HOUSE OF LORDS

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Judgments - Regina *v.* Woollin

HOUSE OF LORDS

Lord Browne-Wilkinson Lord Nolan Lord Steyn
Lord Hoffmann Lord Hope of Craighead

OPINIONS OF THE LORDS OF APPEAL FOR JUDGMENT IN THE CAUSE

REGINA

v.

WOOLLIN
(APPELLANT)

(ON APPEAL FROM THE COURT OF APPEAL (CRIMINAL DIVISION))

Oral Judgement 25 June 1998
Reasons: 22 July 1998

LORD BROWNE-WILKINSON

My Lords,

I have read in draft the speeches prepared by my noble and learned friends, Lord Steyn and Lord Hope of Craighead. I too assented to this appeal being allowed, the conviction for murder quashed, the conviction for manslaughter substituted and the matter remitted to the Court of Appeal to pass sentence.

LORD NOLAN

My Lords,

I have had the advantage of reading in draft the speeches prepared by my noble and learned friends, Lord Steyn and Lord Hope of Craighead. I agree with them, and I have nothing to add.

LORD STEYN

My Lords,

By an order made on 25 June 1998 your Lordships' House allowed this appeal; quashed the conviction of murder and substituted a conviction of manslaughter; and remitted the matter to the Court of Appeal to pass sentence. I now give my reasons for assenting to that course.

The case in a nutshell

The appellant lost his temper and threw his three-month-old son on to a hard surface. His son sustained a fractured skull and died. The appellant was charged with murder. The Crown did not contend that the appellant desired to kill his son or to cause him serious injury. The issue was whether the appellant nevertheless had the intention to cause serious harm. The appellant denied that he had any such intention. Subject to one qualification, the Recorder of Leeds summed up in accordance with the guidance given by Lord Lane, C.J. in *Nedrick* [1986] 1 W.L.R. 1025. The guidance of Lord Lane had been as follows (at 1028F):

> "Where the charge is murder and in the rare cases where the simple direction [that it is for the jury simply to decide whether the defendant intended to kill or to do serious bodily harm (p. 1027)] is not enough, the jury should be directed that they are not entitled to infer the necessary intention, unless they feel sure that death or serious bodily harm was a virtual certainty (barring some unforeseen intervention) as a result of the defendant's actions and that the defendant appreciated that such was the case." (Words in brackets added.)

But towards the end of his summing up the judge directed the jury that if they were satisfied that the appellant "must have realised and appreciated when he threw that child that there was a substantial risk that he would cause serious injury to it, then it would be open to you to find that he intended to cause injury to the child and you should convict him of murder." The jury found that the appellant had the necessary intention; they rejected a defence of provocation; and they convicted the appellant of murder. On appeal to the Court of Appeal (Criminal Division) the appellant's principal ground of appeal was that by directing the jury in terms of substantial risk the judge unacceptably enlarged the mental element of murder. The Court of Appeal rejected this ground of appeal and dismissed the appeal: [1997] 1 Crim.App.R. 97. Giving the judgment of the Court of Appeal Roch L.J. observed about *Nedrick* (107F) that:

> ". . . although the use of the phrase 'a virtual certainty' may be desirable and may be necessary, it is only necessary where the evidence of intent is limited to the admitted actions of the accused and the consequences of those actions. It is not obligatory to use that phrase or one that means the same thing in cases such as the present where there is other evidence for the jury to consider."

The Court of Appeal certified the following questions as of general importance:

> "1. In murder, where there is no direct evidence that the purpose of a defendant was to kill or to inflict serious injury on the victim, is it necessary to direct the jury that they may only infer an intent to do serious injury, if they are satisfied (a) that serious bodily harm was a virtually certain consequence of the defendant's voluntary act and (b) that the defendant appreciated that fact?
>
> "2. If the answer to question 1 is 'yes,' is such a direction necessary in all cases or is it only necessary in cases where the sole evidence of the defendant's intention is to be found in his actions and their consequence to the victim?"

On appeal to your Lordships' House the terrain of the debate covered the correctness in law of the direction recommended by Lord Lane C.J. in *Nedrick* and, if that direction is sound, whether it should be used only in the limited category of cases envisaged by the Court of Appeal. And counsel for the appellant renewed his submission that by directing the jury in terms of substantial risk the judge illegitimately widened the mental element of murder.

The directions of the judge on the mental element

The facts of the case are fully set out in the careful judgment of Roch L.J: [1997] 1 Crim.App.R. 97. Given that the appeal is concerned with questions of law it is unnecessary at this stage to add to what I have already said about the state of the evidence when the judge came to sum up. But it is necessary to set out the judge's relevant directions of law with a brief explanation of the context and implications. The judge reminded the jury that the Crown did not allege an intention to kill. He accordingly concentrated on intention to do really serious bodily harm. He further reminded the jury that the Crown accepted that the defendant did not want to cause the child serious injuries. The judge then directed the jury as follows:

> "In looking at this, you should ask yourselves two questions and I am going to suggest that you write them down. First of all, how probable was the consequence which resulted from his throw, the consequence being, as you know, serious injury? How probable was the consequence of serious injury which resulted from his throw? Secondly, did he foresee that consequence in the second before or at the time of throwing?
>
> "The second question is of particular importance, members of the jury, because he could not have intended serious harm could he, if he did not foresee the consequence and did not appreciate at the time that serious harm might result from his throw? If he thought, or may have thought, that in throwing the child he was exposing him to only the slight risk of being injured, then you would probably readily conclude that he did not intend to cause serious injury, because it was outside his contemplation that he would be seriously injured. But the defence say here that he never thought about the consequence at all when he threw the child. He did not give it a moment's thought. Again, if that is right, or may be right, you may readily conclude that he did not appreciate that serious harm would result. *It follows from that, if that is how you find, that you cannot infer that he intended to do Karl really serious harm unless you are sure that serious harm was a virtual certainty from what he was doing and he appreciated that that was the case.*
>
> "So, members of the jury, that is how you should approach this question- and it is a vital question in the case-'Are we sure that the prosecution have established that the defendant intended to cause Karl serious harm at the time that he threw him?'" (My emphasis added.)

The first two questions identified by the judge appear in Lord Lane's guidance in *Nedrick:* at p. 1028B-D. The underlined passage is a classic direction in accordance with *Nedrick*: at p. 1028F.

After an overnight adjournment the judge continued his summing up. He returned to the mental element which had to be established in order to find the appellant guilty of murder. On this occasion the judge did not use the *Nedrick* direction. Instead the judge directed the jury as follows:

> "If you think that he had not given any thought to the consequences of what he was doing before he did it, then the Crown would have failed to prove the necessary intent, the intent to cause really serious harm, for murder and you should acquit him of murder and convict him of manslaughter.
>
> "If, on the other hand, you reject that interpretation and are quite satisfied that he was aware of what he was doing and must have realised and appreciated when he threw that child that there was a substantial risk that he would cause serious injury to it, then it would be open to you to find that he intended to cause injury to the child and you should convict him of murder."

It is plain, and the Crown accepts, that a direction posing an issue as to appreciation of a "substantial risk" of causing serious injury is wider than a direction framed in terms of appreciation of a "virtual certainty (barring some unforeseen intervention)." If Lord Lane correctly stated the law in *Nedrick*, the judge's direction in terms of substantial risk was wrong. But the Crown argued, as I have indicated, that *Nedrick* was wrongly decided or, alternatively, that the principle as enunciated by Lord Lane does not apply to the present case.

The premises of the appeal

The first premise of any examination of the issues raised by this appeal is that it is at present settled law that a defendant may be convicted of murder if it is established (1) that he had an intent to kill or (2) that he had an intent to cause really serious bodily injury: *Reg. v. Cunningham* [1982] A.C. 566. In regard to (2) the intent does not correspond to the harm which resulted, i.e. the causing of death. It is a species of constructive crime: see my speech in *Reg. v. Powell (Anthony)* [1997] 3 W.L.R. 959, 966D-967C and Lord Mustill's concurring observations, at p. 963H. This feature of the law of murder may have contributed to the problems which courts have experienced with mens rea in murder. But, unless the House of Lords or Parliament have occasion to revisit this point, the sufficiency of an intent to cause serious harm is the basic assumption upon which any analysis must proceed. Secondly, I approach the issues arising on this appeal on the basis that it does not follow that "intent" necessarily has precisely the same meaning in every context in the criminal law. The focus of the present appeal is the crime of murder.

The context of the decision in Nedrick

My Lords, since the early sixties the House has on a number of occasions considered the mens rea required to establish murder. It would be right to acknowledge that none of these decisions satisfactorily settled the law. In *Director of Public Prosecutions v. Smith* [1961] A.C. 290 the defendant tried to avoid arrest and killed a policeman by driving off with the policeman clinging to the car. The House ruled (1) that the defendant committed murder because death or grievous bodily harm was foreseen by him as a "likely" result of his act and (2) that he was deemed to have foreseen the risk a reasonable person in his position would have foreseen. There was widespread and severe criticism of the second part of the decision in *Smith*. In retrospect it is now clear the criminal law was set on a wrong course. By section 8 of the Criminal Justice Act 1967 Parliament reversed the effect of *Smith*. Since then one thing at least has been clear: the mental element of murder is concerned with the subjective question of what was in the mind of the man accused of murder. In *Reg. v. Hyam* [1975] A.C. 55 the House of Lords had an opportunity to consider what state of mind, apart from the case where a defendant acts with the purpose of killing or causing serious injury, may be sufficient to constitute the necessary intention. The defendant had burnt down the house of her rival in love, thereby killing her children. The judge directed the jury to convict the defendant of murder if she knew that it was highly probable that her act would cause death or serious bodily harm. The jury convicted her of murder. The House upheld the conviction by a majority of three to two. But the Law Lords constituting the majority gave different reasons: one adopted the "highly probable" test; another thought a test of probability was sufficient; and a third thought it was sufficient if the defendant realised there was "a serious risk." The law of murder was in a state of disarray. The decision in *Hyam* was not only criticised by academic writers but was badly received in the profession. The next opportunity for the House of Lords to examine the mental element of murder came in *Reg. v. Moloney* [1985] A.C. 905. The clear effect of *Moloney* was to narrow down the broad approach to mens rea adopted in *Hyam*. In the leading judgment Lord Bridge of Harwich observed in *Moloney* with the approval of all the Law Lords (at 925H):

> "But looking on their facts at the decided cases where a crime of specific intent was under consideration, including *Reg. v. Hyam* [1975] A.C. 55 itself, they suggest to me that 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." (My emphasis added.)

Lord Bridge paraphrased this idea in terms of "moral certainty" (at 926F). In the result the House adopted a narrower test of what may constitute intention which is similar to the "virtual certainty" test in *Nedrick*: see also the answer to the certified question in *Moloney*, pp. 908D and 929H. It is true that Lord Bridge said that in the "rare cases" in which it might be necessary to direct a jury by reference to foresight of consequences it would be sufficient to place the following two questions before the jury (at 929G):

> "First, was death or really serious injury in a murder case (or whatever relevant consequence must be proved to have been intended in any other case) a natural consequence of the defendant's voluntary act? Secondly, did the defendant foresee that consequence as being a natural consequence of his act? The jury should then be told that if they answer yes to both questions it is a proper inference for them to draw that he intended that consequence."

It seems clear that Lord Bridge used "natural consequence" as implicitly conveying the concept of a high probability. But the guidance did not make that clear. The suggested direction soon caused practical difficulties. The problems caused by the guidance arose a year later in acute form in *Reg. v. Hancock and Shankland* [1986] A.C. 455. Two miners on strike had pushed a concrete block from a bridge onto a three-lane highway on which a miner was being taken to work by taxi. The concrete block hit the taxi and killed the driver. The defendants were charged with murder. The defendants said that they merely intended to block the road and to frighten the non-striking miner. Following the guidance in *Moloney* the judge directed the jury to ask themselves: "Was death or serious injury a natural consequence of what was done? Did a defendant foresee that consequence as a natural consequence?" The jury convicted the defendants of murder. The Court of Appeal held that the *Moloney* guidelines, and the judge's direction in terms of those guidelines, were defective and potentially misleading. The conviction of murder was quashed. There was an appeal to the House of Lords. In the only speech Lord Scarman accepted that the *Moloney* guidelines were misleading since they omitted any reference to probability. Lord Scarman observed (at 473F):

> "They also require an explanation that the greater the probability of a consequence the more likely it is that the consequence was foreseen and that if that consequence was foreseen the greater the probability is that that consequence was also intended. But juries also require to be reminded that the decision is theirs to be reached upon a consideration of all the evidence."

In the Court of Appeal in *Hancock* Lord Lane had formulated guidelines for the assistance of the juries: 473G. Lord Scarman was not persuaded that guidelines were desirable. The House did not, however, rule out guidelines but emphasized that they should be sparingly used.

The problem facing the Court of Appeal in Nedrick

In *Hancock* Lord Scarman did not express disagreement with the test of foresight of a probability which is "little short of overwhelming" as enunciated in *Moloney.* Lord Scarman also did not express disagreement with the law underlying Lord Lane's model direction in *Hancock* which was based on a defendant having "appreciated that what he did was highly likely to cause death or really serious bodily injury." Lord Scarman merely said that model directions were generally undesirable. Moreover, Lord Scarman thought that where explanation is required the jury should be directed as to the relevance of probability without expressly stating the matter in terms of any particular level of probability. The manner in which trial judges were to direct juries was left unclear. Moreover, in practice juries sometimes ask probing questions which cannot easily be ignored by trial judges. For example, imagine that in a case such as *Hancock* the jury sent a note to the judge to the following effect:

> "We are satisfied that the defendant, though he did not want to cause serious harm, knew that it was probable that his act would cause serious bodily harm. We are not sure whether a probability is enough for murder. Please explain."

One may alter the question by substituting "highly probable" for "probable". Or one may imagine the jury asking whether a foresight of a "substantial risk" that the defendant's act would cause serious injury was enough. What is the judge to say to the jury? *Hancock* does not rule out an answer by the judge but it certainly does not explain how such questions are to be answered. It is well known that judges were sometimes advised to deflect such questions by the statement that "intention" is an ordinary word in the English language. That is surely an unhelpful response to what may be a sensible question. In these circumstances it is not altogether surprising that in *Nedrick* the Court of Appeal felt compelled to provide a model direction for the assistance of trial judges.

In *Nedrick* the appellant poured paraffin through the front door of a house and set it alight. In the fire a child died. The facts were remarkably similar to those in *Hyam*. The trial judge in *Nedrick* framed his direction in terms of foresight of a high probability that the act would result in serious bodily injury. Lord Lane observed (at 1028C-F):

> "When determining whether the defendant had the necessary intent, it may therefore by helpful for a jury to ask themselves two questions. (1) How probable was the consequence which resulted from the defendant's voluntary act? (2) Did he foresee that consequence?
>
> "If he did not appreciate that death or serious harm was likely to result from his act, he cannot have intended to bring it about. If he did, but thought that the risk to which he was exposing the person killed was only slight, then it may be easy for the jury to conclude that he did not intend to bring about that result. On the other hand, if the jury are satisfied that at the material time the defendant recognised that death or serious harm would be virtually certain (barring some unforeseen intervention) to result from his voluntary act, then that is a fact from which they may find it easy to infer that he intended to kill or do serious bodily harm, even though he may not have had any desire to achieve that result. . . . .
>
> *"Where the charge is murder and in the rare cases where the simple direction is not enough, the jury should be directed that they are not entitled to infer the necessary intention, unless they feel sure that death or serious bodily harm was a virtual certainty (barring some unforeseen intervention) as a result of the defendant's actions and that the defendant appreciated that such was the case.*
>
> "Where a man realises that it is for all practical purposes inevitable that his actions will result in death or serious harm, the inference may be irresistible that he intended that result, however little he may have desired or wished it to happen. The decision is one for the jury to be reached upon a consideration of all the evidence." (My emphasis added)

While I have thought it right to give the full text of Lord Lane's observations, it is obvious that the underlined passage contains the critical direction. The effect of the critical direction is that a result foreseen as virtually certain is an intended result.

The direct attack on Nedrick

It is now possible to consider the Crown's direct challenge to the correctness of *Nedrick*. First, the Crown argued that *Nedrick* prevents the jury from considering all the evidence in the case relevant to intention. The argument is that this is contrary to the provisions of section 8 of the Criminal Justice Act 1967. This provision reads as follows:

> "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 reasons 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."

Paragraph (*a*) is an instruction to the judge and is not relevant to the issues on this appeal. The Crown's argument relied on paragraph (*b*) which is concerned with the function of the jury. It is no more than a legislative instruction that in considering their findings on intention or foresight the jury must take into account all relevant evidence: see *Edward Griew, States of Mind, Presumptions and Inferences, essay in Criminal Law: Essays in Honour of J. C. Smith, ed. Peter Smith,* (1987), 68 at 76-77. *Nedrick* is undoubtedly concerned with the mental element which is sufficient for murder. So, for that matter, in their different ways were *Smith, Hyam, Moloney* and *Hancock*. But, as Lord Lane emphasised in the last sentence of *Nedrick*, "The decision is one for the jury to be reached upon a consideration of all the evidence."

Nedrick does not prevent a jury from considering all the evidence: it merely stated what state of mind (in the absence of a purpose to kill or to cause serious harm) is sufficient for murder. I would therefore reject the Crown's first argument.

In the second place the Crown submitted that *Nedrick* is in conflict with the decision of the House in *Hancock*. Counsel argued that in order "to bring some coherence to the process of determining intention Lord Lane specified a minimum level of foresight, namely virtual certainty". But that is not in conflict with the decision in *Hancock* which, apart from disapproving Lord Bridge's "natural consequence" model direction, approved *Moloney* in all other respects. And in *Moloney* Lord Bridge said that if a person foresees the probability of a consequence as little short of overwhelming, this "will suffice *to establish* the necessary intent." Nor did the House in *Hancock* rule out the framing of model directions by the Court of Appeal for the assistance of trial judges. I would therefore reject the argument that the guidance given in *Nedrick* was in conflict with the decision of the House in *Hancock*.

The Crown did not argue that as a matter of policy foresight of a virtual certainty is too narrow a test in murder. Subject to minor qualifications, the decision in *Nedrick,* was widely welcomed by distinguished academic writers: see J.C. Smith (1986) Crim.L.R. 742-744; *Glanville Williams*, *The Mens Rea for Murder: Leave It Alone*, 105 (1989) L.Q.R. 387; J. R. Spencer, [1986] C.L.J. 366-367; *Andrew Ashworth, Principles of Criminal Law*, 2nd ed. (1995), p. 172. It is also of interest that it is very similar to the threshold of being aware "that it *will* occur in the ordinary course of events" in the Law Commission's draft Criminal Code: compare also *J.C. Smith, A Note on Intention* (1990) Cr. L.R. 85, at 86. Moreover, over a period of twelve years since *Nedrick* the test of foresight of virtual certainty has apparently caused no practical difficulties. It is simple and clear. It is true that it may exclude a conviction of murder in the often cited terrorist example where a member of the bomb disposal team is killed. In such a case it may realistically be said that the terrorist did not foresee the killing of a member of the bomb disposal team as a virtual certainty. That may be a consequence of not framing the principle in terms of risk taking. Such cases ought to cause no substantial difficulty since immediately below murder there is available a verdict of manslaughter which may attract in the discretion of the court a life sentence. In any event, as Lord Lane eloquently argued in a debate in the House of Lords, to frame a principle for particular difficulties regarding terrorism "would produce corresponding injustices which would be very hard to eradicate": Hansard (H.L. Debates), 6 November 1989, col. 480. I am satisfied that the *Nedrick* test, which was squarely based on the decision of the House in *Moloney*, is pitched at the right level of foresight.

The argument that Nedrick has limited application.

The Court of Appeal held that the phrase "a virtual certainty" should be confined to cases where the evidence of intent is limited to admitted actions of the accused and the consequences of those actions. It is not obligatory where there is other evidence to consider. The Crown's alternative submission on the appeal was to the same effect. This distinction would introduce yet another complication into a branch of the criminal law where simplicity is of supreme importance. The distinction is dependent on the vagaries of the evidence in particular cases. Moreover, a jury may reject the other evidence to which the Court of Appeal refers. And in preparing his summing up a judge could not ignore this possibility. If the Court of Appeal's view is right, it might compel a judge to pose different tests depending on what evidence the jury accepts. For my part, and with the greatest respect, I have to say that this distinction would be likely to produce great practical difficulties. But, most importantly, the distinction is not based on any principled view regarding the mental element in murder. Contrary to the view of the Court of Appeal, I would also hold that section 8(*b*) of the Act of 1967 does not compel such a result.

In my view the ruling of the Court of Appeal was wrong. It may be appropriate to give a direction in accordance with *Nedrick* in any case in which the defendant may not have desired the result of his act. But I accept the trial judge is best placed to decide what direction is required by the circumstances of the case.

The disposal of the present appeal

It follows that judge should not have departed from the *Nedrick* direction. By using the phrase "substantial *risk*" the judge blurred the line between intention and recklessness, and hence between murder and manslaughter. The misdirection enlarged the scope of the mental element required for murder. It was a material misdirection. At one stage it was argued that the earlier correct direction "cured" the subsequent incorrect direction. A misdirection cannot by any means always be cured by the fact that the judge at an earlier or later stage gave a correct direction. After all, how is a jury to choose between a correct and an incorrect direction on a point of law? If a misdirection is to be corrected, it must be done in the plainest terms: *Archbold, Criminal Pleading, Evidence & Practice,* 1998, para. 4-374.

That is, however, not the end of the matter. For my part, I have given anxious consideration to the observation of the Court of Appeal that, if the judge had used the phrase "a virtual certainty," the verdict would have been the same. In this case there was no suggestion of any other ill-treatment of the child. It would also be putting matters too high to say that on the evidence before the jury it was an open-and-shut case of murder rather than manslaughter. In my view the conviction of murder is unsafe. The conviction of murder must be quashed.

The status of Nedrick

In my view Lord Lane's judgment in *Nedrick* provided valuable assistance to trial judges. The model direction is by now a tried-and-tested formula. Trial judges ought to continue to use it. On matters of detail I have three observations, which can best be understood if I set out again the relevant part of Lord Lane's judgment. It was as follows:

> "(A) When determining whether the defendant had the necessary intent, it may therefore be helpful for a jury to ask themselves two questions. (1) How probable was the consequence which resulted from the defendant's voluntary act? (2) Did he foresee that consequence?
>
> "If he did not appreciate that death or serious harm was likely to result from his act, he cannot have intended to bring it about. If he did, but thought that the risk to which he was exposing the person killed was only slight, then it may be easy for the jury to conclude that he did not intend to bring about that result. On the other hand, if the jury are satisfied that at the material time the defendant recognised that death or serious harm would be virtually certain (barring some unforeseen intervention) to result from his voluntary act, then that is a fact from which they may find it easy to infer that he intended to kill or do serious bodily harm, even though he may not have had any desire to achieve that result.
>
> "(B) Where the charge is murder and in the rare cases where the simple direction is not enough, the jury should be directed that they are not entitled to infer the necessary intention, unless they feel sure that death or serious bodily harm was a virtual certainty (barring some unforeseen

> intervention) as a result of the defendant's actions and that the defendant appreciated that such was the case.
>
> "(C) Where a man realises that it is for all practical purposes inevitable that his actions will result in death or serious harm, the inference may be irresistible that he intended that result, however little he may have desired or wished it to happen. The decision is one for the jury to be reached upon a consideration of all the evidence." (Lettering added)

First, I am persuaded by the speech of my noble and learned friend, Lord Hope of Craighead, that it is unlikely, if ever, to be helpful to direct the jury in terms of the two questions set out in (A). I agree that these questions may detract from the clarity of the critical direction in (B). Secondly, in their writings previously cited *Glanville Williams, J.C. Smith and Andrew Ashworth* observed that the use of the words "to infer" in (B) may detract from the clarity of the model direction. I agree. I would substitute the words "to find." Thirdly, the first sentence of (C) does not form part of the model direction. But it would always be right for the judge to say, as Lord Lane put it, that the decision is for the jury upon a consideration of all the evidence in the case.

The certified questions

Given my conclusions the certified questions fall away.

LORD HOFFMANN

My Lords,

I have had the advantage of reading in draft the speeches prepared by my noble and learned friends, Lord Steyn and Lord Hope of Craighead. For the reasons which they give, I agree that this appeal should be allowed, the conviction for murder quashed, the conviction for manslaughter substituted and the matter remitted to the Court of Appeal to pass sentence.

LORD HOPE OF CRAIGHEAD

My Lords,

I have had the advantage of reading in draft the speech which has been prepared by my noble and learned friend, Lord Steyn. I agree with it, and I wish to add only these brief comments.

I attach great importance to the search for a direction which is both clear and simple. It should be expressed in as few words as possible. That is essential if it is to be intelligible. A jury cannot be expected to absorb and apply a direction which attempts to deal with every situation which might conceivably arise. I think that the *Nedrick* direction, which is (B) in Lord Steyn's analysis, fulfils this requirement admirably. But the substitution of the word "find" for "infer" is an improvement, in the interests of clarity, and I also would make this change to it. However I regard the questions in (A), which are derived from Lord Scarman's speech in *Reg. v. Hancock and Shankland* [1986] A.C. 455, 473F, as detracting from the clarity of the critical direction. I would prefer to say therefore that it is unlikely, if ever, to be helpful to tell the jury that they should ask themselves these questions. I think that it would be better to give them the critical direction, and then to tell them that the decision was theirs upon a consideration of all the evidence.

As for the terrorist example, I think that Lord Mustill's observations in *Attorney-General's Reference (No. 3 of 1994)* [1998] A.C. 245, 261D-F are also relevant. In that passage he gave as an example of "indiscriminate malice," which belongs to the category of deliberate murder where the defendant consciously intended to kill the victim, the example of the terrorist who hides a bomb in an aircraft. As he explained, the intention is aimed at the class of potential victims of which the actual victim forms part, even although the identity of the ultimate victim is not yet fixed at the start when the intent is combined with the actus reus which ultimately causes the explosion. The answer to the question whether those who attempt to dispose of the bomb are within that class will depend on the circumstances. All that needs to be said is that it may not be necessary in every such case to rely on the alternative verdict of manslaughter.

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