

# Chapter 2: Fundamental Principles of Criminal Liability 2: *Mens Rea*

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## Aim of this Chapter

This chapter will enable you to achieve the following learning outcome from the ILEX syllabus:

- 1 Understand the fundamental requirements of criminal liability

## 2.1 Introduction



### HIV carriers could escape jail for passing on infections to others

Anyone deliberately infecting a sexual partner with HIV through a one-off encounter should not be charged with a crime, prosecutors ruled yesterday. A single sexual incident will not count as evidence that they have deliberately tried to infect their partner with the virus, the Crown Prosecution Service said.

Cases of intentional or reckless transmission of sexual infection will only be brought against those who have infected a series of partners, or have infected one partner during a period of regular risky sex.

The rules were set out to clarify the law on reckless infection and to guide prosecutors on how to deal with a crime that can lead to a life sentence for those convicted. They also said that those accused of reckless HIV infection are themselves "victims", because they suffer from a devastating condition.

Eleven defendants have been taken to court in England for transmission of the AIDS virus. 10 of the cases ended in a conviction. Defendants are charged with causing grievous bodily harm under the 1861 Offences Against the Person Act.

*Daily Mail* website, 15 March 2008

All serious crimes and most minor offences require that D had a particular state of mind in relation to the elements in the *AR* of the offence. As we saw in **Chapter 1**, this is the *mens rea* (*MR*) of the crime. This chapter explains the various states of guilty mind that can amount to the *MR*. These include intention or recklessness to causing the result required by the *AR* of the offence. If you look at the article above you can see that causing serious harm through transmitting HIV can be committed intentionally or recklessly. Where an offence has a surrounding circumstance the *MR* is often knowledge, recklessness or

belief. For example, a person charged with handling stolen goods must know or believe that the goods are stolen. It is to be noted that some theft-related offences require dishonesty. This is fully explained in **Chapter 7**.

In addition, we will consider negligence, which applies to statutory offences, gross negligence, which applies to manslaughter and strict liability where no fault at all needs to be proved.

## 2.2 Intention

There is no statutory definition of “intention” and the courts have been reluctant to define it. It is important to understand that “intention” does not relate to motive. “*Rea*” refers to legal guilt, not moral guilt. This means that D may commit a crime where he intends the result even though he has a good motive. In ***Yip Chiu-cheung [1994]*** the Privy Council held that an undercover drugs enforcement officer would be guilty of conspiring to export drugs because the *MR* of conspiracy would be present: the intention that one party to the conspiracy commit the crime. This is despite the presence of his good motive, to catch the co-conspirator. In practice such cases are not brought to trial.

In ***Re A (Children) (Conjoined Twins: Surgical Separation) [2000]*** doctors operating on conjoined twins were said to have the *MR* of murder in relation to one twin who would certainly die with or without the separation procedure, even though the motive for the operation was the continuance of the other twin’s life. In such cases the defence of necessity may apply (see **11.2.1**).

There have been cases where a good motive has allowed D to escape conviction.

The facts in ***Steane [1947]*** were very emotive: the defendant, a UK citizen, had broadcast from Germany during the Second World War. He was convicted of doing acts likely to assist the enemy with intent to assist the enemy, but his conviction was quashed because the jury had not been directed that they should acquit him if he had the innocent intention of wishing to save his family, who had been threatened with a concentration camp if he did not broadcast. The Court of Appeal defined intention very narrowly in order to acquit Steane, confining it to purpose, but he had still intended to assist the enemy even though his motive had been to help his family. This is now considered to have been an incorrect legal decision. Steane probably had an intent to assist but could have been acquitted by applying the defence of duress.

Motive **is** relevant in establishing some specific crimes. These are “racially aggravated offences” under the **Crime and Disorder Act 1998**.

Motive is also relevant in sentencing. Good motive carries a more lenient sentence; bad motive aggravates the offence.

### 2.2.1 Direct and indirect intention

#### 2.2.1.1 Direct intention: aim or purpose

A defendant intends a consequence if he acts with the purpose of doing so. This is referred to as direct intention. Other words that are evidence of direct intention are “desire” and “aim”.

### 2.2.1.2 Indirect intention: foresight of a virtual certainty

In most cases there will be evidence of direct intention. If there is not it may still be that the court will infer that D did intend the result if it was both virtually certain to occur and D appreciated this fact. This is referred to as indirect or oblique intention.

In *DPP v Smith [1960]* it was held that intention could be established where a reasonable person would have contemplated the result. This was an objective test and was criticised because the courts were not able to consider D's actual state of mind. At one time it was presumed that D intended or foresaw the natural and probable consequences of his conduct. In response, **s8 Criminal Justice Act 1967** was enacted. This provides a subjective test as D's state of mind becomes the determining factor in inferring intention. In addition, **s8** abolished the previous presumption that a person intends or foresees a result simply because the result was a natural and probable consequence of his conduct. Instead the jury is now to decide intention (and awareness) by looking at all the evidence, drawing any inferences in the circumstances that appear proper.

The test applies where D has an ulterior purpose (X), which can only be achieved by first committing the offence in question (Y). So D will be guilty where offence (Y) is a virtually certain result of D's conduct and D is aware of this.



An example is where it is D's purpose to blow up a plane in order to collect an insurance payout (X – fraud). D may not want to murder the passengers (Y), but this is a virtually certain result required before the claim can be made.

Similarly, where it is D's purpose to bring about a result (X) and as a consequence another result (Y) will almost certainly occur, it can be inferred that D intended (Y). In *Re A (Children) (No. 1) [2000]*, doctors separating conjoined twins were said to intend the death of one twin (Mary) because it was virtually certain that she would die from the operation. This was not the purpose behind the operation. The purpose was to save the life of the other twin (Jodie). Note that the doctors would have been able to rely on the defence of necessity.



There is a history of case law relating to when indirect intention can be established from the circumstances. The case law has been concerned with the degree of probability required, and the level of awareness on the part of the defendant, before intention can be inferred.

(a) In *Hyam v DPP [1974]*, D tried to frighten the female rival of her lover's affections. She put a blazing paper through the letter box, and this caused the death of her rival's two children. It was not D's purpose to kill or cause serious bodily harm but to frighten her rival. The House of Lords took the view that intention could be inferred if she foresaw that it was "highly probable" that death or serious bodily harm would result. It was stated that this was not a definition of intention. On the facts the result was highly probable and D was aware of this. This wide view of oblique intent was implicitly overruled by the next case.

(b) In ***Moloney [1985]***, D killed his step-father in a game to establish who was quickest on the draw. D was convicted of murder. In the House of Lords, Lord Bridge stated that any elaboration on the meaning of intention was to be avoided – it should be left to the jury's good sense. Where it was required, the jury could be directed that intention could be inferred where death or serious bodily harm was a “natural consequence” of D's act and D foresaw this. It was stressed that this did not equate to intention, as it was in the jury's discretion to then decide if there was intention. A natural consequence was held to be a morally certain consequence, which in turn meant overwhelming. D's appeal was allowed.

(c) In ***Hancock and Shankland [1986]***, striking miners threw a concrete block from a bridge onto a road, where it killed a taxi driver. Lord Scarman held that the natural consequence test from ***Moloney*** was confusing, because the jury may interpret it to simply mean causally related. If this was so then most defendants would be convicted of murder. Lord Scarman stated that a direction was only required in the absence of purpose. The degree of foresight required on the part of D was stated to be foresight of the “high probability” of the result occurring, but again the jury could then simply infer intention. Lord Scarman endorsed Lord Bridge's earlier ratio of the need for death or GBH to be morally or overwhelmingly certain. The jury did not have to find intention. D's conviction was quashed.

(d) In ***Nedrick [1986]***, the appellant, who had a grudge against a woman, poured paraffin through her letter box to frighten her. A child died in the ensuing fire. Lord Lane held that the test was whether D foresaw that death or serious bodily harm would (barring all unforeseen circumstances) be “virtually certain” – a virtually certain result being one that was overwhelming. It was said that if this was so, this was evidence allowing the jury to infer intention. D's murder conviction was substituted with a conviction for manslaughter, given that the result was not virtually certain.

(e) The current position on the meaning of indirect intention is that held in ***Woollin [1998]***. Here D lost his temper and threw his baby five feet across the room, causing him a fractured skull from which he died. It was not D's purpose to kill or cause serious bodily harm. The Court of Appeal held that the oblique test was foresight (awareness) of a substantial risk of death or serious harm. If this could be established, intention could be inferred.

The House of Lords overruled the Court of Appeal and quashed D's conviction for murder, because the judge had unacceptably widened the *MR* for murder so as to include recklessness. The ***Nedrick*** test was approved but the House of Lords held that the jury was “entitled to find intention” if the test was met, as opposed to “entitled to infer intention” as had been held in ***Nedrick***.

This test appears to suggest that there is now a definition of oblique intention: D also intends a result if he knows that, barring all unforeseen circumstances, the result is a virtually certain consequence of his conduct. Intention may not only be inferred, it will be made out. The difference here is that the test provides a substantive rule of law as opposed to a rule of evidence which can only help the jury to decide whether intention is made out. A subsequent decision does not favour this construction of ***Woollin***.

(f) However, in ***Matthews and Alleyne [2003]***, Ds were charged with murder. The prosecution submitted that Ds pushed V, who they knew could not swim, off a bridge, intending to kill him. Ds admitted their presence at the scene but claimed they had not intended to kill V, they just wanted to prevent him from identifying them as robbers. The judge directed that if foresight of a

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