

# *COMMENT*

## *Codifying the Meaning of 'Intention' in the Criminal Law*

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What constitutes an intention to commit a criminal offence has proven to be a notoriously difficult concept to define.<sup>1</sup> The issue as to whether the accused intended the consequences of the prohibited act or omission constituting the criminal offence charged in the indictment is a question of fact for the jury to determine based on the evidence tendered at trial in addition to the trial judge's charge to the jury. In the absence of a clear statutory definition of intention in the criminal law it is imperative for trial judges to instruct juries in accordance with clear judicial guidelines. However, the jurisprudence of the English and Irish superior courts pertaining to the meaning of intention, and in particular indirect or oblique intention, has generally been regarded as unsatisfactory with the result that trial judges have insufficient guidelines when instructing juries.<sup>2</sup>

This comment evaluates the jurisprudence of the superior courts on the meaning of intention in the criminal law.<sup>3</sup> It suggests that the guidelines formulated by the superior courts hitherto are not definitive and may lead to confusion when trial judges instruct juries on the meaning of intention, thus necessitating statutory reform.

### **Constructing the mental element of criminal responsibility**

As a general rule, the criminal law stipulates that before an accused can be convicted of a criminal offence the prosecution authorities must prove beyond reasonable doubt that the prohibited act or omission (*actus reus*) coincided in law and time with a culpable state of mind (*mens rea*). The *mentes reae* of most criminal offences in descending order of seriousness are: intention (which is the most culpable mental state), recklessness, criminal negligence, and knowledge. In the prosecution of result

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1 See, e.g. N. Lacey, 'A Clear Concept of Intention: Elusive or Illusory?' (1993) 56 MLR 621; J. Horder, 'Intention in the Criminal Law: A Rejoinder' (1995) 58 MLR 678; N. Lacey, 'In(de)terminable Intentions' (1995) 58 MLR 692; S. Parsons, 'Intention in Criminal Law: Why Is It So Difficult to Find?' (2000) 4 *Mountbatten Journal of Legal Studies* 5; F. McAuley, 'Modelling Intentional Action' (1982) 22 *Irish Jurist* 179.

2 The significance of appealing to the superior courts on a point of law is to introduce legal certainty which is imperative in the criminal justice process.

3 See also W. Chan, 'Intention Thus Far' [1997] Crim LR 704.

crimes the issue as to whether the accused intended the consequences of the prohibited act has been most problematic in the construction of criminal responsibility.

The accused will rarely admit that he intended to perform the act, or made the omission, constituting the criminal offence charged in the indictment.<sup>4</sup> Whether or not the accused intended the consequences of his unlawful transgression may be ascertained from a consideration of the facts pertaining to the commission of the offence tendered in evidence during the course of the criminal trial. As a general proposition of the criminal law, the accused is deemed to have intended the natural and probable consequences of his voluntary acts, especially when the evidence tendered at trial establishes that the accused had foreseen as a virtual certainty that the particular consequence would occur, regardless of whether he desired it.

Intention has not been sufficiently defined by statute and its meaning therefore has been distilled from the jurisprudence of the superior courts.<sup>5</sup> It is the common-sense meaning of intention that coincides with what most people consider is an intention to do something, that is, the accused's 'aim, objective or purpose'.<sup>6</sup> The fact that the accused does not desire a consequence which he has brought about is not decisive, nor is it relevant that he thinks it unlikely that the consequence of the unlawful act would occur. There need not be a decision in the ordinary sense of the word; a fleeting realisation by the accused of the prohibited consequences may suffice.<sup>7</sup>

Many criminal offences specify intention as the mental element, that is, the accused intended to produce specific consequences from the prohibited act or omission.<sup>8</sup> Most of the case law that examined the meaning of intention in the criminal law pertains to the offence of murder, which is concerned with the subjective state of mind of the accused. The House of Lords has considered what state of mind would be sufficient to constitute intention, in addition to cases where the accused

4 Omission liability should not be excluded from this analysis as the accused may have 'let die' as opposed to killing the victim by a positive (outward) act.

5 One of the earlier judicial pronouncements on the issue was that of James LJ in *R v Mohan* [1976] 1 QB 1 at 11, describing specific intent as: '... a decision to bring about, insofar as it lies within the accused's power, the commission of the offence which it is alleged the accused attempted to commit, no matter whether the accused desired that consequence of his act or not'. This excluded the concept of desire from the meaning of intention in the criminal law.

6 A. Ashworth, *Principles of Criminal Law*, 6th edn (Oxford University Press: Oxford, 2009) 174 writes: '[T]he proper definition of intention remains the subject of theoretical debate and judicial disagreement. The core of "intention" is surely aim, objective, or purpose; whatever else "intention" may mean, a person surely acts with intention to kill if killing is the aim, objective, or purpose of the conduct that causes death.' See further: L. Chantry, 'Intention and Purpose in Criminal Law' (1991) 13 *Liverpool Law Review* 37; M. Thornton, 'Intention in Criminal Law' (1992) 5 *Canadian Journal of Law and Jurisprudence* 177.

7 See P. Cane, 'Fleeting Mental States' (2000) 59 CLJ 273. The criminal law is concerned only to discover if one particular intention was present when the offence was committed, that is, intention specified by the statutory definition of the offence charged.

8 Intention is the culpable state of mind for many heinous criminal offences including murder, theft, burglary and robbery.

had acted with the specific purpose of killing or causing serious injury to the victim. The crucial factor in the offence of murder is whether the accused intended to kill or cause serious harm to the victim. For such crimes of consequences, also referred to as result crimes, it is not so much the act done but the result produced by the accused's unlawful acts that is decisive.<sup>9</sup>

### **Direct and oblique intention**

The criminal law has made a distinction between direct intention (purpose intent) and indirect or oblique intention (foresight intent). The accused is deemed to have had direct intent when he intended a particular consequence of the unlawful voluntary act. Many criminal offences specify intention as the *mens rea* which may be direct or, alternatively, oblique where the prohibited act has consequences that were not the accused's primary purpose. In other words, oblique intention is bringing about another consequence, which although the accused foresaw as a probable consequence of the prohibited act claims that he did not intend.<sup>10</sup>

The issue of indirect intention pertains to cases where the accused had engaged in objectively dangerous conduct but claims that his primary purpose was to achieve something other than killing the victim.<sup>11</sup> In view of the fact that juries may 'find' that the accused acted with intent based on the evidence tendered at trial, it is imperative that trial judges have sufficient guidelines when instructing the jury on the meaning of intention. However, due to their lack of clarity, judicial guidelines for trial judges when directing juries on the meaning of intention have consistently required further refinement by the superior courts.

### **English jurisprudence on oblique intention**

In *DPP v Smith*,<sup>12</sup> the accused while trying to avoid arrest killed a policeman by driving off with the victim clinging to the accused's car. The House of Lords held that the accused was guilty of murder for two reasons. First, because death or grievous bodily harm was foreseen as a likely result of the accused's unlawful act. Secondly, the accused was deemed to have foreseen the risk which a reasonable person in the position of the accused would have foreseen. The second ground for the House of Lords' decision had been widely criticised as it introduced an objective element in the meaning of intention.<sup>13</sup> Consequently, the ruling in *Smith* was effectively reversed by statute. Section 8 of the

9 For the offence of murder, the issue is whether the victim died as a result of certain conduct by the accused such as shooting the victim resulting in death.

10 For further discussion on this extension in the meaning of intention in the criminal law, see: I. Kugler, *Direct and Oblique Intention in the Criminal Law: An Inquiry into Degrees of Blameworthiness* (Ashgate: Aldershot, 2002); I. Kugler, 'Conditional Oblique Intention' [2004] Crim LR 284; I. Kugler, 'The Definition of Oblique Intention' (2004) 68 JCL 79; G. Williams, 'Oblique Intention' (1987) 46 CLJ 417.

11 See e.g. A. Pedain, 'Intention and the Terrorist Example' [2003] Crim LR 579.

12 [1961] AC 290.

13 See e.g. *DPP v Smith* [1960] Crim LR 765, commentary by J. C. Smith.

Criminal Justice Act 1967 provides a statutory framework for assessing proof of criminal intent:

- A court or jury, in determining whether a person has committed an offence:
- (a) shall not be bound in law to infer that he intended or foresaw a result of his actions by reason only of its being a natural and probable consequence of those actions; but
  - (b) shall decide whether he did intend or foresee that result by reference to all the evidence, drawing such inferences from the evidence as appear proper in the circumstances.

Subsection (b) is a legislative instruction to the jury to consider all relevant evidence when deliberating on the guilt or innocence of the accused. The jury is entitled to draw reasonable inferences from all the evidence adduced during the course of the criminal trial when determining if the accused acted with intent at the time the offence was committed.

The first in a succession of cases to consider the meaning of indirect intention was *Hyam v DPP*.<sup>14</sup> The accused poured petrol through the letterbox of a door, stuffed newspaper through it and set it alight. Two of the occupier's daughters died in the fire. The accused claimed to have started the fire only to frighten the occupants and that she had not intended to kill anybody. The trial judge instructed the jury to convict the accused of murder if the facts established that she knew that it was 'highly probable' that her act would cause death or serious bodily harm. The accused was convicted of murder and the House of Lords upheld her conviction stating that murder is committed by a person who has the intention to cause death or serious bodily harm. To establish the *mens rea* of murder it was sufficient for the prosecution to prove that when the accused performed the unlawful act knowing that it was probable that the performance of those acts would result in grievous bodily harm, notwithstanding the fact that the accused did not desire to bring about that particular result. Furthermore, in the circumstances of this case the jury must have been satisfied that when the accused set fire to the house she realised that it was highly probable that one or more of the occupants would suffer death or serious bodily harm, and that she had deliberately exposed them to that danger.

The House of Lords agreed that the accused was guilty of murder as she had foreseen that death or serious injury was a 'highly probable' result of the unlawful act regardless of whether she desired that consequence. Applying this test, a result is intended even though it may not have been desired by the accused if it was foreseen as a highly probable result of the unlawful act. While the House of Lords had apparently equated foresight of consequences with intention, their Lordships did not formulate any definitive guidelines for trial judges when instructing juries on the meaning of intention.

<sup>14</sup> [1975] AC 55.

While the House of Lords by a majority of three to two upheld the appellant's conviction for murder, the majority decision provided diverse reasons for upholding the conviction: 'foresight of probability'; 'foresight of high probability'; and 'foresight of a serious risk' of death or serious injury. Lord Diplock and Lord Kilbrandon differed on the basis that intention to cause serious bodily harm was insufficient, instead suggesting that there must have been an intention to perform the act which was likely to cause death.<sup>15</sup> The diversity of judicial opinions pertaining to the meaning of intention rendered the ruling in *Hyam* unsatisfactory as it resulted in a considerable state of confusion and uncertainty.

*Hyam* was subject to much criticism as the guidelines appeared to have incorporated an extreme form of recklessness in the meaning of intention for murder, that is, the accused had acted in conscious disregard with a high probability of causing death or serious injury. It appeared that the House of Lords had introduced the concept of reckless killing as constituting the mental element for murder, and following this decision the *mens rea* for murder was left in a considerable state of uncertainty. However, the House of Lords subsequently retreated back from the *Hyam* guidelines and introduced less expansive guidelines on the meaning of intention in the criminal law.

The guidelines formulated in *R v Moloney*<sup>16</sup> appeared to have narrowed the broad approach to the meaning of intention previously adopted in *Hyam*. Following a drunken party the accused shot his stepfather who had challenged him to see who could load, draw and fire a shotgun in the shortest time. He may not have realised that the gun was loaded when he aimed at point-blank range at his stepfather's head, shot and killed him. When directing the jury, the trial judge stated that they could convict the accused of murder if they believed that he had foreseen that some bodily harm would probably happen, that is, as a probable consequence of the unlawful act. Lord Bridge stated that if specific intent is at issue, then the probability that the consequences of the accused's transgression was foreseen 'must be little short of overwhelming before it will suffice to establish the necessary intent'.<sup>17</sup>

Allowing the accused's appeal against murder, and substituting a conviction for manslaughter, Lord Bridge held that while foresight of consequences belongs to the law of evidence, it is something from which intention may be inferred but it is not the same as intention. On this point Lord Bridge refused to follow *Hyam*. It is not foresight of consequences but intention which constitutes the *mens rea* for murder. Lord Bridge also stated that in cases where it might be necessary to direct a jury by reference to foresight of consequences, the jury should be directed to consider two questions. First, was the death of the victim or serious injury inflicted a natural consequence of the accused's voluntary act? Secondly, did the accused foresee the consequence of the criminal

15 Above n. 14 at 98.

16 [1985] 1 AC 905.

17 Ibid. at 1036.

transgression as a natural consequence? If the jury determine both of these questions in the affirmative then it would be proper to infer that the accused had intended that consequence. In other words, foresight of consequences is evidence from which the jury could infer intention; however it is not the same as intention.

The House of Lords in *Moloney* did not equate foresight of consequences with intention. Thus, while the accused could have foreseen a consequence of his actions as being inevitable, it did not automatically follow that he intended those consequences. Lord Bridge said that a 'moral certainty' was necessary or in other words a probability which was 'little short of overwhelming' of an act that 'will lead to a certain event unless something unexpected supervenes to prevent it'.<sup>18</sup> However, when summing up the guidelines for trial judges he referred to the term 'natural and probable consequences', in other words a consequence that is virtually certain to follow.<sup>19</sup> While Lord Bridge was referring to the 'natural consequence' test as implicitly including a 'high probability' test, these guidelines were somewhat ambiguous and had failed to adequately resolve the dilemma pertaining to the meaning of intention in the criminal law. However, elsewhere in the judgment it was stated that the prohibited consequence should be 'the probability of the consequence taken to have been foreseen must be little short of overwhelming before it will suffice to establish the necessary intent',<sup>20</sup> or 'virtually certain'.<sup>21</sup> The ruling in *Moloney* appeared to have formulated a model direction for trial judges when instructing juries on the meaning of intention.<sup>22</sup>

A year after the *Moloney* decision, the meaning of intention was again considered by the House of Lords in *R v Hancock and Shankland*,<sup>23</sup> where the issue focused on the probability of natural consequences that the particular harm would result from the accused's unlawful acts. Two miners, who had been on strike, pushed a concrete slab from a bridge onto a highway which they knew a non-striking miner was being transported by taxi to his place of work. The slab hit and killed the driver of the taxi and the two accused were charged with murder. In their defence, they argued that they merely intended to block the road and to frighten the non-striking miner and other miners, and had not intended to kill or cause serious injury. In accordance with the judicial guidance formulated in *Moloney*, whether death or serious injury was a natural consequence of what was done, the trial judge directed the jury to consider the following question:

In determining whether a person intended to kill or to cause really serious injury, you must have regard to all of the evidence which has been put before you, and draw from it such inferences as to you seem proper and

<sup>18</sup> Above n. 16 at 1037.

<sup>19</sup> Ibid. at 1039.

<sup>20</sup> Ibid. at 1036.

<sup>21</sup> Ibid. at 1037.

<sup>22</sup> The House of Lords adopted a narrow test of what may constitute intention, not unlike the 'virtual certainty' test in *R v Nedrick* [1986] 1 WLR 1025, discussed below.

<sup>23</sup> [1986] 1 AC 455.

appropriate. You may or may not, for the purpose of considering what inferences to draw, find it helpful to ask: was death or serious injury a natural consequence of what was done? Did a defendant foresee that consequence as a natural consequence?

Applying these guidelines, intention could be inferred from foresight of consequences of the prohibited act. The two accused were convicted of murder and appealed. The Court of Appeal held that the *Moloney* guidelines were defective and misleading, and quashed the murder conviction. On a further appeal, the House of Lords agreed that the murder conviction should be quashed, and substituted a verdict of manslaughter. Their Lordships emphasised that moral certainty or overwhelming probability was necessary in order to constitute intention.<sup>24</sup> Lord Scarman agreed that the *Moloney* guidelines were misleading as they had omitted any reference to 'probability' and, further, that the *Moloney* guidelines (between foresight and intention) required clarification. The guidelines necessitated an explanation that in cases where there is a high probability of the prohibited consequence occurring it is more likely that this consequence was foreseen. If it can be established that the consequence was foreseen, then there is a greater probability that the consequence was intended. The House of Lords, affirming the decision of the Court of Appeal, also referred to Lord Bridge's avoidance of any reference to the issue of 'probability', which could be misleading to juries with the result that juries might consider that it has little significance and instead 'concentrating exclusively on the causal link between the act and its consequence'.<sup>25</sup> The accused's foresight of probable consequences of his actions may be a determining factor. However, the decision as to whether the accused intended the consequences constituting the criminal offence rests with the jury based on a consideration of all the evidence tendered at trial and the trial judges' charge to the jury.

Lord Scarman did not necessarily disagree with the test of foresight of a probability that is 'little short of overwhelming' as enunciated in *Moloney*. Furthermore, Lord Scarman opined that in cases where an explanation is required, the jury should be directed as to the relevance of probability, although it is not necessary to express the issue in terms of a particular level of probability. The more probable the result the more likely it is that it was foreseen. This, however, did not provide sufficient guidance to trial judges as to the manner in which juries should be directed on the meaning of intention.

Lord Scarman was of the view that intention should not be equated with foresight of consequences, but that intention could be established if there was evidence of foresight. It is for the jury to consider whether the accused foresaw a consequence of the unlawful act. If it is necessary to instruct a jury on the matter, it should be pointed out that probability, however high of consequence, is only a factor, though it may in some

24 Cf. A. P. Simester, 'Moral Certainty and the Boundaries of Intention' (1996) 16 OJLS 445.

25 [1986] 1 AC 455 at 473.

cases be a very significant factor to be considered with all the other evidence in deciding if the accused intended the consequences of his acts.

The House of Lords in *Moloney* declined to formulate a model direction for juries, instead stating that where an explanation was required the jury should be directed in terms of probability, although their Lordships did not express any particular level of probability. The decision is to be made by the jury based on the evidence. As a matter of practice, juries often ask probing questions prior to, or during, their deliberations on the guilt or innocence of the accused. It is imperative, therefore, that the trial judge instructs the jury in accordance with the proper test for determining whether the accused intended the consequences of his unlawful conduct.

The next in a succession of cases to consider the meaning of intention in the criminal law was *R v Nedrick*,<sup>26</sup> the facts of which were very similar to those in *Hyam*. The accused poured paraffin through the letterbox on the front door of a house and set it alight, apparently to frighten the owner of the house, with the result that an occupant of the house, a young child, died. The trial took place before *Moloney* and *Hancock and Shankland* were decided by the House of Lords. The trial judge had directed the jury that they could find the accused guilty of murder if he knew that it was highly probable that the unlawful act would cause serious injury to one of the occupants of the house (foresight of high probability). The prosecution challenged the decision on the grounds that it would prevent the jury from considering all the relevant evidence in the case pertaining to the issue of intention. The Court of Appeal quashed the murder conviction, and substituted a verdict of manslaughter on the basis that the trial judge's direction to the jury based on the *Hyam* guidelines was incorrect in that it had effectively equated foresight of consequences with an intention to kill. Foresight of consequences belongs to the law of evidence and is not part of the substantive criminal law pertaining to the meaning of intention in the construction of criminal liability. Lord Lane CJ stated that when a simple direction to the jury as to the meaning of intention was not enough, the jury should be instructed to consider that they should not infer intention unless 'death or serious bodily harm was a virtual certainty (barring some unforeseen intervention) as a result of the accused's actions and that the accused appreciated that such was the case'.<sup>27</sup> If, in the circumstances of the case, it is inevitable that the consequences of the prohibited act would result in death or serious bodily harm to the victim, then the inference of intention may be irresistible notwithstanding the fact that the accused had not desired this consequence. It is for the jury to decide based on the evidence tendered at trial. If a result is foreseen as a virtually certain consequence, then the jury may infer that the accused intended that result. The effect of this judicial guidance as to what direction should be given to the jury is that a result which was foreseen

26 [1986] 1 WLR 1025.

27 Ibid. at 1028.

by the accused as virtually certain is an intended result (foresight of virtual certainty test).

In accordance with the ruling in *Nedrick*, if the accused did not foresee a consequence as a result of the unlawful act, or where he thought that the probability of it was very slight, he cannot be said to have intended it. Only in circumstances where the accused foresaw the consequence as a virtually certain result of his actions may the jury *infer* intention, regardless of whether the accused actually desired it. The test of foresight of virtual certainty, as enunciated in *Nedrick*, did not present any significant difficulties in trial judges' instructions to juries.

The meaning of intention in the criminal law was revisited and somewhat clarified in *R v Woollin*.<sup>28</sup> The House of Lords held that where oblique intention is at issue then the jury may not find intention (for the offence of murder) unless death or serious bodily harm was a virtual certain result of the accused's prohibited act and, further, that the accused had appreciated this. The House of Lords approved the model direction in *Nedrick* with one exception: instead of being able to 'infer' intention the jury should be entitled to 'find' intention from foresight of virtually certain results. The accused had lost his temper and threw his infant son on to a hard surface, as a result of which the child sustained a fractured skull and subsequently died. The accused was charged with murder and denied that he had intended to cause serious harm. On appeal the accused's conviction for murder was quashed and a verdict of manslaughter imposed. Lord Steyn stated that the trial judge should not have departed from the *Nedrick* guidelines and further that the jury had been misdirected by referring to a 'substantial risk' which had the effect of blurring the distinction between intention and recklessness, and for that reason between the offences of murder and manslaughter. Further, the trial judge's misdirection was substantial in that it had effectively broadened the scope of the mental element for murder.<sup>29</sup>

Lord Steyn then qualified the guidelines formulated in *Nedrick* to mean that the jury may 'find' rather than 'infer' that the accused intended the consequences of his actions.<sup>30</sup> However, his Lordship did not provide an explanation for this change. Lord Hope agreed that the jury should be entitled to 'find' as opposed to 'infer' intention, as this would clarify the judicial guidelines. However, while the jury is entitled to find intention, they are not obliged to find that the accused acted with intent when the offence was committed.<sup>31</sup>

Judicial guidelines on the meaning of intention in the criminal law have not reached the stage where intention and foresight of consequences is equated, and the ruling in *Woollin* did not sufficiently clarify the law on indirect or oblique intention. Therefore underlying issues

28 [1999] 1 AC 82. See further: A. P. Simester, 'Murder, *Mens Rea*, and the House of Lords: Again' (1999) 115 LQR 17; J. Beaumont, 'The Mental Element in Murder: Resolved at Last' (1999) 63 JCL 483.

29 Ibid. at 95–6.

30 Ibid. at 96.

31 Cf. G. Williams and G. Dingwall, 'Inferring Intention' (2004) 55 *Northern Ireland Legal Quarterly* 69; J. E. Stannard, 'Murder, Intention and the Inference of Intention' (1999) 34 *Irish Jurist* 202.

from the seminal cases would require further clarification by the House of Lords in due course.<sup>32</sup> Thus, in *R v Matthews and Alleyne*,<sup>33</sup> the appellants were convicted of murder, having thrown the victim from a bridge into a river. The trial judge directed the jury on the issue of intention in the following terms, that the prosecution could only prove intent either:

- (i) by making you sure that this specific intention was actually in the mind/s of the defendants, or
- (ii) (a) by making you are sure that [the deceased's] death was a virtual certainty (barring some attempts to save him), and  
(b) the defendant whose case you are considering appreciated at the time [the deceased] was thrown off the bridge that this was the case, and he then had no intention of saving him, and knew or realised that the others did not intend to save him either.<sup>34</sup>

The two accused argued that this constituted a misdirection because the alternative in (ii) was put as a substantive rule of law rather than as a rule of evidence. In dismissing the accused's appeal against conviction, the Court of Appeal held that where the accused had acted deliberately with the appreciation of a virtual certainty of death this did not *per se* constitute an intention to kill, however it was evidence from which the jury could infer an intention to kill. Rix LJ delivering the judgment of the Court of Appeal pointed out that the current state of the law did not equate the definition of murder with a virtual certainty of the prohibited consequences occurring. Furthermore, the *Woollin* guidelines had not established a substantive rule of law, but rather had changed one word in the *Nedrick* guidelines which had been derived from existing law based on *Moloney* and *Hancock and Shankland* decisions.

If the jury was satisfied that the appellants had appreciated that death was a virtual certainty of their actions when they threw the victim from the bridge, and also that the appellants had no intention of saving the victim from such death, then the jury was entitled to find that the appellants intended the victim's death. If, in the circumstances of the case, the jury is directed to consider whether there was an appreciation of virtual certainty of death, as opposed to a lesser degree of foresight, that is, merely probable consequences, then the jury would have little to choose between a rule of substantive law and a rule of evidence. Where the accused realised that there was not just a highly probable certainty that the prohibited act would have a particular consequence, but rather that it was a virtually or morally certainty, the issue then is whether the accused's realisation constituted an intention or whether this merely evidence from which the jury may infer or find that the accused had intended to bring about the prohibited consequence.

In circumstances where the accused is deemed to have had foresight of a virtual certainty that death would result from the unlawful act, this is not *per se* equated with intention. Notwithstanding this apparent

32 See, e.g. A. W. Norrie, 'After *Woollin*' [1999] Crim LR 532; W. Wilson, 'Doctrinal Rationality after *Woollin*' (1999) 62 MLR 448.

33 [2003] EWCA Crim 192, [2003] 2 Cr App R 30.

34 Ibid. at [21].

*lacuna* in the definition of indirect or oblique intent, the jury is entitled to 'find' intention in accordance with the evidence tendered during the course of the criminal trial.

The *Woollin* guidelines are relevant only where issues of indirect or oblique intent arise in the construction of criminal liability. Thus, in *R v D*,<sup>35</sup> Hooper LJ stated:

*Woollin* is designed to help the prosecution to fill a gap in the rare circumstances in which a defendant does an act which caused the death without the purpose of killing or causing serious injury, but in circumstances where death or serious bodily harm had been a virtual certainty (barring some unforeseen intervention) as a result of the defendant's actions and the defendant had appreciated that such was the case.<sup>36</sup>

In all other cases where the offence being prosecuted stipulates intention as the *mens rea*, the jury should be instructed to consider the meaning of intention in the ordinary sense based on the facts tendered in evidence.<sup>37</sup> Applying the *Woollin* guidelines in isolation would result in many individuals avoiding conviction for murder notwithstanding the fact that the purpose was to kill or cause serious injury to the victim. Thus, for example, the accused who shoots and kills the victim could avoid conviction for murder if it could be established that the consequence of his actions was not a virtual certainty because he was a bad shot.

Where the accused brought about a particular consequence that he did not desire, the jury may find that he had intent if the consequence of his actions was foreseen as a virtual certainty. This appears to have negated any blurring of the distinction between intention and recklessness, which appeared to have been likely prior to the decision of the House of Lords in *Woollin*.<sup>38</sup>

## Critique of the House of Lords' guidelines

The House of Lords' guidelines pertaining to the meaning of intention in the criminal law have been in a constant state of uncertainty due to the failure by the judiciary to formulate coherent guidelines pertaining to the meaning of intention in the criminal law. In *Hyam*, it was held that foresight of consequences of a high probability could be equated with intention, whereas in *Moloney* foresight of consequences should not be equated with intention, but rather is evidence from which the jury may infer that the accused intended the consequences of the criminal transgression. *Hancock and Shankland* decided that the *Moloney* guidelines required clarification because of the failure to include the issue of probability. The greater the probability of a result, the more likely it is that it was foreseen, and the more likely it is that it was foreseen the

35 [2004] EWCA Crim 1391.

36 Ibid. at [29].

37 *R v Allen* [2005] EWCA Crim 1344; *R v Phillips* [2004] EWCA Crim 112.

38 Cf. M. C. Kaveney, 'Inferring Intention from Foresight' (2004) 120 LQR 81;

M. Gorr, 'Should the Law Distinguish Between Intention and (Mere) Foresight?' (1996) 2 *Legal Theory* 359.

more likely it is that it was intended. In *Nedrick*, the Court of Appeal held that where foresight of consequences was a virtual certainty, the jury could infer intention. The House of Lords in *Woollin* endorsed the *Nedrick* guidelines with one important exception, adding that instead of being entitled to 'infer' intention the jury should be entitled to 'find' intention from foresight of virtually certain consequences of the accused's criminal transgressions.<sup>39</sup> There is no direct connection between foresight of consequences and intention, although the former may be used by the jury as evidence to find intent.<sup>40</sup>

The judicial considerations of intention in the criminal law have been somewhat inconsistent in their approach to the relationship between intention and motive. In some earlier non-murder cases the House of Lords appears to have taken motive into account. Thus, in *R v Steane*,<sup>41</sup> the accused during the Second World War had entered the German broadcasting service and was accused of doing acts likely to assist the enemy. His conviction was quashed by the Court of Criminal Appeal and the reasoning of the court has been subject to much controversy. The accused claimed that his only reason for assisting the enemy was to protect his wife and children whose lives would have been in danger if he had refused. However, Lord Goddard CJ stated that he did not have the necessary intention unless the jury was 'satisfied by the evidence that the act complained of was, in fact, done to assist the enemy and if there was doubt about the matter, the prisoner was entitled to be acquitted'.<sup>42</sup> The accused's purpose was to avoid being detained in the concentration camp; however, he knew that his purpose could only be achieved by assisting the enemy. Nevertheless, it was held that he did not have the intent to assist the enemy.<sup>43</sup> In *Gillick v West Norfolk Area Health Authority*,<sup>44</sup> the House of Lords held that a doctor who gave contraceptive advice to a girl under the age of 16 years for medical reasons while realising that this would facilitate unlawful sexual intercourse was not guilty of aiding and abetting that offence. Lord Scarman stated that the bona fide clinical judgment as to the patient's health and welfare by a doctor negates a guilty mind which is an essential element of aiding and abetting the offence of unlawful sexual intercourse.<sup>45</sup> These decisions may be contrasted with *R v Smith*,<sup>46</sup> where the accused was convicted of corruption by offering an inducement to an official

39 Thus, the issue of law pertaining to the meaning of intention would be determined as an issue of fact.

40 Since the House of Lord's decision in *Hyam* the notion of risk-taking being part of the meaning of intention has not been followed.

41 [1947] KB 997.

42 Ibid. at 1006.

43 Steane had acted intentionally in that he knew what he was doing. However, the court exercised clemency arguably for the wrong reasons. He could have pleaded duress, to protect his family, which should have been allowed as a defence to the substantive offence charged.

44 [1986] AC 112.

45 Ibid. at 190–1.

46 [1959] 2 QB 423.

although his purpose was to prove that the official was corrupt. Likewise, in *R v Yip Chiu-Cheung*,<sup>47</sup> the Privy Council held that for the purposes of conspiracy, an undercover drugs enforcement officer had the intention to commit the agreed offence (exporting drugs from Hong Kong to Australia), though he was not charged with the offence.

## **Human rights standards**

In a criminal trial the onus is on prosecution authorities to establish the guilt of the accused beyond reasonable doubt. It is imperative that judicial guidelines or proposed statutory definition pertaining to the meaning of intention in the criminal law complies with Article 6(2) of the European Convention on Human Rights, which provides that '[e]veryone charged with a criminal offence shall be presumed innocent until proved guilty according to law'.<sup>48</sup> The issue here is that if a trial judge directs the jury that they are entitled to 'infer' or 'find' that the accused intended the results of his unlawful acts, this could potentially undermine the presumption of innocence, and might also strengthen the prosecution's case.<sup>49</sup> Nonetheless, a trial judge's direction to the jury in accordance with the judicial guidelines is permissive rather than obligatory in that the jury is entitled, but not obliged, to find that the accused had acted with intent based on the evidence tendered at trial.

## **Proposals for reform in England and Wales**

In view of the uncertainty inherent in the judicial guidelines pertaining to the meaning of intention in the criminal law it is imperative that the legislature enact a precise statutory definition.<sup>50</sup> The Law Commission for England and Wales reviewed the law of homicide and recommended the adoption of either of the following statutory definitions.<sup>51</sup>

The first model proposed a statutory formulation of intention based on the definition in the Draft Criminal Code:<sup>52</sup>

47 [1995] 1 AC 111.

48 See *Lavents v Latvia* (App. No. 58442/00), 28 November 2002; *Barberrá, Messequé and Jabado v Spain* (1989) 11 EHRR 360.

49 See R. J. Allen, 'Structuring Jury Decision Making in the Criminal Law Cases: A Unified Constitutional Approach to Evidential Devices' (1980) 94 Harv LR 321 at 322 stating: 'When a judge instructs a jury that it may presume the existence of certain unproved incriminating facts from the proof at trial of other less incriminating facts, or suggests by comment that the jury may draw various reasonable inferences, the effect is to increase the weight of the evidence presented by the prosecution. As a result, the constitutional requirement of proof beyond a reasonable doubt may be circumvented.'

50 See, e.g. A. Khan, 'Intention in Criminal Law: Time to Change?' (2002) 23 *Statute Law Review* 235.

51 See Law Commission, *A New Homicide Act for England and Wales?: A Consultation Paper*, Law Com. Consultation Paper No. 177 (2005). Cf. A. Norrie, 'Between Orthodox Subjectivism and Moral Contextualism: Intention and the Consultation Paper' [2006] Crim LR 486.

52 Draft Criminal Code, cl. 18(b), appended to Final Report, *A Criminal Code for England and Wales*, Law Com. No. 177 (1989).

(1) Subject to the proviso set out below:

- (a) A person acts 'intentionally' with respect to a result when he or she acts either:
- (i) in order to bring it about, or
  - (ii) knowing that it will be virtually certain to occur; or
  - (iii) knowing that it would be virtually certain to occur if he or she were to succeed in his or her purpose of causing some other result.

(2) Proviso: a person is not to be deemed to have intended any result, which it was his or her specific purpose to avoid.<sup>53</sup>

This is based on the Law Commission's previous attempt to formulate an acceptable definition of intention. While this has the advantage of legal certainty and consistency of application, it also presents a potential shortcoming in that it may lead to an unduly rigid application.

The second model suggests a codification of the common law definition as enunciated in *Nedrick* and subsequently refined in *Woollin*:

- (1) A person is to be regarded as acting intentionally with respect to a result when he or she acts in order to bring it about.
- (2) In the rare case where the simple direction in clause (1) is not enough, the jury should be directed that:

they are not entitled to find the necessary intention with regard to a result unless they are sure that the result 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.

(3) In any case where the defendant's chance of success in his or her purpose of causing some other result is relevant, the direction in clause (2) may be expanded by the addition of the following phrase at the end of the clause (2) direction:

or that it would be if he or she were to succeed in his or her purpose of causing some other result, and that the defendant appreciated that such was the case.<sup>54</sup>

The second model would not *per se* provide a comprehensive definition for the meaning of intention to assist trial judges in their charge to the jury, but rather would establish defined criteria for juries to consider in their deliberations as to whether the accused acted with intent during the commission of the offence charged. While this proposed statutory definition based on a codification of the judicial guidelines presents an adaptable definition of intention, a caveat must be observed in that this could result in uncertainty of application.

Whichever provision is ultimately adopted it must comply with European Convention on Human Rights standards and would be susceptible to being declared incompatible with the Convention if the right to the presumption of innocence is undermined.<sup>55</sup>

53 Above n. 52 at para. 10.15.

54 Ibid. at para. 10.16.

55 Human Rights Act 1998, s. 4.

## Intention in Irish criminal law

The jurisprudence of the Irish superior courts pertaining to the meaning of intention in the criminal law has closely followed English developments.<sup>56</sup> The relevant statutory provision is s. 4 of the Criminal Justice Act 1964, which provides that:

(1) Where a person kills another unlawfully the killing shall not be murder unless the accused person intended to kill, or cause serious injury to, some person, whether the person actually killed or not.

(2) The accused person shall be presumed to have intended the natural and probable consequences of his conduct; but this presumption may be rebutted.<sup>57</sup>

This provision was enacted in response to the controversial House of Lords decision in *DPP v Smith*,<sup>58</sup> that is, to exclude an objective test for intention in Irish criminal law.<sup>59</sup>

Section 4 of the 1964 Act stipulates that intention is to be judged subjectively, that is, the actual state of mind of the accused when the offence was committed. In other words, the question for the jury is whether the accused actually foresaw the consequences of his act, and whether the accused foresaw objectively is merely evidence which the jury may consider in their deliberations. Furthermore, the presumption in s. 4(2) incorporates the issue of probability into Irish criminal law which is particularly relevant to cases of oblique intention.

Section 4 does not, however, define the meaning of intention in Irish criminal law, but rather the manner in which it may be proved by the prosecution. All the evidence may point to the conclusion that the accused should have foreseen that his conduct would bring about prohibited consequences. However, the question still remains whether the accused actually foresaw these consequences.

The first reported case to consider the meaning of intention was *The People (DPP) v Murray*,<sup>60</sup> where the accused was charged with capital murder. The Supreme Court, *per* Walsh J, distinguished between intention and foresight of consequences, and held that intent to murder or cause serious injury is where the accused had 'a fixed purpose to reach that desired objective'. Accordingly, the state of mind of the accused must have been that he foresaw and willed the consequences of the prohibited conduct. Walsh J then stated that:

... a person who does not intend to kill and does not intend to cause serious injury but nevertheless does an act which exposes others to the risk

<sup>56</sup> See M. O. Rogan, 'The Mental Element in Murder: Tales from the Archives' (2008) 18 *Irish Criminal Law Journal* 19; J. Newman, 'Reforming the Mental Element of Murder' (1995) 5 *Irish Criminal Law Journal* 194.

<sup>57</sup> See P. O'Higgins and L. Ó Braonáin, 'Section 4 of the Criminal Justice Act 1964: A Constitutional Presumption?' (1992) 2 *Irish Criminal Law Journal* 179; P. O'Higgins and L. Ó Braonáin, 'Section 4 of the Criminal Justice Act 1964: The Redundant Presumption?' (1991) 1 *Irish Criminal Law Journal* 113.

<sup>58</sup> [1961] AC 290. Discussed above in text accompanying n. 12 ff.

<sup>59</sup> See *Dáil Debates*, vol. 207, col. 54, 29 January 1964.

<sup>60</sup> [1977] IR 360.

of death or serious injury would not be guilty of murder when the *mens rea* required is an intent to kill or an intent to cause serious injury.<sup>61</sup>

This suggests that the accused who deliberately took a risk by performing the prohibited act would not be guilty of murder in this jurisdiction. This may be contrasted with the House of Lords decision in *Hyam* according to which a deliberate risk-taker, who in effect had acted recklessly, could be found guilty of murder in accordance with the House of Lords guidelines.

In *The People (DPP) v Douglas and Hayes*,<sup>62</sup> the two accused had been convicted of shooting at another person with intent to kill. With regard to the presumption that a person intends the natural and probable consequences of their conduct, the Court of Criminal Appeal stated:

. . . evidence of the fact that a reasonable man would have foreseen that the natural and probable consequence of the acts of an accused was to cause death and evidence of the fact that the accused was reckless as to whether his acts would cause death or not is evidence from which an inference of intent to cause death may or should be drawn, but the court must consider whether either or both of these facts do establish beyond a reasonable doubt an actual intention to cause death.<sup>63</sup>

While foresight of death as a natural and probable consequence of the accused's criminal transgression is not the same as an intention to commit that act, this is evidence from which the jury may infer intention.

The ruling in *Douglas and Hayes* was strongly influenced by the House of Lords decision in *Hyam*, which has since been reformulated, thus rendering the decision in *Douglas and Hayes* open to question. Furthermore, the remarks pertaining to the offence of murder are, strictly speaking, *obiter* in view of the fact that the accused had been charged with the offence of 'shooting with intent to commit murder'.<sup>64</sup> Section 4 of the 1964 Act states that the *mens rea* for murder is an intention to kill or cause serious harm, whereas in *Hyam* the House of Lords included a 'residual malice' in that an accused who did not intent to kill may nevertheless be found guilty of murder if he knew that the prohibited act would probably cause grievous harm.

In *The People (DPP) v McBride*,<sup>65</sup> the accused had been convicted of a number of counts of aggravated assault. The Court of Criminal Appeal said:

61 Above n. 60 at 387. Walsh J continued (at 387): 'Even if the specified and specific intent can be established not only when the particular purpose is to cause the event but also when the defendant has no substantial doubt that the event will result from his conduct, or when he foresees that the event will probably result from his conduct, the test is still based on actual foresight. Even on that basis, foresight of probable consequences must be distinguished from recklessness which imports a disregard of possible consequences. The essential difference between intention and foresight on the one hand and recklessness on the other is the difference between advertence and inadvertence as to the probable result.'

62 [1985] ILRM 25.

63 Ibid. at 28, *per* McWilliam J.

64 Offences Against the Person Act 1861, s. 14.

65 [1996] 1 IR 312.

The jury ought to have been told that while there was a presumption that the applicant intended the natural and probable consequences of his act, this was only a presumption and could be rebutted, one of the things that they had to consider was whether the State had satisfied them beyond reasonable doubt that the presumption had not been rebutted. And in considering that, they had to take into account what the applicant said in his statement. It was for them to decide if it affected their view as to whether he had the necessary intent.<sup>66</sup>

In other words, while the presumption that the accused intended the natural and probable consequences of the prohibited act is provided for in s. 4(2) of the 1964 Act, the jury must also consider whether the prosecution has established that the presumption has not been rebutted.

The meaning of intention pertaining to the trial judge's instruction to the jury was considered by the Court of Criminal Appeal in *The People (DPP) v Hull*,<sup>67</sup> where the applicant was convicted of murder, having shot the victim through a closed door. His plea of guilty to manslaughter was rejected by the prosecution. He appealed on the grounds that the trial judge's charge to the jury was unsatisfactory in that it had contained both legal and factual errors. The issue then centred on the *mens rea* for murder. The trial judge had instructed the jury to consider their verdict in two stages, based on the entirety of the evidence:

The first step is to decide what were the natural and probable consequences. Then, if you believe that the natural and probable consequences were death or serious injury, that is the first hurdle, but you have to say have the State proved that he intended to cause death or serious injury. Even though there may be a presumption that he intended the natural and probable consequences of his act, nevertheless the State must show that the presumption has not been rebutted.<sup>68</sup>

Thus, the jury had to determine whether or not the prosecution had established that when the accused fired the gun his act was deliberate, not accidental, so as to decide whether the presumption was applicable to the circumstances of the case. If the shooting were accidental, this would rebut the presumption in s. 4(2) of the 1964 Act.

The direction in *Hull* required the jury to decide in the first instance whether the natural and probable consequence of firing at the door was to cause death or serious injury. If this was decided in the affirmative, then the jury should determine whether this had been deliberate or accidental. The Court of Criminal Appeal was satisfied that this was a reasonable direction to the jury. If the jury determined that the natural and probable consequences of shooting through the door was to cause death or serious injury, the presumption arose that this was the accused's intention. However, the jury must also consider whether this presumption had been rebutted, that is, whether the accused's act was deliberate or accidental. The trial judge was correct in directing the jury to acquit the accused of murder if shooting the victim was accidental—in

66 Above n. 65 at 317, *per* Blayney J.

67 Unreported, 8 July 1996, Court of Criminal Appeal.

68 *Ibid.*

other words, the presumption to cause death or serious injury would have been rebutted. The Court of Criminal Appeal was satisfied that the trial judge's charge to the jury did not contain any legal or factual errors and was not in any way unsatisfactory. The trial judge had dealt adequately with the jury's question pertaining to the 'natural and probable consequences' of the appellant's unlawful act. Further, the trial judge's charge was a reasonable way to put the matter to the jury for deliberation. Thus, the trial judge's direction to the jury to acquit if they determined that when the appellant had fired the gun it was accidental, and consequently the presumption that he had intended to cause death or serious injury had been rebutted, was correct.

*Hull* illustrates the importance of taking into account the particular intent required by the statutory definition of the offence charged in the indictment. While the accused may have intended to pull the trigger intentionally he may not have had the intention to kill or cause serious bodily harm when he pulled the trigger. This pertains to the fundamental issue as to whether he pulled the trigger accidentally (inadvertence) or intentionally (advertence). Intention relates to a particular consequence, that is, to the specific offence charged, and cannot be established by proving recklessness.

## **Proposals for reform in Ireland**

In view of the relative scarcity of jurisprudence in Ireland with regard to the meaning of intention in the criminal law, it is difficult to draw any definite conclusions. It is not certain whether the English test of foresight of virtual certainty has been adopted into Irish criminal law. Notwithstanding this lacuna, it appears that intention in Irish criminal law has a broader meaning than its English counterpart. It appears that the accused is deemed to have acted with intent where it was his purpose to kill or, alternatively, where the killing occurred with foresight of death or serious injury.

While the abovementioned judicial guidelines pertaining to the meaning of intention in Irish criminal law are useful they have failed to provide a model direction for trial judges when instructing juries on the meaning of intention in the criminal law. Consequently, the Law Reform Commission of Ireland<sup>69</sup> reviewed the *mens rea* of murder and recommended the following definition be adopted:

- (1) Where a person kills another unlawfully it shall be murder if:
  - (a) the accused person intended to kill or cause serious injury to some other person, whether that other person is the person actually killed or not; or
  - (b) the killing is committed recklessly under circumstances manifesting an extreme indifference to the value of human life.
- (2) A person acts recklessly with respect to a killing when he disregards a substantial and unjustifiable risk that death will occur. The risk must be of

<sup>69</sup> Law Reform Commission, Report on *Homicide: Murder and Involuntary Manslaughter*, LRC 87-2008; see also Law Reform Commission, Consultation Paper on *Homicide: The Mental Element in Murder*, LRC CP 17-2001.

such a nature and degree that, considering the circumstances known to him, its disregard involves a gross deviation from the standard of conduct that a law-abiding person would observe in the actor's situation.

(3) A result is intended if:

- (i) it is the defendant's conscious object or purpose to cause it; or
- (ii) he is aware that it is virtually certain that his conduct will cause it, or would be virtually certain to cause it if he were to succeed in his purpose of causing some other result.

(4) The accused person shall be presumed to have intended the natural and probable consequences of his conduct, but this presumption may be rebutted.<sup>70</sup>

The suggestion that the fault element for murder should be extended to include reckless killing, that is, extreme indifference to human life, may circumvent the problematic issue of oblique intention in the construction of criminal liability, similar to that in the criminal law of Scotland.<sup>71</sup> However, recklessness suggests a lesser form of criminal responsibility more akin to a charge of manslaughter; intention cannot be established by proving recklessness. In this context, it is noteworthy that the Commission did not recommend that the fault element for murder be expanded to include recklessness as to serious injury.<sup>72</sup>

Expanding the mental element for murder in Irish criminal law to include recklessness pertains to reckless killing by extreme indifference to human life. Thus, for example, where the accused claims that he did not intend to kill or cause serious harm to the victim, and that he did not foresee death as a probable consequence of the prohibited act, because his actions could be considered as heinous as an intentional killer, he may be found guilty of murder.

While this proposed statutory formulation would assist trial judges when directing juries on the meaning of intention, a caveat must be observed in that the statutory definition must not be unduly rigid, but rather should permit the jury to determine the innocence or guilt of the accused based on the evidence tendered at trial. Furthermore, it would be subject to interpretation by the superior courts and may be struck down on grounds of incompatibility with the European Convention on Human Rights.<sup>73</sup>

## Conclusion

In England and Wales, and in Ireland, the meaning of intention in the criminal law, which predominantly concerns the offence of murder, has a relatively narrow definition; certain killings which are reckless might be equally as heinous as intentional killings. While the legal meaning of the concept of intention remains uncertain, it is evident from the

70 Above n. 69 at para. 3.78. The Report includes a Draft Homicide Bill to place this proposed definition on a statutory footing, which if enacted would repeal s. 4 of the Criminal Justice Act 1964.

71 See S. Christie, *Introduction to Scots Criminal Law* (Longman: Harlow, 2003) 43; T. H. Jones, 'The Scottish Law of Murder' (1989) 105 LQR 516.

72 Above n. 69 at para. 3.49.

73 European Convention on Human Rights Act 2003 (Ireland), s. 5.

jurisprudence of the superior courts that intention pertains to the accused's object or purpose (purpose intent) or foresight of virtually certain consequences of the unlawful act in the case of result crimes (foresight intent).

A clear concept of intention in the construction of criminal liability has not been distilled from the jurisprudence of the superior courts and the criminal law has not reached the stage when foresight of virtually certain consequences and intention are equated. Where indirect or oblique intention is at issue the jury is entitled to find intention based on foresight of virtually certain consequences (evidence) of the unlawful act. However, these concepts are not the same, and furthermore they must be clearly distinguished from recklessness which pertains to the accused's disregard of possible consequences.

Intention and foresight of consequences are distinguished from the concept of recklessness on the basis of advertence and inadvertence as to the probable result of the accused's criminal transgression. While some statutory offences are established by proving that the accused acted recklessly, intent cannot be proved by recklessness which is a lesser degree of criminal responsibility.

The meaning of intention in the criminal law remains undefined by statute and judicial guidelines thus far lack a sufficient measure of clarity; therefore, issues of incompatibility with European Convention on Human Rights standards may arise with regard to the presumption of innocence. It is now opportune for legislatures to eliminate the problem of inefficient judicial guidelines and the general lack of clarity, obscurity and uncertainty that still exists as regards the meaning of the concept of intention in the criminal law. A clearly defined statutory provision would ensure a sufficient measure of consistency of approach in the manner that trial judges instruct juries.