[HOUSE OF LORDS]

HYAM . . . . . APPELLANT

AND

DIRECTOR OF PUBLIC PROSECUTIONS . . . RESPONDENT

[On appeal from REG. *v.* HYAM]

1974 Jan. 15, 16, 17; March 21

Lord Hailsham of St. Marylebone, Viscount Dilhorne, Lord Diplock, Lord Cross of Chelsea and Lord Kilbrandon

Crime—Homicide—Intention to cause grievous bodily harm —Defendant setting fire to house intending to frighten occupant —Occupant's children killed—Death or serious bodily harm foreseen as probable—Whether sufficient intent to establish murder—Criminal Justice Act 1967 (*c.* 80), *s.* 8 [1]

The appellant had had a relationship with a man who became engaged to be married to B. In the early hours of July 15, 1972, she went to B's house and poured petrol through the letter box, stuffed newspaper through and lit it. She gave B no warning but went home leaving the house burning. B escaped from the house but her two daughters were suffocated by the fumes of the fire and the appellant was charged with their murder. Her defence was that she had set fire to the house only in order to frighten B so that she would leave the neighbourhood. Ackner J. directed the jury that the prosecution had to prove beyond reasonable doubt that the appellant had intended to kill or do serious bodily harm to B, that if they were satisfied that when she had set fire to the house she had known that it was highly probable that the fire would cause death or serious bodily harm then the prosecution had proved the necessary intent and that it mattered not if her motive had been to frighten B. He advised the jury to concentrate on the intent to do serious bodily harm rather than the intent to kill. The appellant was convicted of murder. Her appeal against conviction was dismissed by the Court of Appeal.

On appeal:—

Held, dismissing the appeal (Lord Diplock and Lord Kilbrandon dissenting) that a person who, without intending to endanger life, did an act knowing that it was probable that grievous, in the sense of serious, bodily harm would result was guilty of murder if death resulted (post, pp. 68G—69E, 77H—78D, 79A–D, 82D–H, 85C—86B, F–G, 96G–H, 98C).

Director of Public Prosecutions v. *Smith* [1961] A.C. 290, H.L.(E.) and *Reg.* v. *Vickers* [1957] 2 Q.B. 664, C.C.A. considered.

Decision of the Court of Appeal (Criminal Division) [1974] Q.B. 99; [1973] 3 W.L.R. 475; [1973] 3 All E.R. 842 affirmed.

[1] Criminal Justice Act 1967, s. 8: "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."

The following cases are referred to in their Lordships' opinions:

Crofter Hand Woven Harris Tweed Co. Ltd. v. *Veitch* [1942] A.C. 435; [1942] 1 All E.R. 142, H.L.(Sc.).

Cunliffe v. *Goodman* [1950] 2 K.B. 237; [1950] 1 All E.R. 720, C.A.

Director of Public Prosecutions v. *Beard* [1920] A.C. 479, H.L.(E.).

Director of Public Prosecutions v. *Smith* [1961] A.C. 290; [1960] 3 W.L.R. 92; [1960] 2 All E.R. 450, C.C.A.; [1961] A.C. 290; [1960] 3 W.L.R. 546; [1960] 3 All E.R. 161, H.L.(E.).

Hardy v. *Motor Insurers' Bureau* [1964] 2 Q.B. 745; [1964] 3 W.L.R. 433; [1964] 2 All E.R. 742, C.A.

Holmes v. *Director of Public Prosecutions* [1946] A.C. 588; [1946] 2 All E.R. 124, H.L.(E.).

Hosegood v. *Hosegood* (1950) 66 T.L.R. (Pt. 1) 735, C.A.

Lang v. *Lang* [1955] A.C. 402; [1954] 3 W.L.R. 762; [1954] 3 All E.R. 571, P.C.

Parker v. *The Queen* (1963) 111 C.L.R. 610.

Practice Statement (Judicial Precedent) [1966] 1 W.L.R. 1234; [1966] 3 All E.R. 77, H.L.(E.).

Reg. v. *Ashman* (1858) 1 F. & F. 88.

Reg. v. *Bubb* (1850) 4 Cox C.C. 457.

Reg. v. *Desmond*, The Times, April 28, 1868; 11 Cox C.C. 146.

Reg. v. *Doherty* (1887) 16 Cox C.C. 306.

Reg. v. *Jakac* [1961] V.R. 367.

Reg. v. *Porter* (1873) 12 Cox C.C. 444.

Reg. v. *Vickers* [1957] 2 Q.B. 664; [1957] 3 W.L.R. 326; [1957] 2 All E.R. 741, C.C.A.

Reg. v. *Wallett* [1968] 2 Q.B. 367; [1968] 2 W.L.R. 1199; [1968] 2 All E.R. 296, C.A.

Reg. v. *Ward* [1956] 1 Q.B. 351; [1956] 2 W.L.R. 423; [1956] 1 All E.R. 565, C.C.A.

Rex v. *Cox* (1818) Russ. & Ry. 362.

Rex v. *Gibbins and Proctor* (1918) 13 Cr.App.R. 134, C.C.A.

Rex v. *Lumley* (1911) 22 Cox C.C. 635.

Southern Portland Cement Ltd. v. *Cooper* [1974] A.C. 623; [1974] 2 W.L.R. 152; [1974] 1 All E.R. 87, P.C.

Woolmington v. *Director of Public Prosecutions* [1935] A.C. 462, H.L.(E.).

The following additional cases were cited in argument:

Buckett v. *The Queen* (1964) 7 W.I.R. 271, P.C.

Chandler v. *Director of Public Prosecutions* [1964] A.C. 763; [1962] 3 W.L.R. 694; [1962] 3 All E.R. 142, H.L.(E.).

Reg. v. *Byrne* [1960] 2 Q.B. 396; [1960] 3 W.L.R. 440; [1960] 3 All E.R. 1, C.C.A.

Reg. v. *Lipman* [1970] 1 Q.B. 152; [1969] 3 W.L.R. 819; [1969] 3 All E.R. 410, C.A.

APPEAL from the Court of Appeal (Criminal Division).

This was an appeal by Pearl Kathleen Hyam from the dismissal by the Court of Appeal (Criminal Division) (Cairns L.J., Browne and Shaw JJ.) on June 18, 1973, of her appeal against her conviction of murder on November 22, 1972, at Warwick Crown Court (Ackner J. and a jury). The Court of Appeal gave leave to the appellant to appeal to the House

of Lords, certifying that the following point of law of general public importance was involved in their decision:

> "Is malice aforethought in the crime of murder established by proof beyond reasonable doubt that when doing the act which led to the death of another the accused knew that it was highly probable that that act would result in death or serious bodily harm?"

The facts are stated by Lord Hailsham of St. Marylebone.

Charles McCullough Q.C. and *Brian Farrer* for the appellant. The appeal raises the question of the meaning of "malice aforethought." The notice of appeal to the Court of Appeal raised other matters than the question certified, some of which were argued in the Court of Appeal, lest the Crown were to suggest that the proviso to section 2 (1) of the Act of 1968 should be applied. In that court the Crown said that they were not so arguing, and, since these subsidiary points could not enable the convictions to be quashed unless there were success on the question certified, they need not be argued in this House.

[*L. Stuart Shields Q.C.* for the Director of Public Prosecutions. It is accepted that, if the appellant is successful on the point of law for the House, this would not be a case for application of the proviso to section 2 (1) of the Criminal Appeal Act 1968.]

Section 1 of the Homicide Act 1957 abolished what was commonly called "constructive malice" but retained "malice aforethought (express or implied)" without declaring what that meant. The only other relevant statutory provision is section 8 of the Criminal Justice Act 1967 which deals, not with the substantive law, but with the means of proof of intention and foresight in criminal law in general. Within a few weeks of the Act of 1957 a court of five judges in the Court of Criminal Appeal declared in *Reg.* v. *Vickers* [1957] 2 Q.B. 664 that malice aforethought was an intention to kill or cause grievous bodily harm.

In *Director of Public Prosecutions* v. *Smith* [1961] A.C. 290 the Court of Criminal Appeal quashed a conviction for murder because Donovan J., who had spoken to the jury of the presumption of intention, had not told them that it was rebuttable. That court said, at p. 302, that the final question was of intention and that, while consequences foreseen as certain might be taken as the equivalent of consequences which were intended, that was not true of consequences foreseen as less than certain. This House restored the conviction. No decision of this House in the criminal field has been so unkindly received. In its objective approach it was out of line with the great majority of murder cases. Quaere whether Viscount Kilmuir L.C.'s much criticised remarks were directed to all cases or only a limited number of cases of murder. Quaere whether they were obiter or ratio. There are two main views about what he said: (i) that intention to kill or cause grievous bodily harm had to be proved and that that was done objectively (which was the view taken by the Court of Appeal in *Reg.* v. *Wallett* [1968] 2 Q.B. 367 and is the view contended for now) or (ii) that all that was required was an intention to do an unlawful act of a particular kind (as Lord Kilmuir L.C. seems to be saying, at p. 327). If (i) is correct, then section 8 of the Act of 1967 has replaced

the objective approach by a subjective one and Lord Kilmuir's remarks do not stand in the way of success in this appeal. Alternatively, if (ii) is correct, then section 8 has made no difference to the essentials of murder (see *Smith and Hogan, Criminal Law*, 3rd ed. (1973), pp. 227–229) and it becomes necessary for the appellant to ask the House not to follow *Smith's* case. As a matter of binding authority, whatever else *Smith's* case decided it decided that the summing up of Donovan J. was then correct, but on basis (i) it can be said that that too has been overtaken by section 8.

Intention and foresight are quite different. The jury can in fact apply any test they like, but in the last analysis the question must be: "did the accused intend to kill or cause grievous bodily harm?" The ordinary meaning of words is important because jurors are not students of jurisprudence but ordinary people who must be taken to understand words used in summings up in their ordinary sense. "Intention" commonly means purpose or aim, i.e., what a man is trying to achieve. One cannot intend to do something unless one has chosen to do it. "Foresight" or realisation is a matter of knowledge; it involves no choice. This is not to equate "intention" and "desire." Intention and desire may or may not coincide. Nor is it to equate "intention" and "motive." "Motive" properly means what moves a man, e.g., greed or jealousy; it is also, less correctly but commonly, used to mean "ultimate" (as distinct from "immediate") "purpose." If A has made a will in favour of B, B may both desire the continuation of A's life (because he likes A) and desire A's money; if B decides to kill A, then, having chosen to do so, killing A becomes an intention of B which coincides with his desire for the money but conflicts with his desire that A should live: when B kills A, B's immediate purpose is to kill; his motive (in one sense) is to inherit the money; in the more strict sense it is greed.

The appellant's defence in this case was that her immediate purpose was *only* to frighten, i.e., she did not intend any killing or serious injury then but intended only that Mrs. Booth should fear for the future. Ackner J. called "to frighten" her motive (that is, her *ultimate* purpose), whereas her defence was that it was her *only immediate* purpose. By telling the jury that it mattered not if her motive was to frighten Mrs. Booth, he was effectively telling them that her defence did not matter.

[LORD HAILSHAM OF ST. MARYLEBONE L.C. He was plainly using "motive" in the wrong sense.]

Consequences intended are necessarily foreseen, but not all consequences foreseen are necessarily intended. This is so even if they are foreseen as certain. The judge who sends a man to prison knowing that his family is bound to suffer hardship does not intend such hardship.

[VISCOUNT DILHORNE. It follows from the verdict that the appellant must have foreseen, at the least, that it was highly probable that grievous bodily harm would result. Is there any room for saying that it was not therefore intended?]

Perhaps not much, perhaps none, but whether the one followed from the other was for the jury to decide, not the judge. He withdrew that from them. He made the last step an irrebuttable presumption of law, which it is not.

[LORD CROSS OF CHELSEA. Does it not all come to the same thing? If you foresee a consequence of your conduct as highly probable (Ackner J.'s phrase), is not that just another way of saying that you intended that consequence?]

No. Intention and foresight are distinct. It might have been very easy in this case for the jury to say that the one followed from the other, but it was for them to decide, not for the judge. The so-called presumption of intention involves three sub-presumptions: (1) that the appellant was able to reason normally, and that, before acting as she did, she did reason; (2) that she foresaw all the probable consequences of her conduct and appreciated that such consequences were in fact probable; (3) that in acting as she did she intended that all the consequences which she foresaw as probable should ensue. In truth none of the three is irrebuttable. They are all conclusions for the tribunal of fact to reach if it thinks it right having regard to all the evidence. In effect, however, Ackner J. treated (3) as an irrebutable presumption of law and thereby withdrew stage (3) from the consideration of the jury.

If malice aforethought requires intention, i.e., purpose, to kill or cause grievous bodily harm, Ackner J. misdirected the jury. The suggestion stems from *Stephen's Digest of Criminal Law* (1877), that, quite apart from "intention to kill or cause grievous bodily harm," there are two other distinct states of mind each of which of itself constitutes malice aforethought, i.e., foresight of probable death and foresight of probable grievous bodily harm. If "foresight of probable grievous bodily harm" is properly within, or is a species of, malice aforethought (which it is not) this appeal must fail, despite Ackner J.'s misuse of the word "motive." Stephen had some basis for the inclusion of foresight of probable death but no proper basis for the inclusion of foresight of probable grievous bodily harm. Foresight of even a high probability of grievous bodily harm should not have been included by Stephen.

[LORD HAILSHAM OF ST. MARYLEBONE L.C. I do not think that it will assist the House to go back to Stephen. The law develops. The best place to begin is 1957. The law had a fresh start then. What the House wants is a close look at *Reg.* v. *Vickers* [1957] 2 Q.B. 664, *Director of Public Prosecutions* v. *Smith* [1961] A.C. 290 and any other relevant case since 1957.]

In *Reg.* v. *Vickers* there is nothing to suggest that foresight either of probable death or of probable grievous bodily harm would alone suffice. Lord Goddard C.J., at pp. 669, 671, described as impeccable the summing up of Hinchcliffe J. which had stressed intention, not foresight. In *Smith* there is the same stress on intention.

[VISCOUNT DILHORNE. No one in *Smith* denied that the act which led to the killing had to be intentional or that that was a subjective question. The Crown were arguing that it was the likely consequences of the act which had to be determined objectively.]

There are many passages in *Smith* to the effect that the ultimate question, whether determined subjectively or objectively, is the intention to kill or cause grievous bodily harm, e.g., the summing up of Donovan J., at pp. 325–326, 323, the whole of the judgment of Byrne J., at pp. 299–303, the argument for the Crown in the House of Lords, at p. 307, and the

speech of Lord Kilmuir, at pp. 323, 324, 326, 327, 331, 333; see also the application of *Reg.* v. *Vickers* [1957] 2 Q.B. 664, at p. 335. Although not relied on by counsel for Smith in the House of Lords (see at p. 333), the distinction between consequences foreseen as certain and those foreseen as likely (pp. 296, 297, 302–303) is important, since in the former case the jury will readily, perhaps inevitably, conclude that they were intended but in the latter case this will somewhat less readily be done. Whether the inference from consequences foreseen to those intended is easy or not, it is always in the last analysis a question for the jury, and a question of intention. The accused could say: "I didn't intend it" and be believed; this might depend on how likely the consequence was to ensue. The appellant's immediate purpose here was not to kill or to cause grievous bodily harm, but only to frighten. It may have been inevitable that, if she foresaw a great likelihood of injury, she intended such injury, but that was a question for the jury. Foresight is a question of knowledge; intention is a question of her attitude.

In cases where the presumption of intention has been treated as irrebuttable judges have (a) equated the defendant with the reasonable, i.e., reasoning, man and (b) equated consequences foreseen as likely with consequences intended, for example, Donovan J. in *Smith* [1961] A.C. 290, 325–326, 323, where one also finds passages equating consequences foreseen as certain with those foreseen as likely, and *Reg.* v. *Ward* [1956] 1 Q.B. 351. All such equations, whether rightly or wrongly made at the time, must now be regarded as superseded by section 8 of the Act of 1967.

If the question is ultimately one of foresight, rather than intention, it is surprising that there has been a presumption of *intention*, that in drunkenness the question is whether the defendant was so drunk as to have been incapable of forming *the intent* and that *intention* has played such a dominant part in practically every summing up in murder cases and every pronouncement on malice aforethought in higher courts.

Director of Public Prosecutions v. *Smith* [1961] A.C. 290 has been much criticised, e.g., by Sir Owen Dixon C.J., Professor Sir Rupert Cross, Professor Glanville Williams, Professor John Smith and J. W. C. Turner, but in essence these are criticisms of the objective approach, whereas Ackner J.'s direction was subjective and in any event, save on a narrow view of *Smith*, it has been superseded by section 8.

Other pronouncements to the effect that malice aforethought is intention to kill or cause grievous bodily harm are found in *Reg.* v. *Byrne* [1960] 2 Q.B. 396, *per* Lord Parker C.J., at pp. 401, 402; *Reg.* v. *Wallett* [1968] 2 Q.B. 367, *per* Winn L.J., at pp. 369, 371; *Reg.* v. *Lipman* [1970] 1 Q.B. 152, *per* Widgery L.J., at pp. 155–156, where there are references to "specific intent"; "specific" meaning "actual." In murder a specific intent is required.

[LORD HAILSHAM OF ST. MARYLEBONE L.C. I do not think that you need add further examples of this. The statement to the same effect in *Reg.* v. *Vickers* [1957] 2 Q.B. 664 is the classic statement.]

In *Reg.* v. *Jakac* [1961] V.R. 367 the Supreme Court of Victoria had to decide the present question and did so contrary to these submissions. This is the only known case where the precise point has been decided and the place of foreseeability within malice aforethought been discussed. Apart

from *Rex* v. *Lumley* (1911) 22 Cox C.C. 635, which is not a good authority since Avory J. was there mitigating the harsh murder-felony rule, the decision seems to have been based entirely on *Stephen's Digest,* art. 223 (b). Even in *Jakac* the ultimate question was treated as one of intention (p. 371). In *Buckett* v. *The Queen* (1964) 7 W.I.R. 271 a sentence of Lord Donovan, at p. 274, is against the present submissions, but the matter was not apparently argued (see at p. 275). There are also dicta in *Hardy* v. *Motor Insurers' Bureau* [1964] 2 Q.B. 745, *per* Lord Denning M.R., at pp. 758–759, and *per* Pearson L.J., at pp. 763–764, and in *Chandler* v. *Director of Public Prosecutions* [1964] A.C. 763, *per* Lord Devlin, at p. 805, dealing with "purpose," which all treat consequences foreseen as likely as if they were consequences intended, but these were all before the Act of 1967. Contrast *Reg.* v. *Wallett* [1968] 2 Q.B. 367, *per* Winn L.J., at pp. 369, 371. Cairns L.J. in the present case [1974] Q.B. 99, 112 treated Winn L.J., at p. 370, as having approved of a reference by the trial judge to consequences foreseen rather than to consequences intended, but the transcript of the summing up of Thesiger J. shows that the relevant sentence was: "If you feel sure that a man meant to do something that he *must* have known *would* do really serious bodily harm . . .," i.e., he was envisaging consequences foreseen as certain.

[VISCOUNT DILHORNE. Is not *Reg.* v. *Desmond,* The Times, April 28, 1868, in favour of foresight of probable consequences being enough?]

Yes, but Sir Alexander Cockburn C.J. was there requiring foresight of probable death. In any event that was a murder-felony case. Cockburn C.J. left it to the jury on both bases. The case supports Stephen's inclusion of foresight of probable *death* in article 223 (b) but not his inclusion of foresight of probable *grievous bodily harm.* Stephen's separation of intention in article 223 (a) from foresight of probable consequences in article 223 (b) supports the submission that the two are not the same thing. It is notable that, although Stephen sought to provide authoritative illustrations of his propositions, he cited, in an exhaustive study, no case to support his inclusion of grievous bodily harm within article 223 (b), despite the immense research which he had done on the decided cases: see note XIV at pp. 354–366 of the *Digest.* There are a few passages from the 4th edition of *Russell on Crime* (1865) [*Russell on Crimes and Misdemeanours*], all the cases in which Stephen had analysed, which suggest that foresight of probable grievous bodily harm sufficed, but the authorities cited in the footnotes do not appear to justify that. Apart from *Jakac* [1961] V.R. 367 and the dicta already cited, no case has been found since Stephen which is to the effect that foresight of probable grievous bodily harm is alone sufficient except (i) those such as *Rex* v. *Lumley,* 22 Cox C.C. 635 where the murder-felony rule was being mitigated and (ii) those where the presumption of intention was being treated as irrebuttable.

All the formulations of malice aforethought since 1957 have spoken in terms of intention to kill or cause grievous bodily harm; since 1957 there has been nothing in any appellate pronouncement which would lead anyone to think that article 223 (b) is still part of the law. In practice it is believed that Queen's Bench Division judges have for many years now directed juries in accordance with Stephen's article 223 (a) and ignored 223 (b). During argument in the Court of Appeal in the present case Browne J. said that

that was his experience. The same is apparent from an article by R. J. Buxton, "The Retreat from Smith" [1966] Crim.L.R. 195.

There would have been much to be said for confining malice aforethought to intention to kill or knowingly endangering life. That would have been in accordance with the general (although not universal) rule of criminal responsibility that one is only liable if one intends to bring about the actus reus of the crime charged or is prepared to take the risk of it. The presence in malice aforethought of intent to cause grievous bodily harm is anomalous, but it is too firmly entrenched to argue that anything less than legislation could remove it. Some have equated "intent to do grievous bodily harm" with "knowingly endangering life" (see, e.g., Salmon J., "The Criminal Law Relating to Intent," *Current Legal Problems* (1961), p. 12). Thus an intention to kill or cause grievous bodily harm may for practical purposes be virtually the equivalent of the more theoretically satisfactory "intention to kill or to endanger life." Since 1957 grievous bodily harm has only featured in malice aforethought in terms of intention to cause grievous bodily harm. The House should not now declare that mere intention to expose someone to the risk of grievous bodily harm will suffice for malice aforethought.

By drawing the line at "intent to kill or cause grievous bodily harm" a clear and satisfactory division is made between murder and manslaughter. A jury can readily grasp that they have to be sure that the defendant intended to kill or to cause grievous bodily harm, but to make malice aforethought depend on foresight of probable or highly probable consequences blurs the distinction between murder and manslaughter. Once consideration is given to the relative likelihood, in the defendant's mind, of death or grievous bodily harm the jury's task is made more difficult, and there is no good moral or logical reason to draw the line at any particular degree of probability short of certainty.

Sir Michael Havers Q.C., S.-G., L. Stuart Shields Q.C. and *Bruce Laughland* for the Director of Public Prosecutions. The problem with regard to the cases is that in so many of them the intent is clear. The question of foresight arises in the indirect type of case, for example, the bomb outside Clerkenwell jail, or the case of a child abandoned, either on a little used highway or on the steps of a house. This is why in so many of the cases there is no discussion as to foreseeability. The way in which Stephen put it was under "malice aforethought." He was giving instances of malice aforethought. That may be—probably is—why the authorities since have equated foresight with malice aforethought, though it is not really dealt with, following Stephen, by reference to malice aforethought but as a matter of common sense.

The intention initially required here was the intention to set the match to the petrol. In the case of a special verdict of the jury that the appellant knew that it was highly probable that grievous bodily harm would result from that act to someone in the house but that they were not sure that she intended to cause grievous bodily harm, the judge would have recorded a verdict of guilty. The jury must, and must be directed to, consider any explanation which a defendant may wish to give with regard to his intention. They may also (section 8 of the Act of 1967) consider what a

reasonable man would have foreseen in the circumstances as a yardstick by which to measure his intention.

The fundamental point is whether, so far as intention in murder is concerned, if a person foresees grievous bodily harm that is intent. [Reference was made to *Director of Public Prosecutions* v. *Smith* [1961] A.C. 290 and to *Lang* v. *Lang* [1955] A.C. 402: see the reference to *Lang* v. *Lang* by Sachs J., intervening, in Smith at p. 297.] Until section 8 came into force, the ordinary presumption would have involved much the same thing: that a man intends the natural and probable consequences of his act. If *Smith* created an irrebuttable presumption, that has gone (section 8), but anything else contained in the decision remains. Foresight is the same thing as intention, or, rather, not foresight but *knowledge* that one's act is very likely to have certain consequences (*Lang* v. *Lang*). When the appellant set fire to the paper, she knew that one result would very likely be that people in the house would be burned. The question is whether that is the same as intention, but in the above circumstances one does intend to do grievous bodily harm. The Crown relies on both heads of Cockburn C.J.'s direction to the jury in *Reg.* v. *Desmond,* The Times, April 28, 1868. [Reference was made to *Reg.* v. *Ward* [1956] 1 Q.B. 351; Homicide Act 1957, s. 2 (3) and *Archbold Criminal Pleading, Evidence & Practice,* 38th ed. (1973), para. 2673, p. 993. The appellant did here realise that grievous bodily harm was the probable consequence of her act. "Probable consequence" means "very likely." That would be a proper direction which a jury could understand.

McCullough Q.C. in reply. The Crown have cited no case which establishes that foresight of probable grievous bodily harm alone suffices for malice aforethought. So no case would have to be overruled for the present appeal to succeed. *Rex* v. *Lumley,* 22 Cox C.C. 635 was an abortion case where Avory J. was mitigating the murder-felony rule. *Lang* v. *Lang* [1955] A.C. 402 (correctly summarised by Cairns L.J. in the present case [1974] Q.B. 99, 109) was a divorce case where the judge was judge of both fact and law. It is true that Parliament did not enact the second of the two clauses proposed by the Law Commission in their report no. 10, "Imputed Criminal Intent (*Director of Public Prosecutions* v. *Smith* [[1961] A.C. 290])" (1967), but this does not mean that Parliament intended that foresight of probable death or grievous bodily harm would suffice for malice aforethought. There is nothing in that report to suggest that malice aforethought was anything less than intention to kill or cause grievous bodily harm.

The remarks of Lord Reid in *Southern Portland Cement Ltd.* v. *Cooper* [1974] A.C. 623, 640, endorse what has already been said about the difficulties which arise if a particular degree of probability in contemplated consequences is made the criterion of liability. It would be dangerous to invite a jury to consider probabilities, lest this affect their standard of proof; they would have to remember that it would be correct to ask: "Are we *sure*," i.e., "certain," "that the defendant foresaw death or grievous bodily harm as *probable*?," but utterly wrong to ask: "Did the defendant *probably* foresee that death or grievous bodily harm was *certain*?" It would be better not to confuse the jury by the introduction of "probably."

In referring to bombings the Crown's argument has come near to this: " Terror bombs in built up areas are the most feared contemporary activity. Murder is the most serious crime. Therefore if death results from a bombing it must be regarded as murder." The definition of murder should not be stretched in compliance with this.

However compelling may be the argument that consequences foreseen as probable are indistinguishable from consequences intended, it is not right that the appreciation of probable grievous bodily harm should of itself be enough to convict of murder if death results. There is a distinction between forming an intention and foreseeing consequences.

The tactical position of the appellant is that there are four states of mind to be considered: A (1) intention to kill; A (2) foresight of probable death; B (1) intention to cause grievous bodily harm; B (2) foresight of probable grievous bodily harm. For the appeal to succeed B (2) has to be shown to be outside malice aforethought. Its presence within malice aforethought is anomalous and unsatisfactory, both morally and intellectually. Once, however, one argues that B (2) is outside, one is forced by logic to argue either that only A (1) and B (1) suffice (that is, to draw the line at intention) or that only A (1) and A (2) suffice (that is, to require intention to kill or foresight of probable death).

[LORD CROSS OF CHELSEA. But that would involve saying that *Reg.* v. *Vickers* [1957] 2 Q.B. 664 was wrong.]

It would. This is the difficulty which the appellant is in. The man who intends to cause grievous bodily harm will in the vast majority of cases know that he is at least risking life, which means that in practice an A (1) plus B (1) definition may not be greatly different from an A (1) plus A (2) definition.

Some clue as to why Stephen included foresight of probable grievous bodily harm may be provided by his *History of the Criminal Law* (1883), vol. 3, pp. 80–83, where he compares his own article 223 (a) and (b) (228 is a misprint for 223) with article 174 of the draft code of 1879. There is nothing in article 174 to suggest that foresight of grievous bodily harm is sufficient; it makes no mention of the likelihood of grievous bodily harm. The only way in which his article 223 (a) and (b) (which are wholly subjective) may be made to correspond exactly with article 174 (which he said they did, at p. 83) is by (i) equating the defendant with the reasonable man and (ii) equating grievous bodily harm with harm likely to endanger life. If equation (ii) were made today (as was advocated by Professor Sir Rupert Cross, " The Need for a Re-definition of Murder " [1960] Crim. L.R. 728 but rejected by this House in *Director of Public Prosecutions* v. *Smith* [1961] A.C. 290, 334–5) the difficulties would all disappear and malice aforethought would in effect become " intending to kill or to endanger life." If this solution is impossible the next best is that it should be, as it is, " intention to kill or to cause grievous bodily harm." If the argument for the Crown is correct it would mean that the " classic definition " of malice aforethought as " an intention to kill or cause grievous bodily harm " either has not meant what the ordinary use of words would lead one to believe that it did or has been incomplete.

Their Lordships took time for consideration.

March 21. LORD HAILSHAM OF ST. MARYLEBONE. My Lords, in my view the one point in this case is the intention which it is necessary to impute to an accused person in order to find him guilty of the crime of murder. Is it simply the intention to kill or cause grievous bodily harm (in the sense of really serious injury) as is commonly assumed, or is it enough that he intends wilfully to expose another to the risk of death or grievous bodily harm in the sense of really serious injury? I do not believe that knowledge or any degree of foresight is enough. Knowledge or foresight is at the best material which entitles or compels a jury to draw the necessary inference as to intention. But what is that intention? It is acknowledged that intention to achieve the result of death or grievous bodily harm in the sense of really serious injury is enough to convict. But may the intention wilfully to expose a victim to the serious risk of death or really serious injury also be enough? It is upon the answer to this question that, in my view, depends the outcome of the present appeal.

On an indictment containing two counts alleging the murder of two female children, the appellant in this case pleaded guilty to manslaughter, but after a trial lasting three days was convicted of murder by a majority verdict of eleven to one. The question in the appeal is whether the verdicts of murder can stand or whether verdicts of manslaughter should be substituted for them.

The facts are simple, and not in dispute. In the early hours of Saturday, July 15, 1972, the appellant set fire to a dwelling house in Coventry by deliberately pouring about half a gallon of petrol through the letter box and igniting it by means of a newspaper and a match. The house contained four persons, presumably asleep. They were a Mrs. Booth and her three children, a boy and the two young girls who were the subjects of the charges. Mrs. Booth and the boy escaped alive through a window. The two girls died as the result of asphyxia by the fumes generated by the fire. The appellant's motive (in the sense in which I shall use the word "motive") was jealousy of Mrs. Booth whom the appellant believed was likely to marry a Mr. Jones of whom the appellant herself was the discarded, or partly discarded, mistress. Her account of her actions, and her defence, was that she had started the fire only with the intention of frightening Mrs. Booth into leaving the neighbourhood, and that she did not intend to cause death or grievous bodily harm. The judge directed the jury:

> "The prosecution must prove, beyond all reasonable doubt, that the accused intended to (kill or) do serious bodily harm to Mrs. Booth, the mother of the deceased girls. If you are satisfied that when the accused set fire to the house she knew that it was highly probable that this would cause (death or) serious bodily harm, then the prosecution will have established the necessary intent. It matters not if her motive was, as she says, to frighten Mrs. Booth."

The judge explained that he had put brackets round the words "kill or" and "death or" because he advised the jury to concentrate on the intent to do serious bodily harm rather than the intent to kill.

There were other passages in the summing up to the same effect, but this was the vital passage, and the judge reduced it to writing and caused

the jury to retire with it into the jury room. As the case proceeded, it is the only passage in the judge's summing up to which I need draw attention, and gives rise to the only point which was argued before your Lordships' House. The Court of Appeal dismissed the appeal "not without some reluctance," and, in giving leave to appeal to the House of Lords, certified that it involved the following point of law of general public importance, namely, the question:

> "Is malice aforethought in the crime of murder established by proof beyond reasonable doubt that when doing the act which led to the death of another the accused knew that it was highly probable that that act would result in death or serious bodily harm?"

This is the only question which, in my view, it is necessary to consider and the whole appeal is, therefore, within a fairly narrow compass. Both in the Court of Appeal and in your Lordships' House the Crown disclaimed, in my view rightly, any argument based on the so called "proviso" (now section 2 (1) of the Criminal Appeal Act 1968), and accordingly the question certified remains to be considered solely on its merits.

Before directing my mind to the simple point involved there are two general topics I desire to discuss. The first is as to the historical context in which the point falls to be decided, and the second is as to the precise senses in which I shall endeavour to use certain common words such as "motive," "intention," "purpose," "object," "desire."

My Lords, the distinction between murder and manslaughter, both felonies at common law, appears to derive from the statutes of Henry 8 and Edward 6 (23 Hen. 8, c. 1, 25 Hen. 8, c. 3, 1 Edw. 6, c. 12, 5 & 6 Edw. 6, c. 10) by which benefit of clergy was withdrawn from murder committed ex malitia praecogitata, which, in the form "malice prepense" or "prepensed" and "malice aforethought," has continued in common use in legal circles to the present date. (See on this topic *Bacon's Abridgment*, vol. 3 (1740), s.v. "Murder.")

The precise value of this phrase is open to doubt. As long ago as 1883 Stephen described it as "a phrase which is never used except to mislead or to be explained away" [*History of the Criminal Law of England*, vol. III, p. 83] and advised its abolition as a term of art and the substitution for it of a "definite enumeration of the states of mind intended to be taken as constituent elements of murder." In the present case Cairns L.J., in delivering the judgment now appealed from, said [1974] Q.B. 99, 108:

> "There is no doubt that murder is killing 'with malice aforethought,' and there is no doubt that neither the word 'malice' nor the word 'aforethought' is to be construed in any ordinary sense."

I agree with this latter observation, and would myself think that the sooner the phrase is consigned to the limbo of legal history the better for precision and lucidity in the interpretation of our criminal law.

However, "malice aforethought" was and is part of our criminal jurisprudence and by the beginning of the 20th century (and for long before that) had come by judicial interpretation to cover a number of states of

mind which rendered guilty of murder men and women whose conviction of a capital offence would not be considered acceptable today even by the most convinced adherents of the death penalty. In the first place, until the decision in *Woolmington* v. *Director of Public Prosecutions* [1935] A.C. 462, it was commonly held that

> "Every person who kills another is presumed to have wilfully murdered him, unless the circumstances are such as to raise a contrary presumption. The burden of proving circumstances of excuse, justification, or extenuation is upon the person who is shown to have killed another." (See *Stephen's Digest of Criminal Law* (1877), art. 230.)

In the second place, by a doctrine known as that of "constructive malice" a person was deemed to have committed murder ex malitia praecogitata if he had either of the following states of mind:

> "An intent to commit any felony whatever; . . . An intent to oppose by force any officer of justice on his way to, in, or returning from the execution of the duty of arresting, keeping in custody, or imprisoning any person whom he is lawfully entitled to arrest, keep in custody, or imprison, or the duty of keeping the peace or dispersing an unlawful assembly, provided that the offender has notice that the person killed is such an officer so employed"

and the expression "officer of justice" could be held to include not merely a constable, but any private person who happened in the given circumstances to have the right to do any of the acts concerned (see *Stephen's Digest*, art. 223). This remained the law until 1957, when, by section 1 of the Homicide Act of that year, the doctrine of constructive malice in the above sense was abolished and a man was said not to be guilty of murder unless the killing were . . .

> "done with the same malice aforethought (express or implied) as is required for a killing to amount to murder when not done in the course or furtherance of another offence."

Incidentally, in my view this section clearly recognises a state of affairs described as "implied malice" which is distinguished both from "express malice" and from "constructive malice." This may be an inconvenient terminology, but no account of the law which fails to recognise it can be considered accurate.

Further, the same Act of Parliament also reduced the number of cases of murder ex malitia praecogitata by inaugurating the defence of "diminished responsibility" (Homicide Act 1957, section 2). In approaching the question which I am asked to decide today, in so far as I am a free agent, I cannot ignore the repeatedly evinced intention of Parliament (soon afterwards, as I shall proceed to show, added to by section 8 of the Criminal Justice Act 1967) to mitigate the severity of the law as it developed under the successive interpretations of malice aforethought by judicial decision.

The abolition of the doctrine of constructive malice laid the way open for the decision in *Reg.* v. *Vickers* [1957] 2 Q.B. 664, re-argued before a particularly strong full Court of Criminal Appeal. Technically this deci-

sion only rejected the ingenious argument of some academic lawyers that, by enacting section 1 of the Homicide Act 1957, Parliament, despite the express words of the section, had inadvertently got rid of the doctrine of implied malice as well as constructive malice. But, in giving the judgment of the court, Lord Goddard C.J. took the opportunity to define the doctrine of implied malice so retained, and to give what has since become the classical definition of murder, repeatedly employed ever since, as killing "'with the intention either to kill or to do some grievous bodily harm'" (see *per* Lord Goddard C.J., quoting from the summing up of the trial judge, [1957] 2 Q.B. 664, 672). It will be noticed that in this definition the reference is to intention and there is no reference to foresight of the consequences as such, either as equivalent to intention in murder or as an alternative to the requisite intention, or to a "high degree of probability" to describe the degree of certainty of what has to be foreseen, although both the foresight and the degree of probability must be at least material which the jury may, and on occasion must, use as the basis on which an adverse inference is drawn as to the intention of the killer. Not unnaturally counsel for the appellant in this case strongly stressed this circumstance in his argument before their Lordships. I have to remark that if at this stage we were to overthrow the decision in *Vickers* a very high proportion of those now in prison for convictions of murder must necessarily have their convictions set aside and verdicts of manslaughter substituted. This consideration ought not perhaps logically to affect our decision, but I am personally relieved to find that I find myself in agreement with the decision in *Vickers*.

I now pause to say a word about the expression "grievous bodily harm," another term of art in English criminal law of respectable pedigree (cf. 43 Geo. 3, c. 58 and *Rex* v. *Cox* (1818) Russ. & Ry. 362) but uncertain meaning. In the context of murder, the Commissioners on the Criminal Law in their report of 1839 used the expression "great harm" as opposed to "slight harm" in connection with murder, but, apart from the context of murder, "grievous bodily harm" has been used in connection with various statutory offences under various Acts including the Offences against the Person Act 1861 and other statutes, and, shortly before that Act, Willes J., in *Reg.* v. *Ashman* (1858) 1 F. & F. 88, 89, defined "grievous bodily harm" as not necessarily involving injury which was ". . . permanent or dangerous, if it be such as seriously to interfere with comfort or health, . . . ," and for many years Willes J.'s opinion was cited as the authoritative definition. But this led Lord Devlin, in a moment of extra-judicial levity, to conclude that, if this were right, it would open the door in murder to a verdict of "murder by pinprick," since it could not be denied that constantly pricking a man on the stomach with a pin would certainly seriously interfere with his comfort, and in certain cases by some misadventure might cause death. In the case of *Director of Public Prosecutions* v. *Smith* [1961] A.C. 290, to which I will turn in a moment, the late Lord Kilmuir put an end to this strange doctrine with the words, at p. 334:

> ". . . I can find no warrant for giving the words 'grievous bodily harm' a meaning other than that which the words convey in their

ordinary and natural meaning. 'Bodily harm' needs no explanation, and 'grievous' means no more and no less than 'really serious.'"

Since that date, if not before, it has been the practice to direct juries on the authority of *Vickers* [1957] 2 Q.B. 664 and this passage in *Smith* that murder means that a man causes the death of another "with the intent to cause death or really serious injury." What injuries are "really serious" within the meaning of this definition is a question left for the jury to decide for themselves. Obviously it would include any injury likely to endanger life, but, speaking for myself, I would also consider it obvious that there are many injuries which a jury would call really serious which in the ordinary course would not be likely to endanger life. I think it would be difficult by a purely judicial interpretation to restrict the definition further. In particular, if it were desired to restrict the definition of murder by defining it as killing with intent to cause death or endanger life, I would think that an Act of Parliament would be necessary, and, before passing legislation, it would be desirable for Parliament to investigate policy considerations more widely than is desirable or possible in the course of a judicial investigation based on a single case. In particular I would hope that Parliament would consider whether the substitution in effect of the phrase "intent to endanger life" for "to inflict really serious injury" as the mental element of intention in murder would not impose on juries a task unnecessarily onerous or would be morally justifiable. One can visualise a situation in which a defendant said, "True I intended to inflict really serious injury on my victim, but it is most unfortunate that he died. I did not really intend to endanger his life." I am not as clear myself as some of my colleagues that this defence should be permitted to avail him as a valid defence to a charge of murder.

The next stage in my historical summary must necessarily be the much discussed case of *Smith* [1961] A.C. 290 to which I have just referred in a limited context. One of the questions much canvassed in the hearing of this appeal was how much if anything in this decision has survived the enactment of section 8 of the Criminal Justice Act 1967 and whether, on the assumption that anything relevant to this appeal survived, this House should yield to the invitation expressed in the current edition of *Smith and Hogan* to "overrule that case by virtue of the House's newly assumed power to reverse its previous decisions."* (See *Smith and Hogan, Criminal Law*, 3rd ed. (1973), p. 229.)

I will not rehearse the facts in *Smith* since they are sufficiently well known. A criminal seeking to escape killed a police officer who tried to stop him by sitting on the bonnet of his car. The criminal accelerated and threw the officer off in the path of oncoming traffic and this caused him fatal injuries. The defendant's own account of the matter in court was that he lacked the necessary criminal intention because he had become frightened. There was a good deal of very powerful evidence that this defence was untrue in fact, but the judge in effect directed the jury, which convicted him, that this was not material, because they should convict of (capital) murder if satisfied that the accused "as a reasonable man must have contemplated that grievous bodily harm to the officer was likely to

* *Practice Statement (Judicial Precedent)* [1966] 1 W.L.R. 1234.

result as the consequence of what he did." Here there is a clear indication of foresight of the consequences as a possible ingredient of malice aforethought, and that likelihood and not certainty of the consequences is enough. A strong Court of Criminal Appeal (Byrne, Winn and Sachs JJ.) quashed the conviction on the ground that this was a misdirection. Byrne J., in delivering a judgment of the court which personally I find in the main persuasive, lucid and coherent, said [1961] A.C. 290, 300:

> " The law on this point as it stands today is . . . that, as a man is usually able to foresee what are the natural consequences of his acts, so it is, as a rule, reasonable to infer that he did foresee them and intend them. But, while that is an inference which may be drawn, and on the facts in certain circumstances must inevitably be drawn, yet if on all the facts of the particular case it is not the correct inference, then it should not be drawn."

And again, at p. 302:

> " The final question for the jury must always be whether on the facts as a whole an actual intent to do grievous bodily harm was established, remembering, of course, that intent and desire are different things and that once it is proved that an accused man knows that a result is certain the fact that he does not desire that result is irrelevant."

The House of Lords, consisting of the Lord Chancellor (Viscount Kilmuir) and Lords Goddard, Tucker, Denning and Parker of Waddington reversed the decision of the Court of Criminal Appeal, and it is the opinion of the then Lord Chancellor, speaking with the agreement of the rest, that we have read in extenso and discussed in considerable detail.

My Lords, I do not wish to say anything which is not deeply respectful of my learned and greatly admired predecessor with whom I was for many years on terms of intimate friendship, nor of the extremely strong House which followed the lead of his speech in this case. But it would be affectation in me not to recognise that the decision of this House in *Smith* has proved at all times highly controversial, has given rise to an extensive body of literature both here and in the Commonwealth, and has proved unusually difficult to interpret (see, for instance, *Smith and Hogan, Criminal Law*, 3rd ed., p. 227; *Glanville Williams, Criminal Law* (*The General Part*), 2nd ed. (1961), pp. 94 et seq.; see also the literature there referred to at (1960) 23 M.L.R. 605; 14 C.L.P. 1; [1960] Crim.L.R. 1; Lord MacDermott, *Murder in 1963* (1963); Lord Denning, *Responsibility before the Law* (1961); 14 C.L.P. 16; [1960] Crim.L.R. 765; (1961) 35 A.L.J. 154; [1966] Crim.L.R. 195). It was unequivocally dissented from by the Australian High Court (*Parker* v. *The Queen* (1963) 111 C.L.R. 610, 632–633). It was exhaustively criticised by the Law Commission (1967),† and the Law Commission's criticisms formed the basis, in part, of the action of Parliament in passing the Criminal Justice Act 1967, section 8, which was believed at the time to have reversed it (see *Smith and Hogan, Criminal Law*, 3rd ed., p. 228), and the learned authors of that work, whilst not accepting that this is the true effect of the section, reach the conclusion that " it would have

† Law Commission Report No. 10, Imputed Criminal Intention (*Director of Public Prosecutions* v. *Smith*).

been most unfortunate if *Smith* had been held still to be law after all" (p. 229), and owing to the interpretation they themselves put on the case they invite this House to make use of the Practice Direction of 1966 [*Practice Statement (Judicial Precedent)* [1966] 1 W.L.R. 1234] to overrule it as "the right course." These are weighty criticisms by responsible persons, and, in spite of the distinction of the House, and the reverence and affection with which I regard the memory of my predecessor, I feel bound to examine them seriously. Indeed, in a provocative article amongst those cited above one author has done extensive research which appears to conclude that, in actual practice, judges, in directing juries, are in fact ignoring the House of Lords and following *Vickers* [1957] 2 Q.B. 664 and Byrne J. in *Smith* [1961] A.C. 290 (see "The Retreat from *Smith*" [1966] Crim.L.R. 195).

However this may be, it is beyond question that the actual decision in *Smith* has given rise to a series of wholly irreconcilable interpretations. There have been maximalising interpretations, notably from its critics, and minimalising interpretations, usually from its defenders, e.g. *per* Lord Denning M.R. and Pearson L.J. in *Hardy* v. *Motor Insurers' Bureau* [1964] 2 Q.B. 745, especially at pp. 758 et seq. and 762 et seq. It has been interpreted as importing an irrebuttable presumption of evidence (Law Commission Report No. 10 (1967)), and as deciding a new rule of substantive criminal law (*Glanville Williams, Criminal Law (The General Part)*, 2nd ed., pp. 94 et seq. and *Smith and Hogan, Criminal Law*, 3rd ed., pp. 227–229). It has been interpreted as being of general application, or limited to the crime of murder, or to "such a case as the present" (*per* Lord Denning M.R. [1964] 2 Q.B. 745, 759, Pearson L.J., at p. 764). It has been interpreted as importing an objective criterion into the essentially subjective question of intent, as reintroducing the repealed doctrine of constructive malice [1960] M.L.R. 605, or, alternatively, as upholding the subjective test of intention, but sticking an objective label on the nature and quality of the act done. I am not going to endeavour to decide between these rival and wholly irreconcilable interpretations for the very good reason that I believe that each can be justified by particular phrases to be found in the report. What is beyond question is that an attempt to revive the decision in toto without interpreting it de novo would be to introduce confusion and not lucidity into the law. Far better to recognise that Parliament in 1967, after considering a report by the Law Commission, decided that it was better to turn its back on what was rightly or wrongly taken as the main argumentation of *Smith* [1961] A.C. 290, and to impose the rule of a subjective test both as to foresight of the consequences and as to intention, as section 8 of the Criminal Justice Act 1967 appears to do, while yet retaining the intention to cause grievous bodily harm (in the sense explained) as a possible alternative to intent to kill as the essential mental element in the crime of murder. Such at least is the proper inference to be drawn from the decision of Parliament to enact the first and the failure of Parliament to enact the second of the two draft clauses in the Law Commission's recommendations, and such at least appears to have been the view of the Court of Appeal in *Reg.* v. *Wallett* [1968] 2 Q.B. 367 which is the last of the citations I wish to make in this historical survey of the subject.

In that case a male defendant of less than average intelligence shook a little girl so savagely that she died. The trial judge directed the jury impeccably if the above view of the effect of the Criminal Justice Act 1967, section 8, be accepted, but, when they returned for further guidance as to the difference between murder and manslaughter, concluded his additional advice by saying that what the jury had to consider was whether the defendant knew

> "quite well at the time he was doing something *any ordinary person like himself*" (emphasis mine) "would know it was doing her really serious bodily harm."

The Court of Appeal held that it would not be safe to allow the resulting verdict of guilty to stand. I do not believe that they could have done so if they had not accepted the general approach which I have indicated as the true view of the effect of section 8 of the Criminal Justice Act 1967 on *Smith* [1961] A.C. 290.

The judgment of Winn L.J. in *Wallett* [1968] 2 Q.B. 367 was referred to in the Court of Appeal in the present case as supporting their own view of the Act of 1967 (see [1974] Q.B. 99, 112 quoting Winn L.J. at [1968] 2 Q.B. 367, 370). With respect, this carries exactly the opposite implication to that attached to it by the Court of Appeal. Winn L.J. was saying that so long as the judge was telling the jury that if they were sure that the accused with all his defects did intend grievous bodily harm, that was murder it was a good direction, but that the moment he suggested or might be taken as suggesting that the test was objective his charge fell on the wrong side of the line laid down by the Act of 1967.

At the end of the day there are, I think, two reasons against formally overruling *Smith* [1961] A.C. 290 in virtue of our practice direction as suggested by the authors of *Smith and Hogan* [*Criminal Law*, 3rd ed.]. The first is that in view of the diversity of interpretation it is difficult to know exactly what one is overruling. Indeed, if the extreme minimalising interpretations be adopted, there is little or nothing to overrule, or indeed little enough to require the intervention of Parliament in 1967. The second is that there are at least two passages in *Smith* of permanent value which on any view ought not to be overruled. The first is the passage at the end of Lord Kilmuir's opinion (at pp. 334–335) which disposes at least in this context of the doctrine of *Ashman*; 1 F. & F. 88 regarding the nature of grievous bodily harm, and thus excludes the possibility of "murder by pinprick." The second is the earlier passage where Lord Kilmuir says, at p. 327:

> "The unlawful and voluntary act must clearly be aimed at someone in order to eliminate cases of negligence or of careless or dangerous driving."

There is also a more important third element latent in the decision to which I will return later, and which seems to justify the result, if not all the reasoning.

The view taken above of *Smith* and of the Act of 1967 is not enough to dispose of the present appeal. For, whatever may be said by way of criticism of the crucial passage in the judge's direction, it was impeccable at

least in this, that it applied the jury's mind to a subjective test of what was the state of the mind of the accused. The question raised by Ackner J.'s charge to the jury is not whether he revived the passages in *Smith* which seem to suggest an objective test, but (i) whether, on the assumption that the test is subjective, foresight of the probable consequences is an alternative species of malice aforethought to intention, or, as Pearson L.J. clearly suggests in *Hardy* v. *Motor Insurers' Bureau* [1964] 2 Q.B. 745, 764, whether foresight of the probable consequence is only another way of describing intention and (ii) on the assumption that foresight can be used as an alternative to or equivalent of intention whether a high degree of probability in that which is foreseen is enough. This seems to me the point in this case, and I do not find it altogether easy to decide. In order to equip myself to do so, I must embark on a brief inquiry into the meaning of some ordinary words. It has been pointed out more than once that "motive" has two distinct but related meanings. I do not claim to say which sense is correct. Both are used, but it is important to realise that they are not the same. In the first sense "motive" means an emotion prompting an act. This is the sense in which I used the term when I said that the admitted motive of the appellant was jealousy of Mrs. Booth. The motive for murder in this sense may be jealousy, fear, hatred, desire for money, perverted lust, or even, as in so-called "mercy killings," compassion or love. In this sense motive is entirely distinct from intention or purpose. It is the emotion which gives rise to the intention and it is the latter and not the former which converts an actus reus into a criminal act. Thus as Smith and Hogan point out (*Criminal Law*, 3rd ed., p. 53): "The mother who kills her imbecile and suffering child out of motives of compassion is just as guilty of murder as is the man who kills for gain." (See also the discussion on this use of the word by Viscount Maugham in *Crofter Hand Woven Harris Tweed Co. Ltd.* v. *Veitch* [1942] A.C. 435, 452.) On the other hand "motive" can mean a "kind of intention" (see *Glanville Williams, Criminal Law* (*The General Part*), 2nd ed., p. 48). In this sense, in his direction to the jury, the judge (quoted above, and in the judgment of the Court of Appeal) has said: "It matters not if her motive was to frighten Mrs. Booth." See also the discussion of this sense by Lord Wright in *Crofter Hand Woven Harris Tweed Co. Ltd.* v. *Veitch*, at p. 469. I agree with the Court of Appeal that it is desirable, to avoid confusion, to use the word "motive" in this context always in the first sense, and I have attempted so to do.

It is, however, important to realise that in the second sense too motive, which in that sense is to be equated with the ultimate "end" of a course of action, often described as its "purpose" or "object," although "a kind of intention," is not co-extensive with intention, which embraces, in addition to the end, all the necessary consequences of an action including the means to the end and any consequences intended along with the end. In the present case the appellant's "motive"—in the second sense—may have been to frighten Mrs. Booth. This does not exclude, and the jury must have affirmed, the intention to expose the sleepers in the house to the high probability of grievous bodily harm and in many cases it may involve an actual intention to kill or cause grievous bodily harm. Thus, also, in a Victorian melodrama the villain's motive—in the second sense—or his "end," his "purpose," "object" or "intention" may have been to acquire

an inheritance. But this does not exclude, and may involve, the intention to slay the rightful heir, or abduct his sister. Or again, in the Law Commission's report [No. 10 (1967)] on *Smith* [1961] A.C. 290 the example is given where the end is to be paid insurance moneys, the means is to blow up an aircraft in flight, and the inseparable consequence is the death of passengers and crew.

I know of no better judicial interpretation of "intention" or "intent" than that given in a civil case by Asquith L.J. (*Cunliffe* v. *Goodman* [1950] 2 K.B. 237) when he said, at p. 253:

> "An 'intention' to my mind connotes a state of affairs which the party 'intending'—I will call him X—does more than merely contemplate: it connotes a state of affairs which, on the contrary, he decides, so far as in him lies, to bring about, and which, in point of possibility, he has a reasonable prospect of being able to bring about, by his own act of volition."

If this be a good definition of "intention" for the purposes of the criminal law of murder, and so long as it is held to include the means as well as the end and the inseparable consequences of the end as well as the means, I think it is clear that "intention" is clearly to be distinguished alike from "desire" and from foresight of the probable consequences. As the Law Commission pointed out in their disquisition on *Smith* [1961] A.C. 290 [Law Commission Report No. 10], a man may desire to blow up an aircraft in flight in order to obtain insurance moneys. But if any passengers are killed he is guilty of murder, as their death will be a moral certainty if he carries out his intention. There is no difference between blowing up the aircraft and intending the death of some or all of the passengers. On the other hand, the surgeon in a heart transplant operation may intend to save his patient's life, but he may recognise that there is at least a high degree of probability that his action will kill the patient. In that case he intends to save his patient's life, but he foresees as a high degree of probability that he will cause his death, which he neither intends nor desires, since he regards the operation not as a means to killing his patient, but as the best, and possibly the only, means of ensuring his survival.

If this be the right view of the meaning of the relevant words, the question certified in this case must, strictly speaking, be answered in the negative. No doubt foresight and the degree of likelihood with which the consequences are foreseen are essential factors which should be placed before a jury in directing them as to whether the consequences are intended. But the true view is that put forward by Byrne J. in *Smith* [1961] A.C. 290, 300:

> "... while that is an inference which may be drawn, and on the facts in certain circumstances must inevitably be drawn, yet if on all the facts of the particular case it is not the correct inference, then it should not be drawn."

This is in accordance with the views of Denning L.J. in *Hosegood* v. *Hosegood* (1950) 66 T.L.R. (Pt. 1) 735 when he says, at p. 738:

> "When people say that a man must be taken to intend the natural

consequences of his acts, they fall into error: there is no ' must ' about it; it is only ' may.' "

This passage was cited by Lord Porter in *Lang* v. *Lang* [1955] A.C. 402, 425, where the perfectly proper distinction, noted above, that a consequence may be intended though it is not desired, is also drawn, and should be taken as established.

I do not, therefore, consider, as was suggested in argument, that the fact that a state of affairs is correctly foreseen as a highly probable consequence of what is done is the same thing as the fact that the state of affairs is intended. The highest that it can be put in the context of the present set of facts is that what was intended was to expose the inhabitants of the house to the serious risk of death or grievous bodily harm and not actually to cause death or grievous bodily harm. I do not think that these propositions are identical.

But this, again, does not dispose of the matter. Another way of putting the case for the Crown was that, even if it be conceded that foresight of the probable consequences is not the same thing as intention, it can, nevertheless, be an alternative type of malice aforethought, equally effective as intention to convert an unlawful killing into murder. This view, which is inconsistent with the view that foresight of a high degree of probability is only another way of describing intention, derives some support from the way in which the proposition is put in *Stephen's Digest of Criminal Law*, art. 223, where it is said that malice aforethought for the purpose of the law of murder includes a state of mind in which there is

> " knowledge that the act which causes death will probably cause the death of, or grievous bodily harm to, some person, whether such person is the person actually killed or not, although such knowledge is accompanied by indifference whether death or grievous bodily harm is caused or not, or by a wish that it may not be caused; . . . "

If this be right, Ackner J.'s direction can be justified on the grounds that such knowledge is itself a separate species of malice aforethought, and not simply another way of describing intention. Apart from *Smith* [1961] A.C. 290 (if and in so far as it may be regarded as authority for this proposition) the diligence of counsel was unable to discover an English case directly supporting this view, but persuasive authority for it exists in *Reg.* v. *Jakac* [1961] V.R. 367 where the Supreme Court of Victoria expressly adopted the passage from *Stephen's Digest* cited above and said, at p. 372: " We do not think that the passage cited from *Stephen's Digest* has ever been seriously challenged as a correct statement of the law, . . . " Further support for the view of the law embodied in this proposition can be derived from the direction of Avory J. to the jury in *Rex* v. *Lumley* (1911) 22 Cox C.C. 635 and perhaps from the direction in *Reg.* v. *Ward* [1956] 1 Q.B. 351, described by the Court of Criminal Appeal in *Smith* [1961] A.C. 290 as the " high water mark " (p. 301) and not to be relied on now as a fair direction in other respects in the light of the Criminal Justice Act 1967, section 8. Reference was also made to the 19th century case of *Reg.* v. *Desmond*, The Times, April 28, 1868, in which Cockburn C.J., after expounding the doctrine of constructive malice, which then applied, said:

"There was another and larger view of the case. If a man did an act, more especially if that were an illegal act, although its immediate purpose might not be to *take* life, yet if it were such that life was necessarily endangered by it,—if a man did such an act, not with the purpose of taking life, but with the knowledge or belief that life was likely to be sacrificed by it, that was not only murder by the law of England, but by the law of probably every other country."

This clearly applies the test of foresight, and the criterion of probability and not certainty, but the foresight described is of danger to life, and not grievous bodily harm even in the sense defined in *Smith* [1961] A.C. 290. Like other 19th century cases, the direction given was at a time when no jury could have the prisoner's sworn testimony to consider, and when there was no adequate system of criminal appeal. Moreover, it is not really satisfactory to charge a jury on two parallel legal theories each leading to the same result and leave them with no means of saying which of the two their verdict is intended to follow. The jury itself may well have founded their verdict in *Reg.* v. *Desmond* entirely on the doctrine of constructive malice to which, at the time, the defence had, it would seem, no possible answer.

At this point counsel on both sides addressed a number of arguments to the House based on principle and public policy. Of these the most notable were as follows:

(1) Counsel for the Crown urged the necessity of treating deaths such as any arising from the recent bomb outrages as murder. Reference was made to the 19th century case of *Reg.* v. *Desmond*, 1868. These cases, however, must surely be judged like any other on their facts. If murder consists, and consists only, in slaying with intent to kill, or intent to cause grievous bodily harm to some person, a jury must decide the matter after taking into account all relevant circumstances including any warnings given, and any evidence tendered on behalf of the accused, and come to the appropriate conclusion. There should be no difficulty in securing convictions in appropriate cases. If, on the other hand, the mental ingredient in murder may consist in the deliberate exposure of potential victims to the substantial risk of death or grievous bodily harm, in the actual knowledge that such risk is being incurred, then an appropriate direction to that effect can be made. I do not think that it is appropriate for this House in its judicial capacity to be unduly swayed by motives of public policy in defining crimes which have been so long before the courts as have murder and manslaughter.

(2) Counsel for the defence argued that actual foresight of a high degree of probability was too indefinite a phrase to enable juries consistently to administer this important branch of the law. Reference was made to an observation of Lord Reid in a recent civil case (*Southern Portland Cement Ltd.* v. *Cooper* [1974] A.C. 623) with which I respectfully agree. Lord Reid said, at p. 640:

"Chance probability or likelihood is always a matter of degree. It is rarely capable of precise assessment. Many different expressions are in common use. It can be said that the occurrence of a future event is very likely, rather likely, more probable than not, not un-

A likely, quite likely, not improbable, more than a mere possibility, etc. It is neither practicable nor reasonable to draw a line at extreme probability."

If I were to accept the direction of Ackner J. as correct in the present case for all purposes, or to answer without qualification the question certified in the affirmative, I should, I think, be driven to draw the line in a criminal B case of high importance at precisely the point at which it was said to be neither practicable nor reasonable to do so.

I must, however, qualify the negative answer I have proposed to the question certified as of general public importance. For the reasons I have given, I do not think that foresight as such of a high degree of probability is at all the same thing as intention, and, in my view, it is not foresight but intention which constitutes the mental element in murder. It is the absence C of intention to kill or cause grievous bodily harm which absolves the heart surgeon in the case of the transplant, notwithstanding that he foresees as a matter of high probability that his action will probably actually kill the patient. It is the presence of an actual intention to kill or cause grievous bodily harm which convicts the murderer who takes a very long shot at his victim and kills him notwithstanding that he thinks correctly as he takes his aim that the odds are very much against his hitting him at all. D

But what are we to say of the state of mind of a defendant who knows that a proposed course of conduct exposes a third party to a serious risk of death or grievous bodily harm, without actually intending those consequences, but nevertheless and without lawful excuse deliberately pursues that course of conduct regardless whether the consequences to his potential victim take place or not? In that case, if my analysis be correct, there is E not merely actual foresight of the probable consequences, but actual intention to expose his victim to the risk of those consequences whether they in fact occur or not. Is that intention sufficient to reduce the crime to manslaughter notwithstanding a jury's finding that they are sure that it was the intention with which the act was done? In my opinion, it is not, and in this my opinion corresponds with the opinion of the Commissioners on the Criminal Law, Fourth Report (1839), when they said: F

> "Again it appears to us that it ought to make no difference in point of legal distinction whether death results from a direct intention to kill or from wilfully doing an act of which death is the probable consequence."

And again in a later passage: "it is the wilful exposure of life to peril G that constitutes the crime." The heart surgeon exposes his patient to the risk, but does everything he can to save his life, regarding his actions as the best or only means of securing the patient's survival. He is, therefore, not exposing his patient to the risk without lawful excuse or regardless of the consequences. The reckless motorist who is guilty of manslaughter, but not murder, is not at least ordinarily aiming his actions at anyone in the sense explained in *Smith* [1961] A.C. 290, 327. If he were, it is quite H possible that, as in *Smith*, he might be convicted of murder. In the field of guilty knowledge it has long been accepted both for the purposes of criminal and civil law that "... a man who deliberately shuts his eyes to

the truth will not be heard to say that he did not know it." (See *per* Lord Reid in *Southern Portland Cement Ltd.* v. *Cooper* [1974] A.C. 623, 638.) Cannot the same be said of the state of intention of a man who, with actual appreciation of the risks and without lawful excuse, wilfully decides to expose potential victims to the risk of death or really serious injury regardless of whether the consequences take place or not? This seems to me to be the truth underlying the statement of the law in *Stephen's Digest*, the summing up of Cockburn C.J. in *Reg.* v. *Desmond*, The Times, April 28, 1868, and of Avory J. in *Rex* v. *Lumley*, 22 Cox C.C. 635 and of those phrases in *Smith* [1961] A.C. 290 in which it seems to be said that a rational man must be taken to intend the consequences of his acts. It is not a revival of the doctrine of constructive malice or the substitution of an objective for a subjective test of knowledge or intention. It is the man's actual state of knowledge and intent which, as in all other cases, determines his criminal responsibility. Nor, for the like reason, does this set up an irrebuttable presumption. It simply proclaims the moral truth that if a man, in full knowledge of the danger involved, and without lawful excuse, deliberately does that which exposes a victim to the risk of the probable grievous bodily harm (in the sense explained) or death, and the victim dies, the perpetrator of the crime is guilty of murder and not manslaughter to the same extent as if he had actually intended the consequence to follow, and irrespective of whether he wishes it. This is because the two types of intention are morally indistinguishable, although factually and logically distinct, and because it is therefore just that they should bear the same consequences to the perpetrator as they have the same consequences for the victim if death ensues.

This is not very far from the situation in this case. The jury appear to have taken this as a carefully premeditated case and that this was so can hardly be disputed, and, though it was disputed, the jury clearly rejected this view. The appellant had made her way to the house in a van in the early hours of the morning. She took with her a jerrycan containing at least half a gallon of petrol. As she passed Mr. Jones's house she carefully made sure that he was in his own home and not with Mrs. Booth, because, as she said, she did not want to do Mr. Jones any harm. She parked the van at a distance from Mrs. Booth's house, and when she got to the front door she carefully removed a milk bottle from the step in case she might knock it over and arouse somebody by the noise. And when she had started the fire she crept back to her van and made off home without arousing any one or giving the alarm. Once it is conceded that she was actually and subjectively aware of the danger to the sleeping occupants of the house in what she did, and that was the point which the judge brought to the jury's attention, it must surely follow naturally that she did what she did with the intention of exposing them to the danger of death or really serious injury regardless of whether such consequences actually ensued or not. Obviously in theory, a further logical step is involved after actual foresight of the probability of danger is established. But in practice and in the context of this case the step is not one which, given the facts, can be seriously debated. For this reason I do not think the summing up can be faulted, since the judge drew the jury's attention to

the only debatable question in the case, and gave them a correct direction with regard to it.

I, therefore, propose the following propositions in answer to the question of general public importance.

(1) Before an act can be murder it must be "aimed at someone" as explained in *Director of Public Prosecutions* v. *Smith* [1961] A.C. 290, 327, and must in addition be an act committed with one of the following intentions, the test of which is always subjective to the actual defendant:

(i) The intention to cause death;

(ii) The intention to cause grievous bodily harm in the sense of that term explained in *Smith*, at p. 335, i.e., really serious injury;

(iii) Where the defendant knows that there is a serious risk that death or grievous bodily harm will ensue from his acts, and commits those acts deliberately and without lawful excuse, the intention to expose a potential victim to that risk as the result of those acts. It does not matter in such circumstances whether the defendant desires those consequences to ensue or not, and in none of these cases does it matter that the act and the intention were aimed at a potential victim other than the one who succumbed.

(2) Without an intention of one of these three types the mere fact that the defendant's conduct is done in the knowledge that grievous bodily harm is likely or highly likely to ensue from his conduct is not by itself enough to convert a homicide into the crime of murder. Nevertheless, for the reasons I have given in my opinion the appeal fails and should be dismissed.

VISCOUNT DILHORNE. My Lords, for some considerable time the appellant had had regular sexual relations with a Mr. Jones. In consequence of her having some gynaecological trouble those relations ceased and were not resumed after she had had an operation in 1968. She became suspicious of Mr. Jones's relations with a Mrs. Booth and very jealous of her. She tried to break up that association by the writing of anonymous letters. In May 1972 Mrs. Booth obtained a decree nisi of divorce from her husband. That decree was due to be made absolute towards the end of July 1972, and then Mrs. Booth would have been free to marry Mr. Jones.

On July 15, 1972, at about 2 a.m. the appellant drove a van to the house where Mrs. Booth lived with her son and two daughters aged, we were told, 17 and 11. On her way there she went past Mr. Jones's house to see if he was there. The lights were on so she decided that he was in. She did that, she said, because she did not want to do any harm to Mr. Jones. She parked the van round the corner from Mrs. Booth's house. She took a gallon can of petrol from the van and poured petrol through the letter box in Mrs. Booth's front door. She then put newspaper in the letter box and lit it. The petrol ignited and the appellant said that she realised that what she had done was tremendously dangerous to anyone living in the house. She, however, did nothing to alert the occupants of the house to the danger she had put them in or the fire brigade. She just drove to her home some five miles away.

Mrs. Booth and her son succeeded in escaping from the house. Her two daughters did not and were killed. The appellant was charged with and convicted of their murder.

At the beginning of his summing up Ackner J. told the jury that a person who unlawfully and deliberately causes the death of another intending either to kill or to do serious bodily harm is guilty of murder. He said that there was no dispute that the appellant had killed the two children and that it was not suggested that the setting fire to the house was other than a deliberate act. He told the jury that the only question on which they had to focus their attention was the appellant's intent.

He had written down, and he had handed to the jury, his direction with regard to intent. It was in the following terms:

> "The prosecution must prove, beyond all reasonable doubt, that the accused intended to (kill or) do serious bodily harm to Mrs. Booth, the mother of the deceased girls. If you are satisfied that when the accused set fire to the house she knew that it was highly probable that this would cause (death or) serious bodily harm then the prosecution will have established the necessary intent. It matters not if her motive was, as she says, to frighten Mrs. Booth."

In the light of that direction and their verdict one must take it that the jury were satisfied that the appellant knew that, when she set fire to the house, it was highly probable that she would cause serious bodily harm.

The appellant's appeal to the Court of Appeal (Criminal Division) on the ground that this was a misdirection was dismissed, but that court granted leave to appeal to this House, certifying that the following point of law was of general public importance:

> "Is malice aforethought in the crime of murder established by proof beyond reasonable doubt that when doing the act which led to the death of another the accused knew that it was highly probable that that act would result in death or serious bodily harm?"

It is to be observed that Ackner J. in his direction to the jury said that such knowledge established the necessary intent. The question certified asked whether it constituted malice aforethought. If it did, it does not follow that it established an intent to do grievous bodily harm.

In this House Mr. McCullough for the appellant contended that the question certified should be answered in the negative. He submitted that knowledge that a certain consequence was a highly probable consequence does not establish an intent to produce that result. "All consequences that are foreseen are not," he said, "necessarily intended."

He also contended that the direction given by Ackner J. was erroneous in another respect, namely, that, despite the decision in *Reg.* v. *Vickers* [1957] 2 Q.B. 664 and the decision of this House in *Director of Public Prosecutions* v. *Smith* [1961] A.C. 290 to the contrary, intent to do grievous bodily harm did not, nor did knowledge that such harm was the probable result, suffice to make a killing murder. For it to be murder, he contended that the intent must be to kill or to endanger life or, if knowledge was enough, knowledge that the act would kill or endanger life.

With regard to his first contention, so long ago as 1866 Cockburn C.J.

A at the Central Criminal Court in the Fenian trials, *Reg.* v. *Desmond*, The Times, April 28, 1868, directed the jury that if a man did an act

> ". . . not with the purpose of taking life, but with the knowledge or belief that life was likely to be sacrificed by it, that was not only murder by the law of England, but by the law of probably every other country."

B In his *Digest of the Criminal Law*, published in 1877, in art. 223, Sir James Stephen defined "malice aforethought" as involving the following states of mind:

> "(*a*) An intention to cause the death of, or grievous bodily harm to, any person, whether such person is the person actually killed or not; (*b*) Knowledge that the act which causes death will probably cause
C the death of, or grievous bodily harm to, some person, whether such person is the person actually killed or not, although such knowledge is accompanied by indifference whether death or grievous bodily harm is caused or not, or by a wish that it may not be caused; (*c*) An intent to commit any felony whatever; (*d*) An intent to oppose by force any officer of justice on his way to, in, or returning from the execution of the duty of arresting, keeping in custody, or imprisoning
D any person whom he is lawfully entitled to arrest, keep in custody, or imprison, or the duty of keeping the peace or dispersing an unlawful assembly, provided that the offender has notice that the person killed is such an officer so employed."

The Royal Commission on Capital Punishment (1949–1953) in their report (Cmd. 8932) said, at p. 27, that this was the statement of the modern law
E most commonly cited as authoritative. The Royal Commission did not dissent from but endorsed Stephen's statement that such knowledge amounted to malice aforethought. In paragraph 76 (p. 28) five propositions were stated which, the report said, were commonly accepted. The fifth proposition was:

> "(*v*) It is murder if one person kills another by an intentional act
F which he knows to be likely to kill or to cause grievous bodily harm, . . . and may either be recklessly indifferent as to the results of his act or may even desire that no harm should be caused by it."

The propositions, the report said, fell within paragraphs (*a*) and (*b*) of article 223 of *Stephen's Digest* and ". . . it has been generally agreed that they are properly included in the category of murder" (paragraph 77
G (p. 29)) and in paragraph 473 (p. 163) it is stated:

> "Under the existing law as stated by Stephen, the question the jury have to consider in such a case is whether the accused knew or was aware of the likely consequences of his act; and we think that the law is sound."

H In *Reg.* v. *Jakac* [1961] V.R. 367, 371 the full court of the Supreme Court of Victoria delivered a judgment in which it was said that the Royal Commission's fifth proposition was clearly the law.

Stephen in his *Digest* treated such knowledge as a separate head of

malice aforethought and distinct from those in which intent is necessary. The Royal Commission treated it as justifying a conviction of murder even if the accused did not intend to kill or to do grievous bodily harm. If this view is right, then Ackner J. was wrong in telling the jury that proof of such knowledge established the necessary intent.

On the other hand, Lord Devlin in a lecture he gave in 1954 (reported at [1954] Crim.L.R. 661) said, at pp. 666–667, that where a man has decided that certain consequences would probably happen, then

> " for the purposes of the law he intended them to happen, and it does not matter whether he wanted them to happen or not . . . it is criminal intent in the strict sense."

Pearson L.J. appears to have been of the same opinion for in *Hardy* v. *Motor Insurers' Bureau* [1964] 2 Q.B. 745 he said, at pp. 763–764:

> " Then this is the syllogism. No reasonable man doing such an act could fail to foresee that it would in all probability injure the other person. The accused is a reasonable man. Therefore he must have foreseen, when he did the act, that it would in all probability injure the other person. Therefore he had the intent to injure the other person."

Whether or not it be that the doing of the act with the knowledge that certain consequences are highly probable is to be treated as establishing the intent to bring about those consequences, I think it is clear that for at least 100 years such knowledge has been recognised as amounting to malice aforethought. In my opinion, it follows, if the second contention advanced on behalf of the appellant is rejected, that the question certified should be answered in the affirmative.

While I do not think that it is strictly necessary in this case to decide whether such knowledge establishes the necessary intent, for, if Ackner J. was wrong about that, it is not such a misdirection as would warrant the quashing of the conviction as, even if it did not establish intent, it was correct in that such knowledge amounted to malice aforethought, I am inclined to the view that Ackner J. was correct. A man may do an act with a number of intentions. If he does it deliberately and intentionally, knowing when he does it that it is highly probable that grievous bodily harm will result, I think most people would say and be justified in saying that whatever other intentions he may have had as well, he at least intended grievous bodily harm.

I think, too, that if Ackner J. had left the question of intent in the way in which it is left in the vast majority of cases, namely, was it proved that the accused had intended to kill or to do grievous bodily harm, no reasonable jury could on the facts of this case have come to any other conclusion than that she had intended to do grievous bodily harm, bearing in mind her knowledge and the fact that, before she set fire to the house, she took steps to make sure that Mr. Jones was not in it as she did not want to harm him. If the normal direction had been given, much litigation would have been avoided.

I now turn to the second contention advanced on behalf of the appellant. This has two facets: first, that the reference to the intent to cause grievous

bodily harm has been based on the law that killing in the course or furtherance of a felony is murder, and that when the Homicide Act 1957 was enacted abolishing constructive malice it meant that it no longer sufficed to establish intent to do grievous bodily harm; and, secondly, that, if intent to do grievous bodily harm still made a killing murder, it must be intent to do grievous bodily harm of such a character that life was likely to be endangered.

Committing grievous bodily harm was for many, many years, and until all felonies were abolished, a felony. Consequently so long as the doctrine of constructive malice was part of the law of England, to secure a conviction for murder it was only necessary to prove that the death resulted from an act committed in the course of or in furtherance of the commission of grievous bodily harm. But when one looks at the cases and the old text-books, one does not find any indication that proof of intent to do grievous bodily harm was an ingredient of murder only on account of the doctrine of constructive malice. Indeed, one finds the contrary.

Coke in his *Institutes* throws no light on this though in 3 Inst. 56 he went so far as to say that, if death resulted from an unlawful act, it was murder. In *Hale's Pleas of the Crown* (1685) at p. 44 it is said that it is murder "if a man doe an act that apparently must introduce harm, and death ensue; . . . ," and in his *History of the Pleas of the Crown* (published in 1800) it is said, at p. 451, that malice which makes a killing murder is of two kinds, malice in fact and malice in law, and that

> "malice in fact is a deliberate intention of doing any bodily harm to another, . . . It must be a compassing or designing to do some bodily harm."

Hale gave as one instance where murder was to be implied by law the case where the killing was done by "a person, that intends a theft or burglary" (p. 455). He thus distinguished constructive malice implied from a killing in the course of or in furtherance of another offence from malice in fact; and, for there to be malice in fact, it was enough that there should be an intention to do some bodily harm.

Stephen in his *Digest* also distinguished between intent to kill or to do grievous bodily harm and knowledge that death or bodily harm was likely to result (paragraphs (*a*) and (*b*)) from constructive malice (paragraphs (*c*) and (*d*)), and I can find no case to support the contention that a direction that an intent to do grievous bodily harm was regarded and treated as a direction based on constructive malice.

In *Reg.* v. *Bubb* (1850) 4 Cox C.C. 457 the jury was directed that there must be an intention to cause death or some serious bodily injury. In *Reg.* v. *Porter* (1873) 12 Cox C.C. 444, 445 Brett J. told the jury that ". . . if the prisoner kicked the man, intending to inflict grievous harm, and death ensued from it, he was guilty of murder." In *Reg.* v. *Doherty* (1887) 16 Cox C.C. 306 Stephen J. said, at p. 307:

> "What, then, is the intention necessary to constitute murder? Several intentions would have this effect; but I need mention only two in this case, namely, an intention to kill and an intention to do grievous bodily harm."

In *Rex* v. *Lumley*, 22 Cox C.C. 635 Avory J. told a jury that if the accused had contemplated that grievous bodily harm was likely to result, it was murder. In *Rex* v. *Gibbins and Proctor* (1918) 13 Cr.App.R. 134 the Court of Criminal Appeal dismissed an appeal where the judge had directed the jury that it would be murder if the accused wilfully and deliberately withheld food from a child " so as to cause her to weaken and to cause her grievous bodily injury, as the result of which she died " (p. 137). In *Director of Public Prosecutions* v. *Beard* [1920] A.C. 479 Lord Birkenhead L.C. referred, at p. 499, to a charge of murder " based upon intention to kill or to do grievous bodily harm " and in *Holmes* v. *Director of Public Prosecutions* [1946] A.C. 588 Viscount Simon, with whose speech the other members of the House agreed, referred, at p. 598, to malice as the intention to kill or to inflict grievous bodily harm.

Killing with intent to do grievous bodily harm has thus for many years been regarded as murder, quite apart from the doctrine of constructive malice. This was recognised in the report of the Royal Commission on Capital Punishment (1953) (Cmd. 8932). Their five propositions stated in paragraph 76 which were, so the report said, generally accepted to be properly included in the category of murder, were

> " . . . all cases where the accused either *intended* to cause death or grievous bodily harm or *knew* that his act was likely to cause death or grievous bodily harm " (paragraph 77).

The Royal Commission went on to recommend the abolition of constructive malice, and in paragraph 123 suggested a clause for inclusion in a Bill to bring that about.

Section 1 of the Homicide Act 1957 is in all material respects similar to the clause proposed. It would, indeed, be odd if the Royal Commission by recommending the abolition of constructive malice had in fact proposed the abolition of intent to do grievous bodily harm as an ingredient of murder when the commission had not intended and did not recommend that. Parliament may, of course, do more by an Act than it intends but if, as in my opinion was the case, intent to do grievous bodily harm was entirely distinct from constructive malice, then the conclusion that Parliament did so by the Homicide Act 1957 must be rejected. In my opinion *Reg.* v. *Vickers* [1957] 2 Q.B. 664 was rightly decided and this House was right in saying that that was so in *Director of Public Prosecutions* v. *Smith* [1961] A.C. 290.

I now turn to the second facet of the appellant's contention, namely, that the words " grievous bodily harm " are to be interpreted as meaning harm of such a character as is likely to endanger life. In *Reg.* v. *Desmond*, The Times, April 28, 1868, Cockburn C.J. said that " knowledge or belief that life was likely to be sacrificed " made a death murder. This may have been unduly favourable to the accused. Stephen in his *Digest* did not limit grievous bodily harm to harm likely to endanger life, though, as Mr. McCullough pointed out, at p. 80 of his *History of the Criminal Law of England* (1883) Stephen said that paragraphs (*a*) and (*b*) of article 223 in his *Digest* and paragraph 174 of the draft criminal code produced by the Criminal Code Commission 1878–79 exactly corresponded. The draft code did not use the words " grievous bodily harm " but

proposed that it would be murder if "the offender means to cause the person killed any bodily injury which is known to the offender to be likely to cause death, . . ." Therefore, Mr. McCullough contended, when Stephen referred to grievous bodily harm he meant harm likely to cause death. This inference was the sole foundation for this part of his argument.

In *Reg.* v. *Ashman*, 1 F. & F. 88, 89 Willes J. said, in a case where a man was charged with shooting with intent to do grievous bodily harm, that it was

> "not necessary that such harm should have been actually done, or that it should be either permanent or dangerous, if it be such as seriously to interfere with comfort or health, it is sufficient."

Since then that interpretation has in a number of cases been placed on the words "grievous bodily harm" in murder and other cases. Donovan J. in *Director of Public Prosecutions* v. *Smith* [1961] A.C. 290 used it. So far from grievous bodily harm being limited to harm likely to endanger life, since *Reg.* v. *Ashman* its meaning has been extended. This extension was terminated by the decision in *Director of Public Prosecutions* v. *Smith*, Viscount Kilmuir L.C. saying, at p. 334, that there was no warrant for giving the words a meaning other than that which the words convey in their ordinary and natural meaning.

If the words bore the meaning now contended for, there must have been many murder cases in which that was not explained to the jury and in which there was consequently a substantial misdirection. The Royal Commission on Capital Punishment in their review of the law did not suggest that the words had this limited meaning. Indeed, in paragraph 472 of the report [(1953) (Cmd. 8932)] the following appears:

> "We should therefore 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. But we do not believe that, if this change were made, it would lead to any great difference in the day-to-day administration of the law."

In the same paragraph it is stated that Stephen expressed the opinion that to substitute "bodily injury known to the offender to be likely to cause death" would to some extent narrow the definition. So little weight can be attached to the inference which we are asked to draw from the comparison of the article in his *Digest* with the provisions of the draft criminal code [Criminal Code Commission 1878–79].

Our task is to say what, in our opinion, the law is, not what it should be. In the light of what I have said, in my opinion, the words "grievous bodily harm" must, as Viscount Kilmuir said, be given their ordinary and natural meaning and not have the gloss put on them for which the appellant contends.

The House can, it is now recognised, review its previous decisions. I see no reason to review its decision in *Director of Public Prosecutions* v. *Smith* [1961] A.C. 290 on the questions raised in this case. No question here arises of any objective or subjective test, for the jury must be taken to have found that the appellant knew it was highly probable that serious bodily harm would be caused.

To change the law to substitute "bodily injury known to the offender to be likely to cause death" for "grievous bodily harm" is a task that should, in my opinion, be left to Parliament if it thinks such a change expedient. If it is made, an accused will be able to say: "True it is that I intended grievous bodily harm or that I knew such harm was likely to result but I never intended to kill the dead man or to put his life in danger and I did not know that by doing him serious bodily harm I would put his life in danger." But I share the view of the majority of the Royal Commission that such a change would not lead to any great difference in the day-to-day administration of the law.

For these reasons in my opinion this appeal should be dismissed.

LORD DIPLOCK. My Lords, what distinguishes murder from manslaughter today is that murder now falls within the class of crime in which the mental element or mens rea necessary to constitute the offence in English law includes the attitude of mind of the accused not only towards his physical act itself, which is the actus reus of the offence, as is the case with manslaughter, but also towards a particular evil consequence of that act. As I shall endeavour to show, this was not always so. That it is so now is the consequence of the enactment of section 1 of the Homicide Act 1957 and (if the decision of this house in *Director of Public Prosecutions* v. *Smith* [1961] A.C. 290 was right) of the enactment of section 8 of the Criminal Justice Act 1967.

This appeal raises two separate questions. The first is common to all crimes of this class. It is: what is the attitude of mind of the accused towards the particular evil consequence of his physical act that must be proved in order to constitute the offence? The second is special to the crime of murder. It is: what is the relevant evil consequence of his physical act which causes death, towards which the attitude of mind of the accused must be determined on a charge of murder?

Upon the first question I do not desire to say more than that I agree with those of your Lordships who take the uncomplicated view that in crimes of this class no distinction is to be drawn in English law between the state of mind of one who does an act because he desires it to produce a particular evil consequence, and the state of mind of one who does the act knowing full well that it is likely to produce that consequence although it may not be the object he was seeking to achieve by doing the act. What is common to both these states of mind is willingness to produce the particular evil consequence: and this, in my view, is the mens rea needed to satisfy a requirement, whether imposed by statute or existing at common law, that in order to constitute the offence with which the accused is charged he must have acted with "intent" to produce a particular evil consequence or, in the ancient phrase which still survives in crimes of homicide, with "malice aforethought."

I turn then to the second question. I believe that all your Lordships are agreed that if the English law of homicide were based on concepts that are satisfactory, both intellectually and morally, the crime of murder ought to be distinguished from less heinous forms of homicide by restricting it to cases where the consequence of his act, which the accused desired or

foresaw as likely, was the death of a human being. Where we differ is as to whether it is still open to this House to declare in its judicial capacity that this is now the law of England, or whether to define the law of murder thus would involve so basic a change in the existing law that it could only properly be made by Act of Parliament. For my part I think that Parliament itself has, by the Homicide Act 1957, made it constitutionally permissible for this House so to declare, and I believe that this House ought to do so.

Any discussion of the historical development of the law of homicide is complicated by the varying ways in which those who wrote on this subject from the 17th century onwards have differentiated between malice that is "express" and malice that is "implied." In the interests of clarity I shall endeavour to avoid these terms and speak instead of "actual malice" and "constructive malice." By "actual malice" I mean the attitude of mind of the killer towards the infliction of bodily injury on another person at the time he did the act that caused the death; by "constructive malice" I mean those circumstances which until the passing of the Homicide Act 1951 rendered killing murder without its being necessary to inquire into the attitude of mind of the killer towards the infliction of bodily injury on another person. For the purposes of the present case the relevant example of "constructive malice" is where the killing was done in the course or furtherance of some felony other than homicide.

I readily concede that, prior to 1957, it had become commonplace for judges (myself included) to define the "intent" which must be proved to justify a conviction for murder as an intent "to kill or to do grievous bodily harm," and that this practice has continued since the passing of the Homicide Act 1957, during which period it has received the approval of the Court of Criminal Appeal in *Reg.* v. *Vickers* [1957] 2 Q.B. 664 and of this House itself in *Director of Public Prosecutions* v. *Smith* [1961] A.C. 290.

My Lords, the now familiar expression "grievous bodily harm" appears to owe its place in the development of the English law of homicide to its use in 1803 in Lord Ellenborough's Act (43 Geo. 3, c. 58), which made it a felony to shoot at, stab or cut any other person "with intent . . . to murder, . . . maim, disfigure, or disable, . . . or . . . do some other grievous bodily harm . . ." [section 1]. There was a proviso that if the act were committed "under such circumstances as that if death had ensued therefrom the same would not in law have amounted to the crime of murder" the accused was to be acquitted of the felony. In this context the "intent" with which the act was committed appears to be distinguished from the "circumstances" under which it was committed and the latter to refer to such surrounding circumstances as self-defence, a sudden falling out, provocation or preventing an escape from lawful custody or apprehension.

I have found no trace of the actual expression "grievous bodily harm" being used before 1803, by writers on the law of homicide or by judges, to describe what was a sufficient evil intention to constitute that "malice aforethought" that was the badge of murder. Apart from minor piecemeal exceptions of assaults in particular circumstances which had been made felonies by earlier statutes, until the passing of Lord Ellenborough's Act, assaults, however serious their physical consequences, were classified as

no more than misdemeanours unless they resulted in death. So if intention to cause physical injury short of death was sufficient " malice aforethought " for the crime of murder, this must at that time have been because it was " actual malice " and not " constructive malice " implied by law when the act that caused the death was done in the course or furtherance of some other felony.

The felony created by Lord Ellenborough's Act was one in which the intent with which the physical act was done was a necessary ingredient of the offence; but the intent here, unlike that needed to constitute actual malice in the offence of murder, was defined in the statute itself. Consequently after the passing of Lord Ellenborough's Act, wherever the act that caused the death was shooting, stabbing or cutting, it became constructive malice and so made the killing murder if the intent with which the act was done was to do any " grievous bodily harm " within the meaning of the statute. This provision was re-enacted in 1828 (9 Geo. 4, c. 31) [s. 12] and remained in force until it was replaced by section 18 of the Offences against the Person Act 1861, which extended the felonious offence to causing grievous bodily harm by any means if done " with intent, . . . to maim, disfigure, or disable . . . , or to do some other grievous bodily harm . . . , " and omitted the proviso.

The expression " grievous bodily harm " in the earlier statutes had been construed by Graham B. in *Rex* v. *Cox*, Russ. & Ry. 362 and Willes J. in *Reg.* v. *Ashman*, 1 F. & F. 88. In the words of Willes J., at pp. 88–89:

> " It is not necessary that such harm . . . should be either permanent or dangerous, if it be such as seriously to interfere with comfort or health, it is sufficient."

Until the decision of this House in *Director of Public Prosecutions* v. *Smith* [1961] A.C. 290 this statement of Willes J. had been accepted as authoritative upon the meaning of this expression in the Offences against the Person Act 1861, which was passed shortly after it.

Neither *Rex* v. *Cox* nor *Reg.* v. *Ashman* was concerned with a charge of murder: but the effect of the acceptance of Willes J.'s definition was to make it constructive malice sufficient to support a charge of murder if the act that caused the death was done with the intent seriously to interfere with the comfort or health of any person, even though that act was not one foreseen as being in the least likely to endanger life.

In the result, so long as the doctrine of constructive malice continued to be part of the English law of murder, it ceased to matter whether the actual intent with which the act that caused the death was done was an intent to do " grievous bodily harm " within the meaning of the successive statutes or some more heinous intent that might have had to be proved in order to show actual malice sufficient to constitute the crime of murder at common law. So where, as in the generality of murder charges, the prosecution did not rely upon the intent of the accused to commit some other felony such as robbery, rape or abortion, but relied solely on his intent to do physical harm to any person, the distinction between constructive malice and actual malice had no practical consequences and in course of time came to be overlooked.

In 1957 all this was altered. The doctrine of constructive malice was

abolished by section 1 of the Homicide Act 1957. So it was no longer sufficient on a charge of murder to prove that the accused had killed another person in the course or in furtherance of the statutory offence under section 18 of the Offences against the Person Act 1861, for which the only intent necessary was an intent to "do grievous bodily harm" as that expression in the statute had been construed by the courts. It became necessary to prove that his intent was such as would have amounted to actual malice at common law if none of the statutes from Lord Ellenborough's Act onwards had been passed.

The passing of the Homicide Act 1957 thus required the courts to embark upon an inquiry in which the first step was to ascertain in what terms judges were directing juries at the close of the 18th century as to the state of mind of the accused which had to be proved to sustain a charge of murder on the ground of actual malice. If that were the end of the inquiry, however, and judges were again to direct juries in the same terms as their 18th century predecessors, the effect of the passing of the Homicide Act 1957 would have been to set back the clock 200 years. To do this would frustrate the underlying principle which is the justification for retaining the common law as a living source of rules binding upon all members of contemporary society in England. The rules of which it is the source cannot be unchanged. In the field of crime their purpose is to discourage conduct which is commonly accepted by Englishmen to be harmful to society in the circumstances in which men and women live today; not in the circumstances of two centuries ago. They must reflect contemporary views of what is just, what is moral, what is humane, and not those current in an earlier and more primitive or violent age. For unless they do, the system of criminal justice will break down. The unique combination of the functions of judge and jury in a criminal trial, the absence of any means of impugning a jury's verdict of acquittal, or of questioning a direction by the judge which states the law in a way unduly favourable to the accused, have the practical consequence that effect is not given to a criminal law if it outrages the instinctive sense of justice of judges and of juries alike.

So with the passing of the Homicide Act 1957 the courts were faced with a dual task: first, to discover as a matter of historical research what state of mind of the accused was regarded by the 18th century judges as constituting actual malice for the purposes of the crime of murder; and, secondly, to decide in what respects the views on this matter of subsequent generations of judges, if all of them were wise, would have been modified to take account of the way in which material circumstances and social concepts had been developed throughout the 19th and 20th centuries—a task which presents a challenge without precedent to the wisdom of those upon whom this decision rests.

The material for the task of historical research is scanty. There was no systematic contemporaneous reporting of criminal trials before the 19th century. There was no check upon how individual judges directed juries on the criminal law, unless the judge himself chose to reserve a point of law for the informal consideration of his brother judges at Serjeants' Inn—and even such reports as there are of the opinions expressed by all the judges on points of law which were reserved are sparse and haphazard. The major

sources of information are the works of institutional writers on the subject, starting with Coke in 1612, followed by Hale in 1685, by Foster J. in 1762 * and finishing with East in 1803. They were the subject of detailed critical analysis by Sir James Stephen in the 19th century in his *Digest of the Criminal Law* written in 1877 and *History of the Criminal Law of England* written in 1883.

If what was written before the 19th century about the degree of violence that must have been intended by the accused in order to support a charge of murder is to be properly understood, there are several matters to be borne in mind.

(1) It must be remembered that, judged by present day standards, we are dealing with a violent age. Men were used to carrying deadly weapons and not slow to resort to them. So, at the beginning of the period Coke did not classify as murder a killing on "a sudden falling out." Later when this defence became merged in the general doctrine of provocation most of the cases with which the writers were preoccupied involved the use of deadly weapons and it is not without significance that Lord Ellenborough's Act itself was concerned only with shooting, stabbing and cutting.

(2) Medical and surgical science were in a very primitive state. Any bodily injury, particularly if it involved risk of sepsis through an open wound, might well prove mortal although today the likelihood of its resulting in death would be insignificant. It was not until the last quarter of the 19th century that antiseptics came into general use.

(3) Until the 19th century the common law did not recognise unconsummated attempts to commit a crime as being criminal offences in themselves. So in relation to the crime of murder judges were dealing with bodily injuries which had in fact been fatal, and so demonstrated to have been of a kind which could endanger life.

(4) As stated by Foster J. it was accepted law in the 18th century that once the fact of killing was proved the onus lay upon the prisoner to prove facts negativing malice aforethought unless such facts arose out of the evidence produced against him.

(5) Until as late as 1898 persons accused of murder were incompetent to give evidence in their own defence. So the actual intent with which they had done the act which had in fact caused death could only be a matter of inference from the evidence of other witnesses as to what the accused had done or said. In drawing this inference from what he had done it was necessary to assume that the accused was gifted with the foresight and reasoning capacity of a "reasonable man" and, as such, must have foreseen as a possible consequence of his act, and thus within his intention, anything which, in the ordinary course of events, might result from it.

Bearing these considerations in mind, I for my part find it impossible to say with confidence whether or not by the close of this period judges, when in connection with malice aforethought they used various expressions connoting physical injuries, did so with the unexpressed major premise in mind: "All physical injuries, at any rate if they are serious, are likely to endanger life" and so equated intent to cause serious physical injuries with intent to endanger life. Probably they did not at the beginning of the

* *Crown Law*, Discourse on Homicide.

period. Hale thought that an intent to do *any* bodily harm to another was sufficient. The rigour of this doctrine had, however, been modified by the time of Foster. He considered that there must be an intent to do *great* bodily harm, and some light on what he meant by this may perhaps be found in his explanation of a verdict of manslaughter as being justified because the death resulted from a stroke by a cudgel *not likely to kill.* Stephen in his *Digest of the Criminal Law* published in 1877 regards this as a landmark. He says of Foster, at p. 360, that he

> ". . . may be regarded as having laid down the foundation of the modern doctrine on this subject, which has since his time been recognised in a vast number of cases, that the general presumption of malice which arises from the fact of killing is rebutted *if it appear that the means used were not likely to cause death.*" †

East, writing in the year that Lord Ellenborough's Act was passed, defines " malice aforethought express " as " where the deliberate purpose of the perpetrator was to deprive another of life, or do him some great bodily harm." [*Pleas of the Crown* (1803), vol. 1, p. 222.] But in discussing the relevance of the manner of procuring the death, which under the then existing law would constitute the principal material from which the inference of malice would be drawn, he says, at p. 225:

> " But he who wilfully and deliberately does *any act which apparently endangers another's life,*† and thereby occasions his death, shall, unless he clearly proves the contrary, be adjudged to kill him of malice prepense."

So East, whether consciously or not, appears to treat inflicting " great bodily harm " as the same thing as doing an act which endangers life.

In their Fourth Report the Commissioners on Criminal Law, writing in 1839, treated as self-evident the proposition that all serious physical injuries are likely to endanger life. In their prefatory remarks on homicide they wrote:

> " Neither is there any difference between the direct intention to kill and the intention to do some great bodily harm short of death . . . as no one can wilfully do great bodily harm without putting life in jeopardy."

This led them to conclude: " It is the wilful exposure of life to peril that constitutes the crime [sc. murder]." And even as late as 1883 Stephen in his *History of the Criminal Law of England,* when comparing his own previous *Digest* with the draft code proposed by the Criminal Code Commissioners, of whom he himself was one, felt able to say " that the two exactly correspond," although in the *Digest* he had defined the relevant intention as an intention " . . . to cause . . . grievous bodily harm " whereas in the draft code it was defined as an intention " . . . to cause . . . any bodily injury which is known to the offender to be likely to cause death, . . ."

As a final footnote bringing the matter into the 20th century, it appears from paragraph 106 of the report of the Royal Commission on Capital

† Lord Diplock's italics.

Punishment published in 1953 (Cmd. 8932) that Lord Goddard C.J. and Humphreys J. who supported the proposal that a person ought not to be liable to be convicted of murder unless he had intentionally or knowingly endangered life had

> " suggested a definition in terms of the infliction of grievous bodily harm because they held that a *person who wittingly inflicts grievous bodily harm must know that he is endangering life.*" †

Lord Goddard C.J. is reported (paragraph 472) as having told the commission that under the existing law he would direct a jury to that effect.

My Lords, even if the first step towards the solution of the problem with which the courts were confronted by the statutory abolition of the doctrine of constructive malice does not lead to a confident conclusion that judges at the close of the 18th century would only have regarded as sufficient to constitute the actual malice needed for the crime of murder an intention to inflict bodily injury if the intended injury was such as in the existing state of medical skill and science was likely to endanger life, any difficulty created by this is, I think, resolved when one proceeds to the second step, viz., a consideration of how the law in this matter would have developed in the 19th and 20th centuries if there had been no doctrine of constructive malice.

Since the first Commissioners on the Criminal Law issued their Fourth Report in 1839, it has been the uniform view of those who have assumed or been charged with the task of codifying the law of homicide that the relevant intention on a charge of murder should be an intention to kill or to cause any bodily injury which is known to the offender to be likely to endanger life. Such was the view expressed by the Criminal Code Commissioners in 1879, by Stephen in 1877 and 1833, by the Royal Commission on Capital Punishment in 1953 and by the Law Commission in 1966. [Report No. 10, Imputed Criminal Intention (*Director of Public Prosecutions* v. *Smith*)]. The significance of the citations that I have already made from all but the last of these is that they show that it was the opinion of these eminent lawyers at the various dates when they were writing that this would involve a rationalisation of the existing common law rather than any change in it. I have no doubt that the judges in the course of the 19th and 20th centuries would have held this to be the law as to express malice had they not been diverted from doing so by the doctrine of constructive malice.

The opportunity of doing so, however, did not arise until the Homicide Act 1957 was passed and *Reg.* v. *Vickers* [1957] 2 Q.B. 664 came before the Court of Criminal Appeal. The judge had directed the jury in the same terms as he would have done before the passing of the Act, viz., that murder is killing with the intent to kill or to do grievous bodily harm. In dismissing the appeal Lord Goddard C.J. said that killing with that intention had always been malice aforethought in English law. As I have endeavoured to show, this is historically inaccurate. The actual expression " grievous bodily harm " did not come into use until the passing of Lord Ellenborough's Act, when under the doctrine of constructive malice a killing in the course of

† Lord Diplock's italics.

committing an offence under that Act or any of its successors became murder. On the other hand, if "grievous bodily harm" meant, as Lord Goddard appears to have thought it did when he gave evidence before the Royal Commission on Capital Punishment a few years before, "bodily harm likely to endanger life," this statement of the law is accurate. Where it is liable to be misleading, however, is that it uses a phrase taken from a statutory definition of a different offence which, in cases relating to that different offence, had been construed in accordance with the direction of Willes J. in *Reg.* v. *Ashman*, 1 F. & F. 88 as including bodily harm which temporarily, albeit seriously, interfered with comfort or health, although as a result of the advance of medical skill and knowledge it was not in the least likely to endanger life.

It proved to be misleading when the matter came before this House in *Director of Public Prosecutions* v. *Smith* [1961] A.C. 290. That case is best remembered and most criticised for its apparent acceptance of what has come to be known as the objective test of that element in mens rea which involves intending or foreseeing the consequences of an act done voluntarily. This part of the judgment has been overruled by section 8 of the Criminal Justice Act 1967; but in *Director of Public Prosecutions* v. *Smith* this House also approved as a definition of the intention required to constitute the crime of murder "an intention to kill or to cause grievous bodily harm," giving to "grievous bodily harm" the same meaning in this definition as it bears in section 18 of the Offences Against the Person Act 1861.

In his speech Viscount Kilmuir L.C. [1961] A.C. 290, 335 rejected the submission that in cases of murder the expression "grievous bodily harm," if used in the definition of the relevant intent, should be understood in the restricted sense of bodily harm "obviously dangerous to life" or "likely to kill," though he acknowledged that it had been used in this restricted sense in many cases. While rejecting this restricted construction he also rejected the wide construction propounded by Willes J. in *Reg.* v. *Ashman*, 1 F. & F. 88. "Grievous bodily harm" in his view meant "really serious bodily harm"—neither more nor less.

My Lords, this House in *Director of Public Prosecutions* v. *Smith* [1961] A.C. 290 considered, in my view rightly, that it was still open to it in 1961 in its judicial capacity to define the mens rea required to constitute the common law crime of murder after the doctrine of constructive malice had been abolished by Act of Parliament. If that be so, it has in my opinion been open to this House since it assumed the power in 1966 to overrule its previous decisions [*Practice Statement (Judicial Precedent)* [1966] 1 W.L.R. 1234] to refuse to follow this part of Viscount Kilmuir L.C.'s speech in *Director of Public Prosecutions* v. *Smith*, if we are satisfied that it is wrong in law, is liable to cause injustice and offends concepts of what is right and what is wrong that command general acceptance in contemporary society.

For my part, I am satisfied that the decision of this House in *Director of Public Prosecutions* v. *Smith* was wrong in so far as it rejected the submission that in order to amount to the crime of murder the offender, if he did not intend to kill, must have intended or foreseen as a likely consequence of his act that human life would be endangered. I have already

given at some length the reasons why I think so. I will not repeat them. I think the reason why this House fell into error was because it failed to appreciate that the concept of "intention to do grievous bodily harm" only became relevant to the common law crime of murder as a result of the passing of Lord Ellenborough's Act in 1803 and the application to the new felony thereby created of the then current common law doctrine of constructive malice. This led this House to approach the problem as one of the proper construction of the words "grievous bodily harm" which because, though *only* because, of the doctrine of constructive malice had over the past 100 years become part of the standard definition of mens rea in murder, as well as part of the statutory definition of mens rea in the statutory felony of causing grievous bodily harm with intent to cause grievous bodily harm. I do not question that in the statutory offence "grievous bodily harm" bears the meaning ascribed to it by this House in *Director of Public Prosecutions* v. *Smith* [1961] A.C. 290 but the actual problem which confronted this House in *Director of Public Prosecutions* v. *Smith* and the Court of Criminal Appeal in *Reg.* v. *Vickers* [1957] 2 Q.B. 664 was a much more complex one. What it involved, I have endeavoured to analyse earlier in my speech.

It was, I venture to think, a comparable failure to appreciate the significance of the accidents of history in the development of English criminal law that led this House in the same case to adopt the objective test of intention as to the consequences of a voluntary act, i.e., that part of the decision that is now overruled by the Criminal Justice Act 1967. Intention can only be subjective. It was the actual intention of the offender himself that the objective test was designed to ascertain. So long as the offender was not permitted to give evidence of what his actual intention was, the objective test provided the only way, imperfect though it might be, of ascertaining this. The Criminal Evidence Act 1898 changed all this. A defendant to a charge of felony became entitled to give evidence in his own defence. The objective test no longer provided the only means available in a criminal trial of ascertaining the actual intention of the offender; but it had been so for so long that this House overlooked the historical fact that the objective test did not define the relevant intention as to the consequences of a voluntary act. It was no more than one means of ascertaining the relevant intention, to which the Criminal Evidence Act 1898 added another—the defendant's own evidence of what his actual intention was.

My Lords, if a decision of this House is founded upon a proposition of law which is erroneous in a respect which makes it bear too harshly upon a defendant to a criminal charge, particularly where that charge is one of murder, I have no doubt that your Lordships are entitled to correct that proposition and to apply it in its corrected form. I think that your Lordships ought to do so. That all your Lordships are agreed that the law as to the relevant intent in the common law crime of murder ought to be as I have endeavoured to state it; that that was also the view of successive commissions who have considered this topic between 1839 and 1966 and of Sir James Stephen satisfies me that to leave this error uncorrected would offend concepts of what is right and what is wrong that command general acceptance in contemporary society.

If your Lordships were to take this course it would involve allowing this appeal; for although Ackner J.'s direction to the jury was correct as respects the attitude of mind of the appellant towards the particular evil consequences of her physical act that must be proved in order to constitute the crime of murder, he followed the decision of this House in *Director of Public Prosecutions* v. *Smith* [1961] A.C. 290 in his direction as to the nature of those particular evil consequences. So he stated them too broadly. The respondent does not invite this House to apply the proviso to section 2 (1) of the Criminal Appeal Act 1968, and your Lordships have heard no argument about it.

For my part I would allow the appeal and substitute a verdict of guilty of manslaughter for the verdict of guilty of murder.

LORD CROSS OF CHELSEA. My Lords Ackner J. directed the jury in the following terms:

> "The prosecution must prove, beyond all reasonable doubt, that the accused intended to (kill or) do serious bodily harm to Mrs. Booth, the mother of the deceased girls. If you are satisfied that when the accused set fire to the house she knew that it was highly probable that this would cause (death or) serious bodily harm then the prosecution will have established the necessary intent. It matters not if her motive was, as she says, to frighten Mrs. Booth."

As the jury returned a verdict of guilty they must have been satisfied that Mrs. Hyam when she set fire to the house realised at the least that it was highly probable that one or more of the inmates would suffer serious bodily harm. On the other hand, it must be assumed in her favour that they thought that her motive—in the sense of the object which she wished to achieve by her act—may not have been to inflict serious bodily harm on Mrs. Booth or anyone else but simply to frighten her away from Coventry. It is conceded that the judge did not fall into the error of inviting the jury to consider Mrs. Hyam's state of mind "objectively." He told them to ask themselves what "*she*" realised, not what a normal woman would have realised, would be the likely result of her act. Further, there is no question of her having acted "recklessly" in the sense of not having reflected on the probable consequences of her act. The verdict negatives "recklessness" in this sense. The question which we are asked to answer is, therefore, as I see it, whether subparagraph (*b*) of article 223 of *Stephen's Digest of Criminal Law* (original edition 1877) states the law correctly. That article—so far as relevant for present purposes—runs as follows:

> ". . . Murder is unlawful homicide with malice aforethought. Malice aforethought means . . . (*a*) An intention to cause the death of, or grievous bodily harm to, any person, whether such person is the person actually killed or not; (b) Knowledge that the act which causes death will probably cause the death of, or grievous bodily harm to, some person, whether such person is the person actually killed or not, although such knowledge is accompanied by indifference whether death or grievous bodily harm is caused or not, or by a wish that it may not be caused; . . ."

I agree with my noble and learned friend, Lord Kilbrandon, that now that murder no longer attracts the death penalty it would be logical to replace the two crimes of murder and manslaughter by a single offence of unlawful homicide; but there are considerations, in which logic plays little part, which tell against the making of such a change—and as long as one has the two separate crimes one has to decide on which side of the line any given state of mind falls. Stephen's definition covers four states of mind. A (1) an intent to kill, (2) knowledge that the act in question will probably cause death. B (1) an intent to cause grievous bodily harm, (2) knowledge that the act in question will probably cause grievous bodily harm. Counsel for the appellant argued strenuously that there was a great gulf fixed between A (1) and B (1) on the one hand, and A (2) and B (2) on the other, and that unless the accused believed that the consequences in question were certain to ensue, one ought not to equate mere foresight of consequences with an intention to produce them. Even if one views the matter simply from the point of view of linguistics I am not sure that the ordinary man would agree. If, for example, someone parks a car in a city street with a time bomb in it which explodes and injures a number of people I think that the ordinary man might well argue as follows: "The man responsible for this outrage did not injure these people unintentionally; he injured them intentionally. So he can fairly be said to have intentionally injured them—that is to say, to have intended to injure them. The fact that he was not certain that anyone would be injured is quite irrelevant (after all, how could he possibly be certain that anyone would be injured?); and the fact that, although he foresaw that it was likely that some people would be injured, it was a matter of indifference to him whether they were injured or not (his object being simply to call attention to Irish grievances and to demonstrate the power of the I.R.A.) is equally irrelevant." But I can see that a logician might object that the ordinary man was using the word "intentionally" with two different shades of meaning, and I am prepared to assume that as a matter of the correct use of language the man in question did not intend to injure those who were in fact injured by his act. But we are not debating a problem of linguistics; we are asking ourselves whether Stephen was right in saying that the states of mind labelled A (2) and B (2) constitute "malice aforethought." The first question to be answered is whether if an intention to kill—using intention in the strict sense of the word—is murder—as it plainly is—doing an unlawful act with knowledge that it may well cause death ought also to be murder. I have no doubt whatever that it ought to be. On this point I agree entirely with the view expressed by Cockburn C.J. in the passage in his summing up in *Reg.* v. *Desmond*, 11 Cox C.C. 146 which is quoted by my noble and learned friend, Lord Hailsham of St. Marylebone. Turning now to the states of mind labelled B (1) and (2)—*if* it is the law that an intention to cause grievous bodily harm—using intention in the strict sense of the word—is "malice aforethought," whether or not one realises that one's act may endanger life, then I think that it is right that the doing of an act which one realises may well cause grievous bodily harm should also constitute malice aforethought whether or not one realises that one's act may endanger life. No doubt many people think that Stephen's four categories ought to be reduced to two (namely, an intention to kill and a

willingness to endanger life), and my noble and learned friend, Lord Diplock, whose speech I have had the advantage of reading, thinks that since the passing of the Homicide Act 1957 it has been open to the courts to declare that this is in fact the law. But to achieve that result it would be necessary for us to overrule *Reg.* v. *Vickers* [1957] 2 Q.B. 664 and that part of the decision in *Director of Public Prosecutions* v. *Smith* [1961] A.C. 290 which approved *Reg.* v. *Vickers*. For the reasons which I give in the second part of this opinion, I do not think that we ought to consider doing that in this case and so I think that we should for present purposes accept Stephen's article 223 (*a*) and (*b*) as a correct statement of the law. Although judges have generally only used subparagraph (*a*) in their directions to juries, subparagraph (*b*) has sometimes been used, as, for example, by Avory J. in *Rex* v. *Lumley*, 22 Cox C.C. 635. Counsel did not refer us to any case in which any doubt has been thrown on its correctness and it was accepted as correct in the Supreme Court of Victoria in *Reg.* v. *Jakac* [1961] V.R. 367. In the result, therefore, I think that the only criticism which can be directed against Ackner J.'s summing up is that by the insertion of the word " highly " before " probable " it was unduly favourable to Mrs. Hyam.

It was not until counsel for the appellant was in the middle of his reply that I appreciated that he was contending as an alternative to his main argument that *Reg.* v. *Vickers* [1957] 2 Q.B. 664 had been wrongly decided. My failure to appreciate this may well have been partly due to the fact that I have never before had to grapple with this obscure and highly technical branch of the law, but the fact that the Solicitor-General did not deal with this point at all in his argument is some indication that counsel, if he was intending to make it in his opening, did not lay much stress on it at that stage. Moreover, although by the close of the argument I could see that it was a serious point, it was only when I read the speech of my noble and learned friend, Lord Diplock, that I fully appreciated the historical and logical basis for it. Briefly the argument, as I understand it, runs as follows —that the Court of Criminal Appeal was wrong when it said in *Reg.* v. *Vickers* that an intention to inflict grievous bodily harm had itself " *always* " supplied the necessary " malice " to support a conviction for murder whether or not the accused realised that what he was doing was likely to endanger life; that such an intention only came to supply the necessary malice after the intentional infliction of grievous bodily harm had been made a felony by Lord Ellenborough's Act; that accordingly what came to be the common form direction that an intention to do grievous bodily harm constituted " malice aforethought " was, whether those who used it realised the fact or not, only justified by the doctrine of constructive malice and that, whether or not it realised what it was doing, Parliament when it abolished constructive malice by the Homicide Act 1957 in effect swept away the existing law of " malice aforethought " in cases in which an intent to kill could not be proved and left it to the courts to redefine the mental element requisite in such cases to support a conviction for murder. My noble and learned friend may be right. On the other hand, my noble and learned friend, Viscount Dilhorne, whose speech I have also had the advantage of reading, thinks that he is wrong—and he may be right in so thinking. All that I am certain of is that I am not prepared to decide

between them without having heard the fullest possible argument on the point from counsel on both sides—especially as a decision that *Reg.* v. *Vickers* [1957] 2 Q.B. 664 was wrongly decided might have serious repercussions since the direction approved in that case must have been given in many homicide cases in the last 17 years. For my part, therefore, I shall content myself with saying that *on the footing that Reg.* v. *Vickers was rightly decided* the answer to the question put to us should be " Yes " and that this appeal should be dismissed.

LORD KILBRANDON. My Lords, having had the advantage of reading the speech of my noble and learned friend, Lord Diplock, I have no difficulty in coming to the conclusion that to kill with the intention of causing grievous bodily harm is murder only if grievous bodily harm means some injury which is likely to cause death: if murder is to be found proved in the absence of an intention to kill, the jury must be satisfied from the nature of the act itself or from other evidence that the accused knew that death was a likely consequence of the act and was indifferent whether that consequence followed or not. It is because I regard the adoption of a fresh definition of the intention, beyond an intention to kill, necessary to support a charge of murder as inevitably called for by the passing into law of the Homicide Act 1957 that I have come to the conclusion that this House is entitled to declare the common law basis upon which the rule laid down by Parliament rests, rather than leaving it to Parliament itself to do so. It is a satisfaction to me to be able to say that in my opinion such a declaration would be in conformity with the common law of Scotland, where constructive malice has never formed part of the law of murder.

My Lords, it is not so easy to feel satisfaction at the doubts and difficulties which seem to surround the crime of murder and the distinguishing from it of the crime of manslaughter. There is something wrong when crimes of such gravity, and I will say of such familiarity, call for the display of so formidable a degree of forensic and judicial learning as the present case has given rise to. I believe this to show that a more radical look at the problem is called for, and was called for immediately upon the passing of the Act of 1967. Until that time the content of murder—and I am not talking about the definition of murder—was that form of homicide which is punishable with death. (It is not necessary to notice the experimental period during which capital murder and non-capital murder existed side by side.) Since no homicides are now punishable with death, these many hours and days have been occupied in trying to adjust a definition of that which has no content. There does not appear to be any good reason why the crimes of murder and manslaughter should not both be abolished, and the single crime of unlawful homicide substituted; one case will differ from another in gravity, and that can be taken care of by variation of sentences downwards from life imprisonment. It is no longer true, if it was ever true, to say that murder as we now define it is necessarily the most heinous example of unlawful homicide. The present case could form an excellent example exhibiting as it does, assuming it to be capable of classification as manslaughter, a degree of cold-blooded cruelty exceeding that to be found in many an impulsive crime which could never, on our present law, be so classified.

My Lords, since the passage in the summing up of the learned judge which was particularly noticed is not consistent with the common law as it has now, as I agree, been shown to be, and the proviso was not relied on, it follows that this appeal should be allowed.

Appeal dismissed.

Solicitors: *Callingham, Tucker & Co. for Varley, Hibbs & Co., Coventry; Director of Public Prosecutions.*

M. G.

[HOUSE OF LORDS]

ARGYLE MOTORS (BIRKENHEAD) LTD. . . APPELLANTS

AND

BIRKENHEAD CORPORATION . . . . . RESPONDENTS

1972 Oct. 9, 10, 11; Dec. 15
1973 Nov. 12, 13, 14; Dec. 11

Russell, Buckley and Orr L.JJ.

Lord Wilberforce, Lord Hodson, Viscount Dilhorne, Lord Diplock and Lord Kilbrandon

Town Planning—Compensation—Injurious affection—Car dealer on busy road—Street reconstruction under local Act—Execution of works causing loss of vehicular access from main traffic flow—Claim for compensation for loss of business profits—Whether compensation payable—Lands Clauses Consolidation Act 1845 (8 & 9 *Vict. c.* 18), *s.* 68—*Birkenhead Corporation (Mersey Tunnel Approaches) Act* 1965 (*c.* xxxviii), ss. 20, 22 (3) [1]

The plaintiff company was tenant from year to year of premises in which it carried on a car dealing business. In March 1967 the defendant corporation, authorised by a local Act, commenced works which included the reconstruction of the area adjoining the company's premises. Access to the premises from the main traffic flow was obstructed temporarily during the execution of the works and permanently by the completed works. The company sought compensation from the corporation under the local Act, into which section 68 of the Lands Clauses Consolidation Act 1845 [2] was incorporated,

[1] Birkenhead Corporation (Mersey Tunnel Approaches) Act 1965, s. 22 (3): "In the exercise of the powers conferred by this section the corporation shall cause as little detriment and inconvenience as circumstances admit to any person and shall make reasonable compensation for any damage caused by the exercise of such powers."

[2] Lands Clauses Consolidation Act 1845, s. 68: "If any party shall be entitled to any compensation in respect of any lands, or of any interest therein, which shall have been taken for or injuriously affected by the execution of the works, and for which the promoters of the undertaking shall not have made satisfaction under the provisions of this or the special Act, or any Act incorporated therewith, . . . such party may have the same settled . . ."