurisdictions, have greatly shaped the substantive part of international criminal law. These principles have played a varying role as a source of law in the jurisprudence of international criminal courts and tribunals, which may be explained by the different legal and political settings in which these judicial bodies were established and have functioned. The statutes of the ad hoc tribunals encompass only a few substantive law provisions and do not provide for a hierarchy of sources of law. This is not particularly surprising given that the statutes were hastily drafted by mostly diplomats, who were not necessarily criminal law experts, in an atmosphere of disbelief that the grand project of international criminal justice would take off the ground. The establishment of international criminal courts was not a routine measure employed by the UN Security Council to restore peace and security in troubled regions of the world, which to some extent expounds the imperfect nature of legal instruments that laid down the jurisdictional basis for the ICTY and ICTR. As a result, the judges of the ad hoc tribunals had to work with the poorly articulated statutes in terms of substantive law. The recourse to customary law and general principles was inevitable, since it was the only way to render legitimacy to the judgments.[11]

While providing for a hierarchy of sources of law, the Rome Statute of the International Criminal Court (hereinafter—ICC) gives utmost importance to the Statute itself, which is a refined codification of substantive and procedural rules of

[9] In the words of *Judge Cassese*, international criminal proceedings "combine and fuse" the adversarial system with a number of significant features of the inquisitorial approach. See also: *Erdemović* Trial Judgement, Dissenting Opinion, Judge Cassese, para. 4.

[10] Delmas-Marty in Cassese (2009a), p. 103.

[11] UN Secretary-General insisted on the preferred application of customary law in the ad hoc tribunals, given the very ad-hocness of the tribunals that put them at a considerable disadvantage in relation to sources of law. For more on the "battle" of sources of law in the ad hoc tribunals, consult: Zahar and Sluiter (2008), pp. 79–105.

international criminal law. Customary law and general principles of law are only consulted if the overarching sources do not address the issue at dispute. It should be noted that many legal provisions of the Rome Statute are indicative of *opinio juris* of States on various matters, although they do not replicate *all* rules of customary law.[12]

The wording of Article 21 of the Rome Statute clearly postulates "general principles derivative from national law" as a source of last resort. The application of "general principles" is conditioned by the consistency of such principles with the Rome Statute, international law, and internationally recognised norms and standards. *Cassese* observed that the hierarchy of sources in the Rome Statute reflects the legal logic that an international tribunal should first look for the existence of a principle belonging to either treaty or custom before turning to general principles of criminal law recognised by the community of nations.[13] The latest Commentary of the Rome Statute treats Article 21 (1) (c) as an "invitation to consult comparative criminal law as a subsidiary source of norms".[14]

The thorny issue on the relevance of national law for the ICC was discussed in greater detail at the negotiations in Rome. The reached compromise was that national law is considered as a source under "general principles of law". It was further clarified that the Court "ought to derive its principles from a general survey of legal systems and national laws".[15] As it is clear from *travaux preparatoires* of the Rome Statute and some critical observations, the mere reliance upon certain domestic national laws and practices does not justify the transposition of said concepts to the field of international criminal law.[16] Only careful employment of comparative method could fully rationalise the application of general principles of law derivative from national law if the existing lacunae are not covered in treaty and/or customary law.

The early jurisprudence of the ICC shows that the judges utilise a comparative method when interpreting the statutory language. The construal of the law of *mens rea* as well as principal liability is clearly inspired by the German legal theory. A broader reach of comparative method covering a wider range of world legal jurisdictions would clearly render more authoritative weight to the jurisprudence.

[12] Article 21, Rome Statute. For more on whether the Rome Statute's formulations of the applicable law are accurate restatements of customary international law, see: Cryer (2005), pp. 173–176.

[13] Cassese (2008), p. 21. See also: Werle (2005), pp. 47–48.

[14] Schabas (2010), p. 393

[15] Ibid., referring to fn. 3, 4 in the Report of the Working Group on Applicable Law, UN Doc. A/CONF.183/C.1/WGAL/L.2, p.2.

[16] In the context of the ad hoc tribunals, *Judge Cassese* warned against the mechanistic import of legal constructs and terms upheld in national law into international criminal proceedings. See: *Erdemović* Trial Judgement, Dissenting Opinion, Judge Cassese, para. 2.

1.3 Structure

Chapter 2 investigates the fundamental concept of a crime in selected common law jurisdictions such as the UK and USA. The chapter deconstructs the concept of a crime into *actus reus* and *mens rea*. Given the significant influence of the common law theory on the interpretation of the substantive part of international criminal law, such an overview of domestic practices is a solid foundation for a more sound understanding of the concept of a crime and critical assessment of the jurisprudence of international criminal courts.

Chapter 3 examines the concept of a crime in selected continental law jurisdictions, in particular Germany, France, Denmark and the Russian Federation. The chapter scrutinises a number of existing legal instruments and academic writing on the substantive part of criminal law in these jurisdictions, and gives a valuable insight into the construal of the constitutive legal elements of a crime. International criminal courts and tribunals have already substantiated some of their major legal findings with references to national criminal law.[17] However, a broader application of comparative method will furnish and enhance the existing theoretical framework of the substantive part of international criminal law.

Chapter 4 provides brief accompanying historical notes on the legal development of genocide, war crimes and crimes against humanity, and scrupulously analyses contextual elements of international crimes. The chapter touches upon a number of important problematic issues that have been raised in the jurisprudence of the ad hoc tribunals and the ICC on the construal of core international crimes, among others, the much debated contextual element adjacent to the crime of genocide; the meaning of a State or organisational policy within the context of crimes against humanity; the scope of *mens rea* covering contextual elements of international crimes etc.

Chapter 5 explores the complexity of the law on *mens rea* in the jurisprudence of international criminal courts and tribunals. At the backdrop of the inconsistent employment of various *mens rea* in the ad hoc tribunals, the chapter focuses on the latest discussion surrounding the interpretation of Article 30 of the Rome Statute in the jurisprudence of the ICC and offers critical analysis on the evolution of the *mens rea* doctrine through the lens of comparative law.[18]

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[17] *Lubanga* (ICC-01/04-01/06), Pre-Trial Chamber I, Decision on the Confirmation of Charges, 29 January 2007, paras 326–341; *Bemba* (ICC-01/05-01/08), Pre-Trial Chamber II, Decision on the Confirmation of Charges, 15 June 2009, para. 357; *Stakić* Trial Judgement, paras 438–440.

[18] *Bemba* (ICC-01/05-01/08), Pre-Trial Chamber II, Decision on the Confirmation of Charges, 15 June 2009, para. 357. Pre-Trial Chamber attempted to reconcile the continental law and common law theory under the umbrella of international criminal law by conducting a comparative analysis of the gradations of intent in various legal jurisdictions. In regards to *dolus directus* in the second degree, which is a continental law notion, the Chamber found the counterpart of "oblique intention" in English law and cited the following academic works in support: Ormerod and Hooper (2009), p. 19; Kugler (2004), p. 79; Williams (1987), at 422. The notion of *dolus eventualis* was erroneously equated to the concept of subjective or advertent recklessness as known in common

Chapter 6 provides a comprehensive dissection of principal and accessory (derivative) modalities of criminal liability available in international criminal courts and tribunals. The chapter observes the evolution of the controversial concept of Joint Criminal Enterprise (JCE), which was specifically devised to capture "masterminds" (top political and military leadership) who do not necessarily have their hands drenched in blood but direct the commission of international crimes from behind the scenes.[19] On the face of the fading enthusiasm for the applicability of JCE, the chapter investigates the aptness of the newly introduced modes of indirect (co)-perpetration and co-perpetration based on the joint control over the crime in the ICC jurisprudence.[20] The chapter summarises pro- and contra arguments as to the employment of certain principal and accessory modes of criminal responsibility in international criminal law through the comparative analysis of similar notions in selected common law and continental law jurisdictions.

Chapter 7 explores the relevance of grounds excluding criminal responsibility (defences) to core international crimes within the jurisdiction of international criminal courts and tribunals. While the ad hoc tribunals paid little attention to the construal of exculpatory grounds with the exception of the extensive discussion on the duress defence in the *Erdemović* case, the Rome Statute provides a comprehensive overview of defences that could be invoked by the suspect/accused. With the scarce jurisprudence on exculpatory grounds in international law, the chapter examines best domestic practices and compares them to the legal provisions of the Rome Statute.

law. The finding was supported by the ICTY jurisprudence: *Stakić* Trial Judgment, para. 587; *Stakić* Appeal Judgment, para. 101; *Brđanin* Trial Judgment, para. 265 n. 702; *Blagojević* et al., Case No. IT-02-60-T, Judgment on Motions for Acquittal Pursuant to Rule 98ßis, 5 April 2004, para. 50; *Tadić* Appeal Judgment, para. 220.

[19] *Tadić* Appeal Judgement, para. 220.

[20] *Lubanga* (ICC-01/04-01/06), Pre-Trial Chamber I, Decision on the Confirmation of Charges, 29 January 2007, paras 326–341; *Katanga* et al. (ICC-01/04-01/07), Pre-Trial Chamber I, Decision on the Confirmation of Charges, 30 September 2008, paras 480–486; *Al Bashir* (ICC-02/05-01/09), Pre-Trial Chamber I, Decision on the Prosecution's Application for a Warrant of Arrest against Omar Hassan Ahmad *Al Bashir*, 4 March 2009, para. 210; *Bemba* (ICC-01/05-01/08), Pre-Trial Chamber II, Decision on the Confirmation of Charges, 15 June 2009, paras 346–348.

Chapter 2
The Concept of Crime in Common Law Jurisdictions

2.1 The Concept of Crime in English Criminal Law

In common law jurisdictions, criminal law is a melting pot of statutory and precedent laws.[21] A particular peculiarity of English criminal law is the origin of many serious criminal offences in precedent law rather than statutory provisions.[22] While it is difficult enough to work with old judicial pronouncements, there is as well a lack of unanimity in the criminal law theory as to the definition and construal of some fundamental concepts. As it was rightly penned by *Fletcher* "the theoretical work on general part [. . .] is plagued by a great confusion of terminology".[23] The accumulated criminal law materials are voluminous and often abstruse, which makes it challenging to coalesce the judicial practice.

In common law, a crime was originally classified into the following three categories: treason, felony or misdemeanour. The original distinction was purely rooted in procedural grounds. As an illustration, a person suspected of felony was liable to arrest without warrant; could rely upon up to twenty peremptory challenges on trial; and was not entitled to be bailed out as a matter of right.[24] Felonies were regarded as grave crimes that entailed more severe punishment, whereas the remaining crimes were labelled misdemeanours. The distinction, which was abolished in the Criminal Law Act 1967, is not replicated in modern criminal law. The major surviving classification of crimes, which is based upon their gravity, includes indictable and summary offences. Most serious offences are tried on

[21] The history of English criminal law can be traced back far beyond the Conquest. The earliest authority of criminal law was part of the succession laws of kings beginning with King Ethelbert and ending with the compilation of material during the reign of Henry I (*Leges Regis Henrici Primi*). For more on the historical development of English criminal law, see: Stephen (1890), pp. 6–56.

[22] Ormerod (2008), pp. 18–19.

[23] Fletcher (1978, reprint in 2000), p. 395.

[24] Stephen (1890), pp. 58–59.

I. Marchuk, *The Fundamental Concept of Crime in International Criminal Law*,
DOI 10.1007/978-3-642-28246-1_2, © Springer-Verlag Berlin Heidelberg 2014

indictment, whereas minor offences are tried summarily. The latter category of crimes was embedded in statutory laws in order to overhaul safety standards in the cases of drink-driving, offences of common assault, battery etc.[25]

2.1.1 *Actus Reus*

The commission of an act prohibited by criminal law or an *actus reus* is not sufficient ground for imposing criminal liability, as it must be accompanied by a necessary mental element or *mens rea*. The very essence of *mens rea* is the attribution of criminal responsibility to persons who are sufficiently aware of what they are doing, and of the consequences it may have, that they can fairly be said to have chosen the behaviour and its consequences.[26] A person is not criminally liable unless the requisite state of mind coincides with the prohibited *actus reus*. The physical act shall be contemporaneous with the guilty state of mind.[27] In some instances, omissions may also attract criminal responsibility. It was penned by *Williams* that a culpable omission means that the accused could have done something if he had been meant to do so and had prepared himself in time, or at least something that another in his place could have done.[28] Normally, a culpable omission requires a duty to act, which may arise out of parental relations, voluntary undertakings, contractual duties etc. However, most crimes are outlined in terms of a positive act rather than omissions. An act shall be *voluntary*, which is fundamental to the imposition of criminal responsibility, because it reflects the underlying respect for the individual's autonomy.[29] It is a general rule that a person cannot bear criminal responsibility for an involuntary act. There are some exceptions thereto applicable to situations when a person acts in a state of self-induced intoxication.[30] Likewise, a person may be exculpated if he acted in a state of automatism which is normally confined to acts done while unconscious and due to spasms, reflex and convulsions.[31]

An *actus reus* may comprise conduct, its attendant circumstances and/or result. As an illustration, the crime of murder embraces the elements of conduct, circumstance (victim is a human being) and result (death of a victim). The crime of rape involves conduct (vaginal or anal penetration) and circumstances (non-consent on

[25] Williams (1983), pp. 18–25; Ormerod (2008), pp. 34–36.

[26] Ashworth (2009), pp. 154–155.

[27] Williams (1961), p. 2.

[28] Ibid., p. 4.

[29] Ormerod (2008), pp. 52–53.

[30] *Hardie* [1984] 3 All ER 848, [1985] 1WLR 64, CA.

[31] *Bratty* [1963] AC 386, [1961] 3 All ER 523 at 532. In the same vein, *Watmore v Jenkins* [1962] 2 All ER 868 at 878.

the part of a victim). The so-called "result" crimes are prevalent in comparison with "conduct" crimes.

2.1.2 Mens Rea

Over the years, the jurisprudence of English courts has been littered with inconsistent and often contradictory interpretations of various *mens rea* standards. In fact, the law on *mens rea* is one of the most challenging and complex areas of criminal law. It is observed by *Williams* that the complexity of the law on *mens rea* is induced by the discordant opinions voiced by judges, which reflect the failure of the legal profession to agree upon the meaning of elementary terms, but not the disagreement among academic commentators.[32] The use of the term *mens rea* in common law was criticised by *Fletcher* who avers that "there is no term fraught with greater ambiguity that that venerable phrase that haunts Anglo-American criminal law: *mens rea*".[33] The confusion over the meaning of the term continues to exist in modern criminal law, which is fuelled by the perpetual theoretical debates on the nature of various *mens rea* standards and the principle of culpability.

Given that the definition of a mental element varies upon each criminal offence, the only means of arriving at a full comprehension of *mens rea* is by detailed examination of the definitions of particular crimes.[34] The law on *mens rea* has been mostly shaped by the discussions on the requisite *mens rea* standards in relation to particular crimes. A number of terms have been employed in English criminal law to convey culpability, among others, purpose, intention, recklessness, wilfulness, knowledge, belief, suspicion, reasonable cause to believe, maliciousness, fraudulence, dishonesty, corruptness, and suspicion.[35] The jurisprudence of international criminal courts is replete with the *mens rea* terms of common law origin, which makes the account of the law on *mens rea* in this chapter particularly beneficial for grasping the complexity of the substantive part of international criminal law.

2.1.2.1 The Concept of Culpability (Blameworthiness)

The term "culpability" derives from the Latin word "*culpa*" and literally means "fault". Despite the perception of the concept of culpability as a philosophical offspring, it is of utmost significance for the criminal law theory. The critique of the concept has largely been due to its proximity to such philosophical categories as will and consciousness. From the legal perspective, culpability is associated with

[32] Williams (1965), p. 9.

[33] Fletcher (1978, reprint in 2000), p. 398.

[34] Stephen (1833), pp. 94–95.

[35] Simester and Sullivan (2007), p. 120.

the level of blameworthiness while committing the crime. The "blame" is a reflection of social condemnation of non-compliance with community demands, although it cannot be understood as the imputation of a purely moral judgement.[36]

Interestingly, some academic writings on *mens rea* lay down propositions that criminal responsibility shall be based on the harm caused rather than the state of a guilty mind. *Baroness Wootton* submits that material consequences of an action, and the reasons for prohibiting it, are the same whether it is the result of sinister malicious plotting, of negligence or of sheer interest. The author brings forward an illustrative example of a man who is equally dead and his relatives equally bereaved whether he was stabbed or run over by a drunken motorist or by an incompetent one. The author concludes that the presence or absence of the guilty mind is not unimportant, but it would be absurd to turn a blind eye to those socially damaging actions, which were due to carelessness, negligence or accident.[37] To the contrary, *Hart* trusts in the people's ability to determine their own action. He contends that it is important for the law to reflect common judgements of morality, and it is even more important that it should in general reflect in its judgements on human conduct distinctions, which not only underlie morality, but also pervade the whole of our social life.[38] *Hart's* standpoint on culpability has been widely acknowledged in criminal law with the overwhelming consensus among scholars over the ultimate objective to punish only those individuals who have mental capacity to appreciate unlawfulness of their actions, but nevertheless cross legal boundaries of socially accepted behaviour.

2.1.2.2 Intention

In colloquial terms, it is true that a person can be said to *intend* something if he recognises that there is a chance of achieving it. Hence, if a person does not believe that the consequence is a possible result of his actions, he cannot be regarded as trying to achieve it.[39] The significance of intention in criminal law is clearly demonstrated by the fact that nearly all crimes of serious gravity are defined in terms of "acting with an intent to commit a crime". However, the law on intention remains the stumbling block in academic and judicial circles alike.

Naturally, when an actor engages himself in any activity, he could entertain different intentions. What does the term "intention" stand for in criminal law? The general approach in criminal law is not to enquire with what intentions a person committed the act, but to ask whether one particular intention was present when the act was committed.[40] The distinction between intention and motive is crucial for the

[36] Silving (1967), p. 19.

[37] Wootton (1981), pp. 43, 46–48.

[38] Hart (1968), p. 183.

[39] Duff (1986) at 779; Duff (1990), p. 58.

[40] Ashworth (2009), p. 171.

theory of criminal law, which is commonly explained by the reference to the following domestic 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 it 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 moral certainty that that is where he will arrive.[41]

Although the proof of motive is often irrelevant, it may be important to infer the existence of intention by way of evidence, notwithstanding that these concepts are distinct.[42] On the interplay between motive and intention, *Gordon* submits that "there will be room for a strong plea in mitigation based on an accused's motive if it is not that of evil doing, malice, defiance, or some similar "criminal" or "depraved" state of mind".[43]

There is no unified legislative definition of intention in English criminal law. It has been coined in relation to particular crimes by the justices who are entrusted with broad discretionary powers. The only statutory law provision on the proof of criminal intent is section 8 of the Criminal Justice Act 1967 which lists a number of procedural rules that a court or jury shall rely upon in determining whether a person committed an 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 only of it 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 evidence as appear proper in the circumstances.

The discussion on the actual meaning of intention has been accompanied by an impressive diversity of opinions, which led to the establishment of the two major concepts. The first one known as "direct intention" means that the prohibited consequence is intended when it is the aim or the objective of the actor. Putting it differently, a result cannot be regarded as intended unless it was the actor's purpose.[44] The concept of "oblique intention" views the prohibited consequence as intended when it is foreseen as a virtual, practical or moral certainty.[45]

The law on *mens rea* is a technical area of law, since it is concerned with legal rather than moral guilt.[46] The *Smith and Hogan Criminal Law* textbook pinpoints that a crime nearly always reflects a state of mind which ordinary people would

[41] *R. v Moloney* [1985] A.C. 905 at 926.
[42] Stroud (1914), pp. 3–4.
[43] Gordon and Christie (2000), p. 260.
[44] Ormerod (2008), p. 98.
[45] Clarkson et al. (2007), p. 119.
[46] Simester and Sullivan (2007), p. 119.

regard as blameworthy, however, moral blameworthiness is not the legal test.[47] What is meant by "intention" in English criminal law? What is the *mens rea* threshold for intentional crimes? Does a crime qualify as intentional only when a person purposefully brings about the very result of his illegal behaviour? Does the virtual certainty of harmful consequences suffice to prove intentional crimes? These questions have contributed to the terrain for debate in English criminal law. The accumulated precedent law is an excellent working tool to provide answers to the aforesaid questions. The crime of murder reflects the evolution of the concept of intention in English criminal law. The jurisprudence, which is discussed in this sub-chapter, sheds light on this complex and somewhat murky area of law.

The first case, in which the House of Lords discussed the mental element of the crime of murder, is *DPP v Smith*.[48] The accused, who was driving a car loaded with stolen property, refused to stop when asked by a police officer. While the latter clung on to the front of his car, the accused gained speed and drove further until the officer was shaken off and fell in front of oncoming traffic, sustaining fatal injuries.[49] The jury returned a verdict guilty of murder. The Court of Criminal Appeal overturned his conviction on the ground of misdirection and reached a verdict of manslaughter instead. The Crown appealed to the House of Lords that subsequently reversed the decision of the Court of Criminal Appeal and reinstated the conviction for capital murder.[50] The House of Lords employed the objective test of intention to determine the responsibility of the accused:

> [. . .] the sole question is whether the unlawful and voluntary act was of such a kind that grievous bodily harm was natural and probable result. The only test available for this is what the ordinary, responsible man would, in all the circumstances of the case, have contemplated as the natural and probable result.[51]

By attributing the objective test to the crime of murder (and presumably to all crimes), the House of Lords converted murder to the crime of negligence. The case has gone to the dangerous extreme, given its unconditional reliance on the projected behaviour of a reasonable person. The objective test of intention was hailed with much scepticism among academics and law practitioners who advocated for the subjective test of responsibility. The objective test of intention was eventually overruled by section 8 of the Criminal Justice Act 1967.

Another notable case of *Hyam v DPP* dealt with the accused who set a house ablaze in order to frighten away her rival for the affections of a man. As a result, two children of the targeted woman died while being asleep.[52] The judges came to grips with the question of whether malice aforethought in the crime of murder could be established beyond a reasonable doubt when the accused knew that it was highly

[47] Ormerod (2008), p. 97.

[48] *Director of Public Prosecutions v Smith* [1961] A. C. 290.

[49] Ibid., at 290–291.

[50] Ibid., at 335.

[51] Ibid., at 291.

[52] *Hyam v DPP* [1975] A.C. 55.

probable that the act would result in death or serious bodily harm.[53] The House of Lords upheld the conviction for murder and recognised the state of mind of the accused as amounting to an intention to kill or cause serious bodily harm.[54] *Lord Hailsham* endorsed the definition of intention as outlined in the civil case of *Cunliffe v Goodman*:

> An intention [. . .] connotes a state of affairs which the party 'intending' [. . .] does more than merely contemplate. It connotes a state of affairs which, on the contrary, he decides, so far in him lies, to bring about, and which, in point of possibility, he has a reasonable prospect of being able to bring about by his own act of volition.[55]

The foresight and the degree of likelihood of consequences are essential factors to be placed before a jury in directing them as to whether the consequences were intended. *Lord Hailsham* comports with *Byrne J*. in *Smith* that the inference of intention shall be only drawn when it is inevitable on the facts of the case, yet it shall not be drawn if it is not the correct inference on all facts of the case.[56]

In *R v Moloney,*[57] the concept of intention was reassessed again. When the defendant fired a single cartridge from a twelve-bore shotgun, the full blast of the shot struck his stepfather and killed him instantly. The defendant denied that he entertained the requisite intent to kill. The question, which arose from the factual background of the case, was whether the defendant had the necessary intent when he pulled the trigger.[58] The verdict of murder was set aside and substituted with a verdict of manslaughter on appeal.[59] In the House of Lords, *Lord Bridge* formulated a golden rule in directing the jury on the mental element 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.[60]

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[53] Ibid., at 57.

[54] Ibid., at 99.

[55] Ibid., at 74 referring to *Cunliffe v. Goodman* [1950] 2 K.B. 237 at p. 253.

[56] Ibid., at 74. As the Law Commission pointed out in their disquisition on Smith [1961] A.C. 290 [Law Commission Report No. 10], "a man may desire to blow up an aircraft in flight in order to obtain insurance money. But if any passengers are killed, he is guilty of murder, as their death will be a moral certainty if he carries out his intention. There is no difference between blowing up the aircraft and intending the death of some or all of the passengers. On the other hand, the surgeon in a heart transplant operation may intend to save his patient's life, but he may recognise that there is at least a high degree of probability that his action will kill the patient. In that case he intends to save his patient's life, but he foresees as a high degree of probability that he will cause his death, which he neither intends nor desires, since he regards the operation not as a means to killing his patient, but as the best, and possibly the only, means of ensuring his survival".

[57] *R. v Moloney* [1985] A. C. 905.

[58] Ibid., at 905–906.

[59] Ibid., at 929–930.

[60] Ibid., at 926.

Although the direction does not treat the foresight of consequences as the part of substantive law on the crime of murder, it refers it to the law of evidence.[61] Furthermore, *Lord Bridge* formulated two major questions for the consideration of the jury when deciding on the intentionality of conduct: (i) whether death or really serious injury in a murder case was a "natural consequence" of the defendant's voluntary act; and (ii) whether the defendant foresaw that consequence as being a "natural consequence" of his act. In the case of affirmative answers to both questions, the inference is that the defendant intended that consequence.[62] The newly introduced concept of "natural consequences" was described in the following fashion:

> This word conveys the idea that in the ordinary course of events a certain act will lead to a certain consequence unless something unexpected supervenes to prevent it. One might also say that, if a consequence is natural, it is really otiose to speak of it as also probable.[63]

The abovementioned definition of "natural consequences" is riddled with ambiguities. It remains uncertain whether the use of the word "otiose" was meant to draw a demarcating line between "natural" and "probable" consequences.

The interpretation of "natural consequences" was reappraised in *R v Hancock*.[64] The Court unanimously disapproved the guidelines in *R v Moloney* as well as labelled them defective.[65] The direction to "probable consequences" was endorsed as the correct assessment standard: "if the likelihood that death or serious injury will result is high, the probability of that result may be seen as overwhelming evidence of the existence of the intent to kill or injure".[66] It was further explicated that the greater the probability of a consequence implies that it is more likely that the consequence was foreseen, and if that consequence was foreseen, the greater the probability is that the consequence was also intended.[67] Notwithstanding that the main discussion revolved around the probability of consequences with respect to the proof of the very existence of intent in murder cases, particular attention was also paid to the evaluation of evidence while determining whether a person intended to bring about those harmful consequences.[68]

R v Nedrick recapitulated the *mens rea* findings in *R v Moloney* and *R v Hancock*.[69] The defendant who had a grudge against another woman set her house alight. In addition to the house being completely burnt down, one of the woman's children died of asphyxiation and burns. The judges in the given case

[61] Ibid., at 928.
[62] Ibid., at 929.
[63] Ibid.
[64] *R. v Hancock and Shankland* [1986] A. C. 455.
[65] Ibid., at 473.
[66] Ibid.
[67] Ibid.
[68] Ibid., at 474.
[69] *R. v Nedrick* [1986] 1 W.L.R. 1025 (Court of Appeal, Criminal Division).

referred to their Lordships' speeches in *R v Moloney* and *R v Hancock*, and observed that "a man may intend the certain result whilst at the same time not desiring it to come about".[70] The following scenarios were constructed with respect to the foreseeability aspect of intention:

(i) If the defendant did not believe that death or serious harm was *likely* to result from his acts, he *cannot have intended* to bring about said result;
(ii) If the defendant believed that there was a *slight risk* of the death or serious harm, he *cannot have intended* to bring about said result;
(iii) If the defendant believed that death or serious harm would be *virtually certain* to materialize from his voluntary act, then it could be inferred from that fact that he *intended* to kill or cause serious bodily harm, even though he may not have had any desire to achieve that result.[71]

It was lastly accentuated that in rare murder cases, when the simple direction did not suffice, the jury 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 the result of the defendant's actions and that defendant appreciated that such was the case.[72]

The same discussion on the applicability of intention arose in *R. v Woollin*, which involved the defendant who threw his 3-month-old son across a room that led to his death 2 days later.[73] The jury found that the defendant had the necessary intention for the crime of murder. The Court of Appeal examined the appellant's principal ground of appeal that the judge unacceptably enlarged the mental element of murder by directing the jury in terms of substantial risk.[74] The murder conviction was quashed and substituted for manslaughter in the House of Lords with the matter being remitted to the Court of Appeal to pass sentence.[75]

Lord Steyn noted that the model direction for intention was a settled tried-and-tested formula with the reference to *Lord Lane CJ's* judgment in *Nedrick*. However, he found it necessary to substitute the word "infer" with "find", which means that a jury is not entitled to "find" the necessary intention, unless they feel sure that death or serious bodily harm was a virtual certainty and the defendant appreciated that such was the case.[76] *Woollin* gave rise to the two interpretations of intention which apply in rare cases when a person has a primary objective in acting other than causing the prohibited harm: (i) definitional interpretation—if a consequence is foreseen as virtually certain, the jury may be told that this amounts to intention;

[70] Ibid., at 1027.
[71] Ibid., at 1028.
[72] Ibid.
[73] *R. v Woollin* [1999] 1 A. C. 82.
[74] The Court of Appeal ([1997] 1 Cr.App.R. 97) dismissed the appeal.
[75] *Woollin supra*., at 97.
[76] Ibid.

(ii) evidential interpretation—where a consequence is foreseen as virtually certain, this is evidence entitling a court or jury to find intention.[77]

The definitional interpretation embraces (i) direct intent (a person aims to achieve the prohibited consequences) and (ii) oblique intention (a person aims to achieve other than causing the prohibited harm, but nevertheless foresees such harm as a virtual certainty of his actions). The definitional approach may preclude judges to "find" intention from the foresight of virtual certainty:

> Direct intention and foresight are different states of mind, in the same way that love is different from acquisitiveness. Proving that a person foresees a consequence as probable/highly probable is no more conclusive of an intention to produce that consequence than counting an art dealer's acquisitions can establish his love of art.[78]

The evidential interpretation of intention has two sides to the coin. On the one hand, it renders flexibility to judges to "find" whether intention exists in a particular case. In a situation, when a person does not directly intend consequences which may be foreseen as virtually certain, and those consequences are at serious odds with what the person intended, judges and juries would be entitled to "find" that the moral threshold between what the accused intended and what he foresaw as virtually certain was sufficiently large to avoid attribution of fault.[79] The "beauty" of the evidential interpretation is that it gives a jury more freedom or so-called "moral elbow-room" to dismiss the very existence of intention.[80] However, such significant flexibility may pose danger to the fair administration of justice, as it becomes unpredictable when a jury will or will not "find" intention. The danger is that the jury may simply drown in moral assessments that could potentially lead to the distortion of justice. *Ashworth* advocates for a tighter definition of intention, which omits the permissive formulation and accommodates a greater emphasis on appropriate defences.[81]

The mainstream critique of the concept of intention touches upon the interrelation between substantive law and the law on evidence. The fact that the result was a virtually certain consequence of the person's act is a very good piece of evidence that he knew it was a virtual certain consequence. It may occur that the actor knew that his act will produce virtual certain consequences, but some external circumstances intervened or impeded the virtual certain outcome. The further critique concerns the use of the phrase "may find" in *Woollin*. Does it imply that the jury may find intention only if they wish to do so? Does the foresight of consequences as virtually certain trigger the attribution of intent? Does the foresight of consequences as virtually certain only belong to the law of evidence that could or, alternatively, could not be used by the jury to find the requisite intent? The finding in *Woollin* is far reaching because it allows the jury to "find" intention in

[77] Clarkson et al. (2007), p. 126.

[78] Wilson (1999) at 451–452.

[79] Norrie (1999) at 538.

[80] Horder (1995) at 687.

[81] Ashworth (2009), pp. 176–177.

particular cases. This contributes to unpredictability of the outcome in criminal cases. The concerted efforts have been undertaken to re-shape the law on *mens rea*, so it would more objectively reflect the needs of criminal justice. The propositions of the Law Commission on re-designing the law on intention have not been implemented, however, there is room for optimism that the law will be unified and settled in the nearest future.

2.1.2.3 Recklessness

Recklessness is an intermediate *mens rea* standard in common criminal law that does not have any counterparts in criminal law of civil law jurisdictions. The cumulative understanding of "acting recklessly" means that a person disregards harmful consequences of his action. The most challenging task is to work out precise boundaries between bordering *mens rea* clusters, in particular intention and recklessness, recklessness and negligence. *Fletcher* submits that the demarcating line between intention and recklessness shall be drawn with the consideration of two distinct factors, which are the relative degree of a risk that the result will occur, and the actor's attitude towards the risk.[82] The distinction between recklessness and negligence may prove to be difficult when the objective test is employed to measure the person's conduct. The digest of the jurisprudence of English courts below illustrates challenges in separating recklessness from other bordering *mens rea* clusters.

R v Cunningham is a pivotal authority on the applicability of the subjective standard of recklessness.[83] In this particular case, the defendant stole a gas meter and its contents from the cellar of a house, and in doing so fractured a gas pipe. As a result of his act, coal gas percolated through the cellar wall to the adjoining house, and entered a bedroom of his neighbour who inhaled a considerable quantity of gas while asleep. The jury was directed by the judge that "maliciously" meant "wickedly"—doing something, which a person has no business to do, and perfectly knows it. The appeal was lodged with respect to the second indictment (endangering life of a person contrary to the 1861 Offences Against the Person Act) on the ground of the misdirection of the jury.[84]

Given that the act of the appellant was clearly unlawful, the question for the jury was whether it was "malicious" within the meaning of section 23 of the Offences Against the Person Act. The counsel for the appellant submitted a number of legal arguments in favour of his client. Firstly, he contended that *mens rea* of some kind was necessary to prove the crime charged in the second indictment. Secondly, he defined the requisite *mens rea* in terms that "the appellant must intend to do the particular kind of harm that was done, or, alternatively, that he must foresee that

[82] Fletcher (1978, reprint in 2000), p. 445.
[83] *R. v Cunningham* [1957] 2 Q.B. 396.
[84] Ibid., at 397.

harm may occur yet nevertheless continue recklessly to do the act". Lastly, he argued that the judge misdirected the jury as to the meaning of the word "maliciously". In light of the defence arguments, the justice *Byrne J* referred to an academic source that construed malice not in the old vague sense of wickedness but as requiring either:

> An actual intention to do the particular kind of harm that in fact was done, or recklessness as to whether such harm should occur or not (the accused has foreseen that the particular kind of harm might be done and yet has gone on to take the risk of it).[85]

The major finding on appeal was that the word "malicious" in a statutory offence could not be equated to "wicked". In addition, it was observed that it should be left to the jury to decide whether the appellant foresaw that the removal of the gas meter might cause injury to someone, but he nevertheless removed it. The conviction was quashed on the ground of the misdirection of the jury by the trial judge.[86] This authoritative judgement established two limbs of recklessness: (i) foreseeability of the possibility of harmful consequences; and (ii) undertaking of unjustifiable or unreasonable risk.

R v Caldwell is a leading authority on the standard of objective recklessness, which is a departure from the previous findings in *R v Cunningham*.[87] The disgruntled defendant set the residential hotel ablaze, which was his place of employment. The evidence record revealed that the defendant was so drunk at the time that it did not occur to him that there might be people there whose lives were endangered. He pleaded guilty to destroying or damaging property that amounted to the violation of section 1 (1) of the Criminal Damage Act 1971, however, refused to accept the charge under section 1 (2) of intending to endanger life or being reckless as to whether life was endangered. Despite the fact that the defendant was initially found guilty of a more serious charge,[88] the Court of Appeal (Criminal Division) set the respective conviction aside.[89] The question of law certified for the opinion of the House of Lords was whether evidence of self-induced intoxication was equally relevant to intentional and reckless criminal offences within the meaning of section 1 (2) (b) of the Criminal Damage Act 1971.[90] Although the Majority dismissed the relevance of self-induced intoxication for reckless offences, it confirmed its relevance for intentional offences under section 1 (2) of the Criminal Damage Act.

Lord Diplock seized an opportunity to coin the definition of recklessness with respect to the crime charged. His conclusion was that a person is reckless as to whether any such property would be destroyed or damaged if, when he commits the act "he either has not given any thought to the possibility of there being any such

[85] Ibid., at 399.

[86] Ibid., at 401.

[87] *R. v Caldwell* [1982] A. C. 341 (House of Lords).

[88] Ibid.

[89] In respect to the charge to which the defendant had pleaded guilty the Court imposed the same sentence pronounced by the trial judge.

[90] *Caldwell supra*., at 344.

risk, or has recognised that there was some risk involved and has nonetheless gone to do it".[91] This finding provoked a terrain for debate in legal circles. The test of objective recklessness was met with the storm of outspoken criticism among academics and practitioners. *Williams* characterised the decision as "profoundly regrettable",[92] whereas *Smith* noted that the decision was "pathetically inadequate".[93] The mainstream criticism was directed against the recognition of such a minor difference in terms of blameworthiness between the defendant who ignored a risk of which he was aware, and the defendant who gave no thought to the potential risk of having exposed others to danger.

R v Lawrence was another notable case before the House of Lords following the judgement in *R v Caldwell*.[94] The defendant killed a pedestrian in the motorcycle accident, and was convicted of causing death by reckless driving contrary to section 1 of the Road Traffic Act 1972.[95] The jury was directed that a driver was guilty of driving recklessly if he deliberately disregarded the obligation to drive with due care and attention, or was indifferent whether or not he did so, and thereby created a risk of an accident which a driver driving with due care and attention would not create (*Murphy* direction). The Court of Appeal (Criminal Division) set aside the verdict on the ground that both directions to the jury left some grey areas of law that rendered the verdict unsafe and unsatisfactory.[96]

The legal points of general importance in the case were as follows: (i) whether *mens rea* is involved in the offence of driving recklessly; (ii) if so, what mental element is required; and (iii) whether the *Murphy* direction[97] was the proper one to follow.[98] With respect to the aforementioned areas of inquiry, *Lord Diplock* acknowledged the presence of *mens rea* in the offence of driving recklessly which involved an obvious and serious risk of causing physical injury to another person, and failure on the part of a driver to give any thought to the possibility of there being any such risk. The mental element also meant to cover situations of some risk, which was undertaken by a person. The *Murphy* direction was dismissed due to its unfavourable effect on the driver.[99] The Caldwell/Lawrence test of recklessness captures a person who failed to give any thought to the possibility of the risk, or who recognised some risk involved. This controversial direction

[91] Ibid., at 354.

[92] Williams (1981) at 252.

[93] Smith JC (1981) at 394.

[94] *R. v Lawrence* [1982] A. C. 510 (House of Lords).

[95] Amended by Criminal Law Act 1977 (c. 45), s. 50 (1).

[96] *Lawrence supra*.

[97] Reg. v. William Murphy [1980] Q.B. 434. The *Murphy* direction recognises a driver to be guilty of driving recklessly if he deliberately disregards the obligation to drive with due care and attention or is indifferent as to whether or not he does so, and thereby creates a risk of an accident, which a driver driving with due care and attention would not create.

[98] *Lawrence supra*., at 518.

[99] Ibid., 527.

resembles the state of negligence, thus watering down the demarcating line between recklessness and negligence.[100]

Elliot v C examined the *mens rea* standard of recklessness in the crime of arson.[101] The case concerned a 14-year-old girl of low intelligence who entered a wooden shed, in which she picked a bottle of white spirit, poured it on the floor and set it ablaze. The resulting fire immediately flared out of control, and led to the complete destruction of the shed. The defendant was charged contrary to section 1 (1) of the Criminal Damage Act 1971. The judges acquitted the defendant on the ground that the defendant had given no thought to the possibility of the risk that the shed and its contents would be destroyed by her action, and even if she had given thought to the matter, the risk would not have been obvious to her.

The prosecution submitted that the justices misdirected themselves in law while considering whether the risk was obvious to the defendant. The main argument on appeal was that the defendant acted recklessly according of the test laid down in *R v Caldwell* because the risk should have been obvious to a *normal* 14-year old child.[102] The defence counsel challenged the prosecution's argument by contending that the *Caldwell* test spoke of a state of mind of the accused himself at the time of the act, which could not be the mental state of a non-existent hypothetical person. Furthermore, he claimed that it was necessary to decide whether the risk of the shed being destroyed was an obvious risk to the *particular* 14-year old girl in question.[103] The High Court concluded that the justices erred in their interpretation of the meaning of "reckless".[104] The category of "obvious risk" was construed as embedding "the risk which must have been obvious to a reasonably prudent man, not necessarily to the particular defendant if he or she had given thought to it".[105] In other words, neither limited intelligence nor exhaustion served as a defence to non-appreciation of the risk. The adherence to the objective standard of recklessness is truly perplexing, since the test disregards individual characteristics of the defendant and substitutes it with the standard of an ordinary prudent individual.

Shimmen case examined the loophole in the *Caldwell* test of recklessness.[106] The defendant was charged contrary to section 1(1) of the Criminal Damage Act 1971 of "without lawful excuse destroying property, intending to destroy any such property or being reckless as to whether such property would be destroyed". He damaged the property (window) when he attempted to demonstrate his martial arts skills of the control over his bodily movements, and made as if to strike the window with his foot. The justices acquitted the defendant on the ground of his belief in non-existence of the risk due to his martial arts ability.

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[100] Simester and Sullivan (2007), p. 136.

[101] *Elliott v C*. [1983] 1 W.L.R. 939.

[102] Ibid., at 941.

[103] Ibid., at 941–942.

[104] Ibid., at 943–947.

[105] Ibid., at 946.

[106] *Chief Constable of Avon v Shimmen* [1987] 84 Cr.App.R.7 (Quenn's Bench Division).