DIRECTOR OF PUBLIC PROSECUTIONS v. SMITH[1]

Criminal law—Presumption—Intention—Natural and probable consequence of acts—Homicide

S, while driving a car containing two sacks of stolen goods, was stopped by a policeman, V. Fearing arrest, he drove off at high speed while V remained clinging to the side of the car. V eventually fell off and was killed by a car coming in the opposite direction. S was charged with murder.

At his trial S claimed that he had no intention of harming the policeman, but accelerated merely in a blind effort to avoid him, without ever adverting to the possible consequences. As a result, he claimed, unless the prosecution could show him to have had the requisite intent to cause grievous bodily harm, his offence must be no more than manslaughter. The jury, however, found him guilty of capital murder,[2] after a direction by Donovan J. in the following terms:

> If you are satisfied that . . . he must as a reasonable man have contemplated that grievous bodily harm was likely to result to that officer . . . and that such harm did happen and the officer died in consequence, then the accused is guilty of capital murder . . .[3]

Against this passage S appealed on the ground that it involved a misdirection as to the true test of criminal intention. For the direction involved ascertainment of 'intention' by reference to the mind of the 'reasonable man', not merely as a guide to the plausibility of the defence, but rather as an imperative presumption of intention. S contended that 'malice', the requirement which distinguishes murder from manslaughter, had always involved an intention on the part of the accused either to kill or to cause grievous bodily harm,[4] and further, that this had always meant his real intention, whereas failure to measure up to an objective standard had been negligence. Using the test prescribed by Donovan J., the sole question for the jury was what S '*must*[4a] as a reasonable man have contemplated . . .' and evidence of his actual intention would be irrelevant to this issue. The Court of Criminal Appeal upheld the appeal,[5] holding that 'there always remained the question whether the appellant really did . . . realize what was the degree of likelihood of serious injury'.[6]

On appeal by the Director of Public Prosecutions to the House of Lords the Lord Chancellor, Viscount Kilmuir, in delivering a speech with which all the other Lords of Appeal present concurred, allowed the appeal, and said that the principle stated by the trial judge 'is that upon which the Courts have always acted'.[7] Thus, once it could be shown that a reasonable man would have foreseen the consequences, S was to be held responsible. For the law concerns itself with foresight when determining intention,[8]

[1] [1960] 3 W.L.R. 546; [1960] 3 All E.R. 161 House of Lords; Viscount Kilmuir L.C., Lord Goddard, Lord Tucker, Lord Denning and Lord Parker.
[2] Homicide Act 1957 (U.K.), s. 5. [3] [1960] 3 W.L.R. 546, 549.
[4] Except of course in the case of constructive murder where malice is imputed.
[4a] Writer's italics. [5] [1960] 3 W.L.R. 92. [6] *Ibid.* 98.
[7] [1960] 3 W.L.R. 546, 553.
[8] 'Intention' in the law is largely bound up with responsibility, and must not be confused with the connotations of motive it bears in everyday speech. See *R. v. Hicklin* (1868) L.R. 3 Q.B. 360. Consequently a man is held criminally responsible for consequences of his acts which he foresees as probable, even though such consequences may not be sought by him *per se*. See 'Intention Motive and Responsibility' (1945) xix *Aristotelian Society Supplementary* 230.

and, accepting without further aetiological discussion the jury's finding of sufficient connexion between the harm resulting and that 'intended', S was guilty of murder.

It is, however, doubtful whether any such principle can be discerned in the many decisions before the House. First cited was the 'persuasive authority'[9] of *The Common Law,* by Oliver Wendell Holmes. While this lends definite support to the proposition suggested, it is submitted that its authority is slender in the face of adverse criticism by many academic commentators.[10]

R. v. Faulkner[11] lends doubtful support to the Lord Chancellor's case. Although he cites it as a case where a sailor was convicted of arson, when, with intent to steal, he tapped a cask of rum thus igniting it and his ship, in fact the case involved the quashing of the conviction by the Court of Crown Cases Reserved for Ireland.[12] This in itself renders the passage cited a mere *obiter dictum,* but it is further submitted that the section quoted gives a misleading view of the whole case. For Palles C.B. there concerned himself with constructive malice, in which case intention was irrelevant, rather than with a general theory of objective ascertainment of intention as in the case before the House.

Equally doubtful as authority in this case is the passage cited from *Director of Public Prosecutions v. Beard*[13] as follows:

> . . . *Meade's* case in its wider interpretation is not, and cannot be, supported by authority. The difficulty has arisen largely because the Court of Criminal Appeal used language which has been construed as suggesting that the test of the condition of mind of the prisoner is not whether he was incapable of forming the intent, but whether he was incapable of foreseeing or measuring the consequences of the act.[14]

In this passage it seems that Lord Birkenhead meant merely to limit *R. v. Meade*[15] to its true *ratio decidendi.* It is the 'wider interpretation' which is abrogated, in order to remove the misconception that *Meade's* case required a knowledge of danger in all cases. Rather, the rule is that foresight of the consequences is relevant only in so far as it bears on the intent, and while drunkenness may limit perception of the consequences, in felony-murder such foresight forms no part of the intent. Lord Birkenhead distinguished *Meade's* case thus:

> In *Meade's* case the crime charged was that death arose from violence done with intent to cause grievous bodily harm. In this case the death arose from a violent act done in furtherance of what was in itself a felony of violence. In *Meade's* case, therefore, it was essential to prove the specific intent; in *Beard's* case it was only necessary to prove that the violent act causing death was done in furtherance of the felony of rape.[16]

Thus *Meade's* case was not overruled as the passage cited by the Lord Chancellor implies, and it is submitted that if the inference of foresight

[9] [1960] 3 W.L.R. 546, 554.
[10] See, for instance, Jerome Hall, 'Interrelations of Criminal Law and Torts' (1943) 43 *Columbia Law Review* 753, 760 ff.; Hall, *General Principles of Criminal Law* (1960) 146 ff.
[11] (1877) 13 Cox C.C. 550. [12] *Ibid.* [13] [1920] A.C. 479.
[14] *Ibid.* 503, 504. [15] [1909] 1 K.B. 895. [16] [1920] A.C. 479, 504.

may be negatived by proof of drunkenness, then the law should equally take cognizance of other limitations of perception.

But there are authorities in favour of the objective view. While the direction in *R. v. Lumley*[17] is explicable as an early attempt to limit the harshness of the felony-murder rule in relation to abortion, by the requirement that death be reasonably contemplated, *R. v. Philpot*[18] and *R. v. Ward*[19] both involved directions substantially similar to the one given in this case. In the latter case the test was given as 'what a reasonable man would or would not contemplate'.[20] But the test suggested by Lord Goddard C.J. in that case is itself largely subjective, for the 'reasonable man' is defined as 'a person who cannot set up a plea of insanity . . .'.[21] It would seem that such a wide definition removes much of the objectivity from the test, for before a positive inference may be drawn the jury must decide that the reasonable man with the lowest degree of perception 'must' have foreseen the injury. Hence, *a fortiori,* if such an inference is drawn the accused could not deny it without claiming insanity. Thus it must be doubted whether Lord Goddard advocated a practically objective test at all. Such would have been totally alien to his stated views in *R. v. Steane*[22] which, although passed over by Viscount Kilmuir as 'a very special case',[23] nevertheless contained cogent *obiter dicta* in support of the subjective view.[24]

But whether or not Lord Goddard intended a truly objective test to limit *R. v. Steane,* there can be little doubt that in practice the jury would indulge in self-identification with the reasonable man no matter how his intelligence may be defined. In this way the House of Lords, in defining the reasonable man somewhat less broadly, whilst in theory going beyond the decision in *R. v. Ward,*[25] were in fact merely giving judicial recognition to a *de facto* situation. For the Lord Chancellor was careful to define the reasonable man as 'an ordinary man capable of reasoning . . .'[26] who, while less perceptive than either 'the man on the Clapham omnibus'[27] or his American colleague mowing the lawn in his shirtsleeves, is at least not verging on insanity. However, it would seem that the assurance that the distinction between the reasonable man in the civil and the criminal jurisdiction 'would be understood by a jury'[28] can only be accepted with some reservation.

The foregoing discussion shows the authorities in favour of the objective theory to be very slender indeed; those against it seem to command assent. In discussing the distinction between manslaughter and murder the Criminal Law Commissioners of 1843 said,

> If, supposing the likelihood of an evil result to be continually and gradually increased from very little to very great, it be asked at what point a party should be deemed to offend not merely negligently but wilfully, the answer is, that the question does not depend on the mere degree of probability, but that his liability as a wilful offender attaches when, being conscious that his act is attended with risk and danger of producing the evil consequence, he wilfully does that act.[29]

[17] (1911) 22 Cox C.C. 635. [18] (1912) 7 Cr. App. R. 140.
[19] [1956] 1 Q.B. 351. [20] *Ibid.* 356. [21] *Ibid.*
[22] [1947] K.B. 997. [23] [1960] 3 W.L.R. 546, 558.
[24] [1947] K.B. 997, 1004. [25] [1956] 1 Q.B. 351.
[26] [1960] 3 W.L.R. 546, 557. [27] *Ibid.* [28] *Ibid.*
[29] Seventh Report of Her Majesty's Commissioners on Criminal Law (1843) 26.

This seems to be the correct approach, and it was a view held in 1953 by the Royal Commission on Capital Punishment who 'prefer to limit murder to cases where the act by which death is caused is intended to kill or to "endanger life" or is known to be likely to kill or endanger life'.[30] This appears to be the true view of malice.

As a criterion of intention, the maxim that a man is 'deemed to intend the natural and probable consequences of his acts' has been the subject of considerable criticism by academic writers.[31] In logic its justification as the 'only measure that can be brought to bear in these matters . . .'[32] extends only to the rule of evidence. The correct view is rather that expressed recently by Denning L.J. (as he then was) that 'There is no "must" about it; it is only "may"'. The presumption of intention is not a proposition of law but a proposition of ordinary good sense.[33] The confusion of thought involved in the admission of objective criteria as a guide to the workings of a man's mind, followed by their exclusive adoption, has been the subject of both judicial[34] and academic[35] criticism. For it involves a confusion of the evidence of intention with the proposition proved by that evidence. Therefore the objective theory is supported neither by logic nor by legal philosophy.

The decision in *R. v. Ward*[36] has received strong academic criticism,[37] and in *Smyth v. The Queen*[38] the High Court of Australia registered its strong disapproval of the principles there set down. It remains to be seen whether the High Court will continue its support of the subjective view in the face of this decision of the House of Lords. It is submitted that the present attitude of the High Court is the correct one.

D. McL. EMMERSON

RE HAUNSTRUP, DECEASED[1]

Probate duty—Valuation of estate—Large block of shares—Market price at date of death—Discount on valuation for quantity—Administration and Probate (Estates) Act 1955 Section 6

In 1957 H died and pursuant to section 152 of the Administration and Probate Act 1928 as amended by section 8 of the Administration and Probate (Estates) Act 1951[2] the executors of his will and estate filed a statement specifying the particulars and value of his estate.

Part of this estate consisted of 26,338 £1 stock units in Haunstrup Constructions Ltd which had a total issued capital of 170,000 shares. The executors valued this parcel of shares at 16s. *per* share (later amended to 18s. 3d.). The Commissioner of Probate Duties increased this valuation to 18s. 9d. *per* share and under section 157 of the Administration and Probate Act 1928 as amended by section 13 of the Administration and Probate

[30] Cmd 8932, 472.
[31] Salmond, *Jurisprudence*, (1947, 10th ed.), 381; Glanville Williams, *Criminal Law* (1953) §27.
[32] *R. v. Ward* [1956] 1 Q.B. 351, 356, *per* Lord Goddard C.J.
[33] *Hosegood v. Hosegood* [1950] 1 T.L.R. 735, 738.
[34] *Angus v. Clifford* [1891] 2 Ch. 449, 471, *per* Bowen L.J.
[35] Holdsworth, W. S., *History of English Law* (1909) iii, 298. [36] [1956] 1 Q.B. 351.
[37] S. Prevezer, 'Murder by Mistake' (1956) *Criminal Law Review* 375; Also (1956) 72 *Law Quarterly Review* 166; (1956) 19 *Modern Law Review* 414 are relevant.
[38] [1957] Argus L.R. 441.
[1] [1960] V.R. 302. Supreme Court of Victoria; Sholl J.
[2] Now Administration and Probate Act 1958, s. 108.