<u>In English Law What Is Meant By:</u>
<u>A) Intention B) Recklessness C) Negligence</u>
<u>Why Has There Been Uncertainty Surrounding The Appropriate Meaning To Be Attributed To These Words?</u>

Intention, recklessness and negligence are mens rea elements in criminal liability. However, there has been difficulty in regards to their general application and overall definitions.

Direct intention refers when A desires the prohibited outcome, (aiming a loaded gun at a person's heart and pulling the trigger), showing a direct intention to kill. There is also indirect intention, in which A does not necessarily desire the prohibited outcome, but realises that it is almost inevitable to occur. Whilst Lord Diplock[1] stated, "an actor intended a result only if he knew that it was highly probable, even though it may have not been his purpose to cause that result"[2], explanations in Hancock & Shankland[3] and Woollin, modified intention to be seen as: -

1. "A result is intended when it is the actor's purpose to cause it
2. A court or jury may also find that a result is intended, thought it is not the actor's purpose to cause it, when
    a. The result is a virtually certain consequence of that act, and b. The actor knows that is a virtually certain consequence"[4] The question is whether these descriptions are exhaustive or guidelines for juries to infer what they wish from them?

Initially, a jury should be directed that they are not to infer the necessary intention unless they are sure that the consequence was a virtual certainty as a result of the defendant's actions and the defendant appreciated that this was the case[5]. The Court of Appeal ruled foresight of virtual certainty is not intention but evidence from which intention can be inferred. However, a jury may find that the defendant saw the victim's death as virtually certain and still not consider that as intention, which seemed unjust.

Therefore, in the case of Woollin[6], D claimed by throwing his child across the room in a fit of rage, the death wasn't intentional. The trial judge directed the jury that they may infer intention if they believed when the D threw the child he appreciated there was a, "substantial risk",[7] that he would cause serious harm of the child, to which the jury found so and D was convicted. D appealed on the grounds that the phrase, "substantial risk", tested recklessness, not intent, instead the judge should have stated, "virtual certainty". The House of Lords agreed, reversing the conviction, allowing D to be charged with manslaughter not murder, so a, "a result foreseen as certain is an intended result".[8] This demonstrates how directions by judges can be detrimental, inferring certain clarification of the term is needed to avoid appeals and injustices.

Whilst Woollin is interpreted as having a clear rule on whether or not foresight of virtual certainty is intention, the Court of Appeal have shown their reluctance in following this rule, as shown in Matthews & Alleyne[9]. The defendant's were convicted of kidnapping, murder and robbery, the victim, who was known to be unable to swim, drowned. On appeal, the defendant's stated the judge directed the jury that foresight of virtual certainty was intention, directing "If drowning was a virtual certainty and the D appreciated this, they must have had the intention of killing him"[10], and not evidence to find intention, as stated by Woollin. The Court of Appeal rejected this, believing the judge in Woollin went further than permitted and did not lay down a substantive law and, "the law

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[1] Hyam [1975] AC 55, [1974] 2 ALL ER 41
[2] [1975] AC 55, [1974] 2 ALL ER 41
[3] Ormerod,D Smith & Hogan *Criminal Law* (New York: Oxford University Press, 2008) p.98
[4] Ormerod,D Smith & Hogan *Criminal Law* (New York: Oxford University Press, 2008) p.99
[5] Nedrick [1986] 3 All ER 1, [1986] 1 WLR 1025
[6] [1998] UKHL 28; [1998] 3 WLR 382
[7] [1998] UKHL 28; [1998] 3 WLR 382
[8] Lord Steyn – Woolin [1998] UKHL 28; [1998] 3 WLR 382
[9] [2003] Cr App R 30 [2003] Crim LR 553
[10] Ormerod,D Smith & Hogan *Criminal Law* (New York: Oxford University Press, 2008) p.100

has not yet reached a definition of intent in murder of appreciation of virtual certainty".[11] Thus, it seems today that when a defendant admits to having seen a prohibited harm as virtually certain, technically they will not be found to have intended the result, it is up to the jury to find that he did or not, leaving 'intention' as continually indefinite.

Academics such as, Finnis therefore, take the view that only direct intention, the aim and purpose should exist, since indirect intention is unfair. Finnis demonstrates by saying in English, we wouldn't say, "someone hanging curtains knowing that sunlight will fade intends they will fade"[12], and a jury would be entitled to find that they did intend exactly that under oblique intention.

Noorie argues foresight of virtual certainty being seen as intention, is, "over-inclusive"[13], suggesting when a jury decides D did foresee a prohibited harm as certain, they should look at the circumstances and judge whether or not he was, "so wicked that an intention to cause the evil should be attributed to him".[14] However, whilst this improves the chances of individual justice in cases, there is still little certainty for general application of intention.

Concluding, the courts are uncertain themselves on directing juries and what the actual definition is. Since the term has not been defined conclusively, and there still remains two conflicting schools of thought, arguing whether intention should be limited solely direct intention or include oblique intention, uncertainty still exists.

Recklessness states a "person who does not intent to cause a harmful result, may take an unjustifiable risk of causing it. If he does, he may be held as reckless." [15] Conflict has debating whether recklessness should be classified, "subjectively"; to observe the case from the defendant's perspective, or should it be assessed, "objectively", observing the case from the perspective of a reasonable man.

Originally the subjective test was the preferred method. This test required proof of taking an unjustified risk, but also proof D was aware of the existence of the unreasonable risk. The main issue point focused on the defendant's own perceptions of the existence of a risk. This was first presented in Cunningham[16]. When D ripped a gas meter out of the wall, the question was whether he foresaw the risk of someone inhaling the gas as a consequence of his actions. The Court of Appeal ruled, "Recklessness was the foresight of harm, to have foreseen the harm and risk of harm and still went on to take the risk".[17] D is not guilty unless he knew, when he broke off the gas meter that it might be inhaled by someone. Therefore, to be guilty of a crime of recklessness, the prosecution has to proof subjective fault – which is actual foresight – that when he ripped the gas meter, he foresaw someone getting hurt.

While this is the accepted definition to date, there was a period when recklessness was tested objectively, causing further uncertainty. The Caldwell[18] case illustrated recklessness was determined according to what an ordinary individual would have foreseen, as opposed to the Cunningham test of what the defendant actually did foresee, with Lord Diplock directing that "recklessness is established when proving the risk taken was an, obvious and serious risk".[19] This model introduced problematic questions, such as, what happens to those who fail to give fault to a risk because they have mental issues or inexperienced in the field? This became apparent in the case of Elliot v. C[20], where further uncertainty rose. The courts stated C was guilty since Caldwell was applicable; she failed to give thought to obvious risk. Although, it was thought to be more just to excuse those who fail to give thought because of incapability due to age or mental intelligence. Due to the erroneous decision that Caldwell was the law regarding recklessness, the use become increasingly vague until the case of R v

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[11] Matthews & Alleyne [2003] Cr App R 30 [2003] Crim LR 553
[12] Martin J. Storey T. *Unlocking Criminal Law* (London: Hodder Arnold, 2007) p.67
[13] A Norrie, 'After Woolin' [1999] C rim LR 532; Norrie, *Crime, Reason & History,* p.47
[14] A Norrie, 'After Woolin' [1999] Crim LR 532; Norrie, *Crime, Reason & History,* p.48
[15] Omerod D. Smith & Hogan. Criminal Law. Oxford University Press. Oxford. 2008. p.107
[16] Cunningham [1957] 2 QB 396 2 All ER 412
[17] [1957] 2 QB 396 2 All ER 412
[18] [1981] 1 All ER 96, [1982] AC; 341
[19] Ormerod, D. Smith & Hogan *Criminal Law* (New York: Oxford University Press, 2008) p.113
[20] [1983] 1 WLR 939

G[21], in which the uncertainty was put to rest. The House of Lords in G concluded Caldwell should not be applicable anymore, being labelled as, "unfair"[22], and Lord Bingham referring to it as, "neither just nor moral"[23]. Resultantly, Lord Bingham returned to the Cunningham test and formally stated recklessness was to be determined subjectively, when " D is aware of a risk that it exists or will exist; a result when he is aware of a risk that it will occur, & it is, in the circumstances known to him, unreasonable to take that risk",[24] cementing the primary use of the subjective test.

Whilst there may have been a period of uncertainty regarding the test for recklessness, problematic areas have been resolved, with the courts settling on a subjective test.

Negligence involves the defendant failing to comply with an objective standard set by the law. Whereas intention and subjective recklessness require proof of D's state of mind, that is the foresight of the risk of the proscribed harm, negligence varies, as liability can be proven by showing D's conduct simply failed to comply with the objective standard of the law. Uncertainty may be expressed by confusing this definition of negligence, to the described objective recklessness test set by the Caldwell case. However, under Caldwell recklessness, a defendant would not be liable if he had given thought to the matter of the risk of harm his conduct posed and therefore concluded there was no risk. On the other hand, in negligence, D would be liable since negligence is simply proven by illustrating D's conduct failed to measure up to an objective standard and foresight is not of much relevance.

Conflict rising from using negligence in cases, is, if it is permissible to take into account the defendant's state of mind when the defendant has special knowledge an ordinary person would not have had? Uncertainty therefore is presented as to whether the negligence test should take into account the individual's personal inabilities to appreciate the risk of the prescribed harm. Although, it is given when the defendant has capacity for foresight, then a higher standard will be expected[25], so if you have the ability to appreciate the risk of the proscribed harm, then a higher standard will be required of you.

Uncertainty also transpired in asking whether or not the test should take into account if the defendant had some personal inability to appreciate the risk of the proscribed harm, with the usual answer being if D has less capacity for foresight, this will not help him, since the D ought to have known the consequences.

Because of this strictness, the courts have accepted the objective test should be modified in certain circumstances, such as when the defendant is a child. In RSPA v C[26], it was questioned if a 15 year old girl was negligent in not taking her injured cat to the vet, being judged by the standard of a reasonable girl of her own age. It was concluded that this was in fact a sufficient qualification for determining negligence, however it must be treated with caution. Although this led to further debate, with academics questioning if age can be a determining factor, could it undermine the policy of negligence itself. For instance, if a 14 year old is caught joyriding, technically his age can be used as a defence, some arguing this being inappropriate, since the defendant of that age should know the consequences.

Consequently, it has been suggested the objective standard of negligence should to a certain extent take into account characteristics such as age, hearing and sight[27]. Whilst this may be seen as fair, the courts possibly would be reluctant to incorporate this, since it undermines the objective principle.

In conclusion, throughout the years, there has been general uncertainty on the definition of these mens rea elements and how to apply them. One thing that is and will remain certain is that it's the courts discretion on which direction to take.

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[21] [2003] UKHL 50
[22] Ormerod,D Smith & Hogan *Criminal Law* (New York: Oxford University Press, 2008) p.113
[23] ibid
[24] ibid
[25] Ormerod, D Smith & Hogan *Criminal Law* (New York: Oxford University Press, 2008) p.144
[26] [2006] EWHC 1069
[27] Ormerod, D Smith & Hogan *Criminal Law* (New York: Oxford University Press, 2008) p.144

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