

The Definition of Oblique Intention

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Abstract The Law Commission contended that a person should not be held as having oblique intention with respect to a result if his whole purpose in acting is to avoid this result. This article asserts that the Commission was wrong concerning this point. The justifications that it gave for the rule it suggested are not convincing, while the rationales for the doctrine of oblique intention apply even to cases in which the whole purpose of the actor, in acting, is to avoid the proscribed result.

Direct/oblique intention

Many offences that contain a result element can be committed ‘intentionally or recklessly’. There are, however, offences that are defined so as to require an intention to cause a specified result. The element of ‘intention to cause a result’ may appear not only in offences where the *actus reus* includes the forbidden result, but also in ‘*ulterior intent*’ offences (i.e. offences in which the *mens rea* includes an intention to produce some further consequence beyond the *actus reus* of the offence). The offences in which there is a requirement of intention may be called ‘intention crimes’. A person may be convicted of ‘intention crimes’ if when he acted he wanted to bring about the specified result. These are cases of ‘direct intention’. However, in many ‘intention crimes’ oblique intention is also sufficient for conviction. Oblique intention is established in cases in which the actor, who does not act in order to cause the proscribed result, is aware, when he acts, that there is a practical certainty that the proscribed result will ensue.¹

Practical certainty and purposeful avoidance

Clause 18 of the Draft Criminal Code for England and Wales defines oblique intention on the lines described above. It provides that a person acts intentionally with respect to a result ‘when he acts either in order to bring it about or being aware that it will occur in the ordinary course of events’.² This definition was criticised by Professor John Smith on the basis, *inter alia*, that it enables a person to be held as having intended a result that it was his purpose to avoid. According to the definition in cl. 18 of the code, a person who knows that there is a practical certainty that a result will happen and his whole purpose in acting is to avoid it will be considered as intending the result to happen. Professor Smith thought that such a person should not be treated as intending the result,

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1 See A. Ashworth, *Principles of Criminal Law*, 3rd edn (Oxford University Press: Oxford, 2003) 175–6.

2 Law Commission, *A Criminal Code for England and Wales*, Report No. 177 (London, 1989).

and this was one of his reasons for contending that the definition of oblique intention in the draft criminal code should be different from that cited above.³ The definition suggested by Professor Smith for intention was that a person acts intentionally with respect to a result when '(i) it is his purpose to cause that result; or (ii) his purpose is to cause some other result and he knows that, if he succeeds, his act will, in the ordinary course of events, cause that result'.⁴ A result which it is the actor's purpose to avoid is therefore not intended. And indeed in 1993 the Law Commission suggested that a person will be held as intentionally causing a result when it is his purpose to cause it or 'although it is not his purpose to cause it, he knows that it would occur in the ordinary course of events if he were to succeed in his purpose of causing some other result'.⁵ The Commission explained that one of the reasons for adopting the new definition for oblique intention was that 'it is prudent to provide specifically that a result that it is the actor's purpose to avoid cannot be intended'.⁶

But is it correct that oblique intention should not cover cases in which the actor's purpose, in acting, is to avoid the proscribed result? The answer is 'No'.

The reason given by Professor Smith for his view that in cases where the whole purpose of the actor is to avoid the proscribed result, the actor should not be treated as having an oblique intention with regard to that result, was that in such cases 'It does not make good sense to say that he intended that result'.⁷ He does not explain why this is so, in terms of a discussion of justice or policy, and it seems that he relies on a linguistic argument that in such cases it cannot be said that the result was caused intentionally. But it seems that the linguistic argument cannot be used as a justification for not treating such cases as ones of oblique intention. First, other commentators are also of the view that in typical cases of oblique intention, it is not appropriate to say, in plain English, that the actor acted with intent to cause the result.⁸ And if in relation to typical cases of oblique intention there is a readiness to accept a legal definition which differs from the definition of 'intention' in plain English, why should there not be the same acceptance in the cases under consideration here? Secondly, when enacting a code, the legislature may define certain terms in such a manner that their legal meaning will be different from the meaning they have in plain English and, if so, it can also do that in the context of cases in which it is the actor's purpose to avoid the proscribed result.

³ See J. C. Smith 'A Note on "Intention"' [1990] Crim LR 85 at 86. See also J. C. Smith and B. Hogan *Criminal Law*, 10th edn, J. Smith (ed.) (Butterworths: London, 2002) 76.

⁴ J. C. Smith, 'A Note on "Intention"' [1990] Crim LR 85 at 91.

⁵ Law Commission, *Legislating the Criminal Code: Offences against the Person and General Principles*, Report No. 218 (London, 1993). See cl. 1 of the Draft Criminal Law Bill.

⁶ Ibid. at 10.

⁷ Smith, above n. 4 at 86.

⁸ See e.g. J. Finnis, 'Intention and Side-effects' in R. G. Frey and C. W. Morris (eds), *Liability and Responsibility* (Cambridge University Press: Cambridge, 1991) 32, 46–7.

Law Commission illustration

The Law Commission justified the idea that a result cannot be intended if it was one that the actor's purpose in acting was to avoid by citing an example where conviction for the relevant intention crime would be inappropriate—a man who threw a child from a burning building, knowing that the child would thereby almost inevitably be seriously injured, even though the inevitable consequence of inaction would be the child's death from burning: the child was seriously injured. The Commission assumes that the man who threw the child should not be convicted of an offence of intentionally causing serious injury, stating that if a definition of oblique intention is adopted according to which a result cannot be intended if it was the actor's purpose to avoid such a result, it is a certainty that in the example provided there would not be a conviction of intentionally causing serious injury to another.⁹ But this argument is problematic. The example deals with a unique case in which the actor acts in order to save the life of a child, and if the actor in these circumstances should not be convicted, the decision not to convict should be based on a justification or on an excuse, such as necessity or duress of circumstances. For example, consider a case in which the motives of the actor are not laudable: a person wishes to practise her marksmanship. She puts an apple on the head of a child and shoots with a gun intending to hit the apple, but knowing that it is practically certain that she will miss and cause serious bodily harm to the child. If she misses and serious bodily harm is caused to the child, a conviction for intentionally causing serious bodily harm is required, but this will not be possible if adopting Professor Smith's definition of oblique intention or that of the Law Commission. This is because in that example, if the actor succeeds in achieving her purpose (hitting the apple), the injury to the child will not be caused.

Justifications for the oblique intent doctrine

It seems, therefore, that the arguments for justifying the idea that a result which it is the actor's purpose to avoid cannot be intended are not convincing. The proper way to deal with this question is to examine whether the rationale for convicting, in the context of intention crimes, where there is oblique intention, applies even to cases in which it is the actor's purpose to avoid the proscribed result. One possible rationale of the law that oblique intention is sufficient for conviction in many intention crimes is that the degree of moral culpability of an actor increases in proportion to the degree of probability in which he foresees the occurrence of the bad result. Therefore, when the actor foresees the result as practically certain, a very high degree of culpability exists and it is equivalent to the degree of culpability that exists in cases in which there is a desire to cause the result. Hence, oblique intention is sufficient for conviction.¹⁰ This rationale applies even to the type of cases discussed

⁹ See Law Commission, above n. 5 at 10.

¹⁰ Cf. S. Z. Feller, 'The Knowledge Rule' (1970) 5 Isr LR 352 at 359–60.

in this article, since in these cases the proscribed result is foreseen as practically certain, and therefore the degree of moral culpability may be viewed as equivalent to that which exists in cases in which the actor wants the result to ensue.

A second possible rationale for the doctrine of oblique intention is that there is a common mental denominator between cases of direct intention and cases of oblique intention because in both of them the actor chooses to cause the proscribed result.¹¹ A person who acts in order to cause the proscribed result certainly chooses to cause it. A person who does not act in order to cause the proscribed result but when he acts he knows that there is a practical certainty that his action will cause the proscribed result also chooses to cause that result. Therefore, the degree of culpability that exists in cases of oblique intention is identical to that which exists in cases of direct intention, and because of this oblique intention is sufficient for conviction in many intention crimes. Now, it might be suggested that in cases in which it is the actor's purpose in acting to avoid the proscribed result, it cannot be said that the actor chooses to cause the proscribed result (because he acts in order to avoid it) and therefore in such cases the actor cannot be considered as having oblique intention. This argument is open to criticism. It should be kept in mind that the discussion assumes that in cases in which the actor's purpose is to avoid the proscribed result, the degree of probability in which the actor foresees the proscribed result is the same as in typical cases of oblique intention, i.e. practical certainty. If the term 'practical certainty' is understood so that in cases of practical certainty the actor simply cannot hope that the result will not ensue, then the cases considered in this article cannot exist in reality.

However, Professor Smith and the Law Commission think that such cases may exist in reality and therefore they should be understood as assuming that in some cases of 'practical certainty' the actor can form a hope that the result will not ensue. If so, in some of the typical cases of practical certainty, the actor may also hope that the result will not ensue. But in cases in which the actor forms such a hope, he should not be seen as choosing to cause the proscribed result, and therefore should not be convicted of an intention crime. Professor Smith and the Law Commission do not suggest that in such cases the doctrine of oblique intention will not apply. Perhaps their approach is that in cases of practical certainty, a hope that the result will not occur is not real enough to be taken seriously. But if so, why should it be taken seriously in the cases in which it is the actor's purpose to avoid the proscribed result? It therefore seems that either the doctrine of oblique intention should not be based on the element of 'choice' or it should be said that in the cases discussed by Professor Smith and the Law Commission there is also a choice to cause the result and therefore the actor should be considered as having oblique intention with respect to the result.

11 See R. A. Duff, *Criminal Attempts* (Oxford University Press: Oxford, 1996) 369; M. Kremnitzer, 'Comment' in R. Gavison (ed.), *Issues in Contemporary Legal Philosophy* (Oxford University Press: Oxford, 1987) 277, 286.

Conclusion

It is submitted in conclusion that the rule concerning cases in which the actor is practically certain that the proscribed result will ensue and the actor's purpose is to avoid the proscribed result should be (assuming that such cases exist in reality) that the actor has to be considered as obliquely intending the proscribed result.

Oblique Intention Definition:

(Clause 18 of the Draft Criminal Code) Oblique intention is when an actor does not aim to cause a result directly but is aware that it is practically certain to occur as a consequence of their actions.

Direct intention involves an actor wanting to bring about the result, while oblique intention applies when the actor foresees the result as almost certain, even if it's not their purpose.

Law Commission's Position:

The Law Commission defined oblique intention as applying only when a person acts either to cause a result or knows that the result will occur in the ordinary course of events.

It argued that if an actor's purpose is to avoid a result, they should not be considered as having intended the result, even if it is practically certain to occur.

Criticism of the Law Commission's Definition:

The article argues that the Law Commission's position is flawed. It suggests that even if an actor's purpose is to avoid the result, if they know that the result is practically certain to happen, they should still be considered as having oblique intention.

The author believes that the rationale for oblique intention—particularly moral culpability based on the degree of certainty of the result—applies in these cases as well.

Justifications for Oblique Intention:

Moral culpability: If an actor foresees the result as practically certain, their degree of moral culpability is the same as if they desired the result, making oblique intention sufficient for conviction.

Choice to cause the result: Even if an actor's purpose is to avoid the result, if they know it is practically certain to happen, they are still choosing to take the risk, which makes oblique intention applicable.