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ZABURONI v THE QUEEN (2016) 256 CLR 482

I Introduction

In *Zaburoni v The Queen*,[1] the High Court decided what it means to 'intend' to transmit a serious infectious disease to another person under s 317(b) of the *Criminal Code Act 1899* (Qld) ('the *Code*'). Godfrey Zaburoni was convicted in the District Court of Queensland of intentionally transmitting the human immunodeficiency virus ('HIV') to his former partner.

This case note analyses the High Court's approach in determining and interpreting the meaning of intent under the common law. Specifically, it will examine the distinction between intention and purpose, motive or desire, and the significance of the concept of knowledge of a virtually certain consequence under the criminal law. This case note will also explore the tendency of the triers of fact to conflate intention with foresight of a risk of harm, and briefly examine the broader context of the treatment of HIV positive people under Australian law.

II Background

Every Australian state and territory criminalises the transmission of HIV in some circumstances,[2] and some jurisdictions also criminalise reckless HIV exposure.[3] Until it was abolished in 2015, Australia's most controversial transmission law was s 19A of the *Crimes Act 1958* (Vic), which created the offence of intentionally transmitting a 'serious bodily disease', carrying a maximum sentence of life imprisonment. 'Serious bodily disease' was defined exclusively to mean HIV, making s 19A the last HIV-specific transmission offence still operating in Australia. Such offences are heavily criticised on the grounds that they unnecessarily single out and stigmatise HIV-positive people for engaging in conduct that should fall under the remit of more

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1 (2016) 256 CLR 482 ('*Zaburoni*').

2 *Crimes Act 1900* (ACT) ss 19, 20, 25; *Crimes Act 1900* (NSW) ss 33, 35, 54; *Criminal Code Act* (NT) ss 174E, 177, 181, 186; *Criminal Code 1899* (Qld) ss 320, 317(b), 328, 329; *Criminal Law Consolidation Act 1935* (SA) s 23; *Criminal Code Act 1924* (Tas) ss 170, 172; *Crimes Act 1958* (Vic) s 16; *Criminal Code 1913* (WA) ss 297, 320.

3 *Criminal Law Consolidation Act 1935* (SA) ss 29(1)–(2); *Crimes Act 1958* (Vic) ss 22, 23; *Criminal Code 1913* (WA) s 294(8).

general criminal offences such as causing grievous bodily harm.[4] Section 19A was abolished in Victoria in 2015.

Today, the criminalisation of the transmission of HIV is done so by general offences that criminalise the reckless or intentional transmission of disease or causing harm offences, depending on the jurisdiction. The scope, penalties and defences attached to the law vary according to jurisdiction. Most jurisdictions also have public health legislation that requires HIV-positive people to practise safe sex or disclose their HIV status.[5]

Both the intentional and reckless transmission of HIV are criminalised under the *Code.* At trial the appellant was convicted under s 317 — '[a]cts intended to cause grievous bodily harm and other malicious acts'. Subsection (b) creates the offence of transmitting a serious disease 'with intent', and HIV falls within the definition of 'serious disease'.[6] Section 317(b) carries a maximum sentence of life imprisonment. The appellant was also charged in the alternative with, and pleaded guilty to, unlawfully causing grievous bodily harm to the complainant under s 320, for which recklessness is a sufficient fault element. Because in pleading guilty to the s 320 offence the appellant made admissions of his guilt of that offence, the sole issue at trial was whether the appellant had actually intended to transmit HIV to the complainant.

III Facts

The appellant was diagnosed with HIV in 1998 while touring Australia as an acrobat. At the time, doctors in Adelaide and Perth explained his condition to him and that he needed to use condoms during intercourse to avoid transmitting the disease. The appellant never began antiretroviral therapy, nor did he monitor his condition. He met the complainant on 31 of December 2006. When asked, he told her that he had tested negative for HIV. After an initial period of protected sex, the couple began to have unprotected sex two to three times per week. The appellant had told the complainant that sex was more pleasurable for him without condoms.

During the couple's relationship the complainant fell ill with what was diagnosed as glandular fever, and asked the appellant again if he had HIV. He again denied it. The complainant continued to suffer bouts of illness throughout their relationship, and the relationship ended in September 2008. In August 2009 the complainant

4 See, eg, 'International Guidelines on HIV/AIDS and Human Rights' (Guidelines, UNAIDS and the Office of the United Nations Commissioner for Human Rights, 2006) Guideline 4.

5 *Public Health Regulation 2000* (ACT) reg 21; *Public Health Act 2010* (NSW) s 79; *Public Health Act 2005* (Qld) s 143; *Public and Environmental Health Act 1987* (SA) s 37; *Public Health Act 1997* (Tas) s 51; *Public Health and Wellbeing Act 2008* (Vic) s 111; *Health Act 1911* (WA) s 264.

6 *Criminal Code Act 1899* (Qld) s 1.

received a tentative HIV diagnosis. The appellant again denied having HIV, before later admitting that he was HIV-positive. He claimed, however, to have only known of his diagnosis for six months and believed he had been infected only two years earlier. He said he had not told her of his diagnosis because he had not wanted to make her unhappy, and he 'didn't want to ruin her life'.[7] The complainant's diagnosis was confirmed on 2 September 2009.

In May 2010 the appellant was questioned and lied to police, stating that he and the complainant had had unprotected sex on possibly two occasions, and that he had been diagnosed in 1998 but had not been told that he must inform his sexual partners of his HIV status. He also claimed that he had tested negative for HIV in April of 2005 in a Department of Immigration test, but later admitted that he had submitted a friend's blood sample.

The appellant was convicted under s 317(b) in the District Court of Queensland and sentenced to nine and a half years' imprisonment. His appeal was dismissed by the Supreme Court of Queensland (Court of Appeal), where Gotterson and Morrison JJA found it was open to the jury to be satisfied beyond reasonable doubt that the appellant intended to transmit HIV to the complainant. Justice Applegarth dissented, inferring from the evidence only that the appellant had been reckless.

IV Decision

The High Court had to decide whether it could be inferred from the evidence admitted at trial that the appellant had intended to transmit HIV to the complainant beyond reasonable doubt. The appellant argued that the trial judge and jury, and Gotterson and Morrison JJA at the Court of Appeal, had conflated recklessness with intent.[8] The appellant further argued that the conclusion of the majority of the Court of Appeal that it was open to the jury at trial to make that finding was unreasonable and contrary to the evidence.[9]

The High Court considered two main issues: the meaning of 'intent' under s 317(b) (and thus whether the Court of Appeal had conflated the meanings of 'intention' and 'recklessness'), and the inferences open to be drawn from the facts of the case regarding the appellant's intent. All three judgments (Kiefel, Bell and Keane JJ; Gageler J; Nettle J) agreed that it could not be inferred that the appellant intended to transmit HIV to the complainant and concluded that the appeal should be allowed, but differed in their reasoning as to the meaning of intent. The Court quashed the appellant's conviction, and downgraded it to a conviction under s 320 for recklessly

7 *Zaburoni* (2016) 256 CLR 482, 493 [28].

8 Ibid 496 [39].

9 Ibid 487 [4].

causing grievous bodily harm. The matter was then remitted to the District Court for sentencing.[10]

A *The Meaning of 'Intent'*

The majority, Kiefel, Bell and Keane JJ, provided the most detailed analysis. Their Honours distinguished the standard of intent where 'proof of the intention to produce a particular result is made an element of liability for an offence under the *Code*' from the standard of intent forming the mental element of common law murder.[11] This was the reasoning applied in *R v Crabbe*,[12] on which McPherson JA had relied on his Honour's judgment in *R v Reid*,[13] another s 317(b) HIV transmission case. Their Honours confirmed Keane JA's statement in that case that 'common law concepts of foreseeability, likelihood and probability' are irrelevant to proof of intention under s 317(b),[14] stating that 'foresight of risk of harm is distinct in law from the intention to produce that harm'.[15]

Instead, their Honours approved of Connolly J's explanation of 'intent' in *R v Willmot (No 2)*,[16] where 'the directing of the mind, having a purpose or design' was held to be key.[17] Their Honours' crucial statement was that 'proof of the s 317(b) offence required the prosecution to establish beyond reasonable doubt that … he had as a purpose the transmission of HIV to her'.[18] Importantly, 'knowledge or foresight of result, whether possible, probable or certain, is not a substitute in law for proof of a specific intent under the *Code*'.[19] Even if an outcome were 'virtually certain', it must still be shown that the accused *meant* to produce that result.[20] The High Court clarified that foresight of a virtually certain consequence is of mere 'evidential significance'[21] — a defendant's awareness of a virtually certain consequence of their action is compelling evidence from which intention to bring that result about can be inferred, but it is not itself the test for intention.

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10 Mr Zaburoni was eventually given a five-year suspended sentence: Andrew Kos, 'Godfrey Zaburoni, who Infected Partner with HIV, Walks Free from Jail', *Australian Broadcasting Corporation* (online), 3 June 2016 <http://www.abc.net.au/news/2016-06-03/godfrey-zaburoni-suspended-sentence-gbh/7474160>.

11 *Zaburoni* (2016) 256 CLR 482, 490 [14].

12 (1985) 156 CLR 464.

13 [2007] 1 Qd R 64, 72 [13] ('*Reid*').

14 Ibid 83 [67].

15 *Zaburoni* (2016) 256 CLR 482, 488–9 [10].

16 [1985] 2 Qd R 413.

17 Ibid 418.

18 *Zaburoni* (2016) 256 CLR 482, 491 [19].

19 Ibid 490 [14].

20 Ibid 490 [15].

21 Ibid.

Justice Gageler similarly stated that 'the intention to be proved was an actual subjective intention to achieve that result as distinct from awareness of the probable consequence of his actions.'[22]

However, Nettle J differed from the plurality on the issue of virtual certainty: 'where it is proved that an accused foresaw that his or her actions would have an inevitable or certain consequence, it logically follows that the accused intended to bring about that consequence.'[23] According to this analysis, had the appellant known that by having unprotected intercourse with the complainant over the 21-month period of their relationship she was certain to contract HIV, it could be inferred from his actions that he intended to transmit HIV to her. It appears that his Honour impliedly adopted the English concept of oblique intention.[24] This is further discussed below.

B *Inferences Drawn from the Evidence*

Each judgment considered when an inference could be drawn from the evidence of the appellant's conduct admitted at trial that he had intended to transmit HIV to the complainant beyond reasonable doubt. The Court was unanimous in finding that it could not, but the judgments differed in their reasoning.

At the Court of Appeal, Gotterson and Morrison JJA found that a jury could infer from the frequency of unprotected intercourse over a protracted period that the appellant had the requisite intent — Gotterson JA commented that 'such acts repeated frequently with the same partner over many months, defied description as mere recklessness as to the risk of transmission'.[25] The inference was supported by the lies he told the complainant and police.

The High Court construed the facts differently. The judgments of Kiefel, Bell and Keane JJ and Gageler J both found the crux of the case to be in the inference to be drawn from the frequency and protracted period of the appellant's conduct, with his lies being a secondary issue.

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22 Ibid 501 [55].

23 Ibid 504 [66]. The *Criminal Code 1995* (Cth) s 5.2(3) adopts a similar definition of intent: 'A person has intention with respect to a result if he or she means to bring it about or is aware that it will occur in the ordinary course of events.'

24 See generally, Nicola Lacey, 'Clear Concept of Intention: Elusive or Illusory?' (1993) 56 *Modern Law Review* 621; Glanville Williams, 'Oblique Intention' (1987) 46 *Cambridge Law Journal* 417; Jeremy Horder, 'Intention in the Criminal Law — A Rejoinder' (1995) 58 *Modern Law Review* 678; Simon Bronitt and Bernadette McSherry, *Principles of Criminal Law* (Lawbook, 2nd ed, 2005) 175–6; Itzhak Kugler, *Direct and Oblique Intention in the Criminal Law: An Inquiry into Degrees of Blame-Worthiness* (Ashgate, 2002); Sir Anthony Mason, 'Intention in the Law of Murder' in Ngaire Naffine, Rosemary Owens and John Williams (eds), *Intention in Law and Philosophy* (Ashgate, 2001) 107; Alan Norrie, 'Oblique Intention and Legal Politics' [1989] *Criminal Law Review* 793.

25 *R v Zaburoni* (2014) 239 A Crim R 505, 514–15 [43].

The majority took particular issue with Gotterson JA's 'mere recklessness' comment, reiterating that awareness of a risk 'does not, without more, support the inference that the person intended to produce that harm'.[26] Their Honours then found that another rational inference could be found on this evidence: the appellant's actions 'enhanced his sexual pleasure',[27] and he was merely reckless to that risk of HIV transmission.[28] Critically, the existence of that competing inference was held to 'lessen the force of reasoning' behind the conclusion that the appellant had intended to transmit HIV, so his intention could not be inferred beyond reasonable doubt.[29]

On the appellant's lies, their Honours found the rational inference was that rather than constituting evidence of the appellant's consciousness of guilt, they were told merely to 'procure and maintain the complainant's consent to unprotected sexual intercourse',[30] and did not in themselves found further inference that he intended to transmit HIV.

Justice Gageler's reasoning was very similar. His Honour also found that the appellant's lies did not in themselves indicate the requisite intention. They 'demonstrated consciousness of wrongdoing, but not necessarily consciousness of guilt of a crime of specific intent'.[31] On the issue of the frequency and protracted period of unprotected intercourse, his Honour agreed with Applegarth JA in the Court of Appeal decision, who stated that the evidence 'supported an inference of intent',[32] but also left open the inference that the appellant was merely acting 'selfishly for his own gratification, being reckless as to whether or not the complainant might become infected'.[33] Because that second hypothesis could not be excluded beyond reasonable doubt, the appellant could not be found to have intended to transmit HIV to the complainant.

Finally, following his Honour's differing conception of intent, Nettle J stated that the evidence did not give rise to competing inferences, but to one inference which could be found to establish intent if the appellant foresaw the 'inevitability or certainty' that he would transmit HIV to the appellant.[34] However, his Honour decided that the inference, 'even taken at its highest, was insufficient to establish intent'[35] because the appellant neither foresaw such certainty, nor was the likelihood actually certain.[36]

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26 *Zaburoni* (2016) 256 CLR 482, 497 [42].

27 Ibid 497–8 [43].

28 Ibid.

29 Ibid 498 [44].

30 Ibid 499 [47].

31 Ibid 502 [58].

32 *R v Zaburoni* (2014) 329 A Crim R 505, 515 [46].

33 *Zaburoni* (2016) 256 CLR 482, 503 [63].

34 Ibid 504 [67].

35 Ibid 505 [72].

36 Ibid 504 [68]–[69].

Instead, all that could be inferred from the appellant's conduct was his recklessness in transmitting HIV.[37]

Evidently from the appeal proceedings, even though the parties had agreed that the prosecution was required to provide proof of actual intent,[38] there were doubts as to what the precise meaning of intention is under the common law, or whether the virtual certainty of a consequence could itself demonstrate the intent of the accused.

V Comment

The common law has long grappled with the definition of intention in the criminal law, because usually the analysis of whether intention exists will be intuitively obvious and '[t]he general legal opinion is that "intention" cannot be satisfactorily defined and does not need a definition, since everybody knows what it means.'[39] However, in a case where it is difficult to surmise whether there was intention, further explanation is necessary.

Queensland's criminal law has been codified, but the concept of specific intention is left to the common law.[40] Under the common law, the meaning of intention is somewhat elusive, as a result of its meaning being left to the juries and triers of fact to decide,[41] and judges are to avoid elaborating or paraphrasing what intent means to the jury.[42] This has resulted in decisions conflating intention with recklessness.[43] To explain simply, recklessness is a state of mind of an accused who is aware of a risk that a particular consequence is a likely result of his or her conduct.[44] Therefore, awareness of a risk of harm is the essence of recklessness.

In *Zaburoni*, the Court expanded upon the meaning of intention in the negative, clarifying what intention is *not*, rather than expanding on what it *is*.[45]

Further complicating this issue, the High Court's analysis of intent directly contradicts legislated definitions of the word, such as under the *Criminal Code Act 1995* (Cth), which includes the foresight of a risk of harm in its definition. Section 5.2(3)

37 Ibid 504–5 [69].

38 Ibid 488 [7].

39 Glanville Llewelyn Williams, *Textbook of Criminal Law* (Stevens, 1st ed, 1978) 74. See also, Thalia Anthony et al, *Waller & Williams Criminal Law* (LexisNexis, 12th ed, 2013).

40 *Zaburoni* (2016) 256 CLR 482, 488 [7]–[12].

41 *R v Moloney* [1985] AC 905, 926 (Lord Bridge).

42 Ibid.

43 *La Fontaine v The Queen* (1976) 126 CLR 62; *R v Crabbe* (1985) 156 CLR 464; *Buoghey v The Queen* (1986) 161 CLR 10; *R v Demirian* [1989] VR 97.

44 Bronitt and McSherry, above n 24, 179.

45 (2016) 256 CLR 482, 499–503.

provides that '[a] person has intention with respect to a result if he or she means to bring it about or is aware that it will occur in the ordinary course of events'.[46] This definition effectively equates recklessness with intention; clearly then the common law meaning of intention is narrower than the Commonwealth Code's meaning of intention, and this difference suggests that the common law may be at odds with legislative policy.

This raises an inconsistency between the Commonwealth Code, and the states and territories that have retained their common law criminal jurisdictions. An act that is obviously reckless, such as Mr Zaburoni's in this case, potentially resulting in greater culpability in one jurisdiction compared to another, is worrying because it is contrary to the principle of fair labelling.[47]

Nevertheless, the decision does provide a guideline in determining what intention means. It can now be safely stated that intention is not to be equated with foresight of a risk of harm under the common law concept of specific intention. However, in further analysing this judgment it is appropriate to first consider their Honours' observation on the distinction between intention and purpose, desire and motive.

A *Intention, Purpose, Motive and Desire*

As Lord Hailsham explained, it is intention 'which converts an *actus reus* into a criminal act'.[48] In the majority's reasoning, it is implied that purpose and object are the closest synonyms to intention. For instance, their Honours reference Brennan J's statement in *He Kaw Teh v The Queen* that intention 'connotes a decision to bring about a situation so far as it is possible to do so — bring about an act of a particular kind or a particular result'.[49] Purpose, therefore, appears to be synonymous with intention. Motive, however, describes the reason for the formation of an accused's intention.[50] Intention is not synonymous with motive, but motive might be relevant in attributing intention to an accused, for example as circumstantial evidence.[51] Motive is of course relevant in the sentencing of an offender if malice exists.[52]

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46 *Criminal Code Act 1995* (Cth) s 5.2(3).

47 See, eg, Andrew Ashworth, 'The Elasticity of *Mens Rea*' in C F H Tapper (ed), *Crime Proof and Punishment: Essays in Memory of Sir Rupert Cross* (Butterworths, 1981) 45, 53–6; James Chalmers and Fiona Leverick, 'Fair Labelling in Criminal Law' (2008) 71 *Modern Law Review* 217; Barry Mitchell, 'Multiple Wrongdoing and Offence Structure: A Plea for Consistency and Fair Labelling' (2001) 64 *Modern Law Review* 395, 398–400; Glanville Williams, 'Convictions and Fair Labelling' (1983) 42 *Cambridge Law Journal* 85.

48 *Hyam v DPP* [1975] AC 55, 73.

49 *He Kaw Teh v The Queen* (1985) 157 CLR 523, 569.

50 See, eg, Bronitt and McSherry, above n 24, 175; M N Howard, Peter Crane and Daniel A Hochberg, *Phipson on Evidence* (Sweet & Maxwell, 14th ed, 1990) 356–7 [16]–[19]; *De Gruchy v The Queen* (2002) 211 CLR 85.

51 Bronitt and McSherry, above n 24, 175.

52 Ibid.

Additionally, the majority correctly notes that desire is not involved in the proof of intention.[53] A person may 'intend a particular result without desiring that result'.[54] As a matter of language, desire and intent are not equivalents. A person may desire an outcome, without intending to bring it about.[55] Similarly, a person may intend an outcome that he or she does not desire.[56] Furthermore, the Courts in *R v Crabbe*[57] and *Moloney v DPP*[58] held that intention is 'distinct from desire'.[59] Intention is meant as a 'decision to bring about the commission of the offence … no matter whether the accused desired that consequence of his act or not'.[60]

However, Brennan J in *He Kaw Teh v The Queen* supported the view that intention should be defined in terms of desire.[61] Professor Glanville Williams also advocates the approach that intention and desire be equated.[62] Simster et al share a similar approach:

> The key ingredient of any account of intention is … that the defendant acts because of her desire or belief. Without it, there cannot be intention. If [the accused] foresees an outcome, and indeed welcomes it, but that outcome nonetheless plays no part in her decision to act, then she does not intend it.[63]

However, it is the opinion of the authors of this case note that intention is distinct from desire, as explained by their Honours: 'Illustrations of the distinction between desire and intention commonly raise a false issue'.[64] Moreover, their Honours referred to Professor Gillies' example in explaining intention:

> the criminal law does not connote desire by the example of the accused who sets fire to his enemy's house so as to spite the enemy even though he regrets the destruction of the house because it is a masterpiece of period architecture. Accepting the accused's refined sense of regret, it hardly seems apt to say that in setting fire to the house he did not desire to destroy it. A direction that a person may do something, fully intending to do it although the person does not desire to do it, may often be confusing.[65]

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53 *Zaburoni* (2016) 256 CLR 482, 491 [18].

54 Ibid, citing A P Simester and G R Sullivan, *Simester and Sullivan's Criminal Law: Theory and Doctrine* (Hart Publishing, 3rd ed, 2007) 123.

55 Ibid.

56 Ibid.

57 (1985) 156 CLR 464, 467–70.

58 [1985] AC 905, 929.

59 Ibid.

60 *R v Mohan* [1976] QB 1, 11; see also *Hyam v DPP* [1975] AC 55, 74.

61 *He Kaw Teh v The Queen* (1985) 157 CLR 523, 569.

62 Williams, 'Oblique Intention', above n 24, 423.

63 Simester and Sullivan, above n 54, 123.

64 *Zaburoni* (2016) 256 CLR 482, 491 [18].

65 Ibid (citations omitted).

In a criminal case, the onus is placed on the prosecution to prove that the accused's purpose was to bring about the result or consequences of the conduct.[66] If the accused has this purpose, he or she acts intentionally even where, to that person's knowledge, the chance of him or her causing the result are small.[67] If an accused does not have this purpose, he or she does not act intentionally, even though to his or her knowledge the chances of causing the result are high. However, recklessness may still be made out.

Returning to the case at hand, the majority explained that the offence requires that the offender engage in unprotected sexual intercourse with the purpose or object of transmitting HIV to the complainant.[68] The fact that the accused may have had multiple purposes or objects in engaging in unprotected sexual intercourse, most relevantly that he preferred it as it gave him sexual pleasure, is not inconsistent with proof that he had the requisite intention of transmitting HIV.[69] Instead, it is the absence of this latter intention that precluded a conviction under s 317(b).

B *Inferring Intention: The Evidential Significance of Virtual Certainty*

In the past there has been some uncertainty as to whether the foresight of virtual certainty is a test for intent at law, or whether it is only evidence from which an inference of intent could be drawn. Justice Windeyer's dissent in *Parker v The Queen*,[70] and Kirby and McHugh JJ's dissent in *Cutter v The Queen*,[71] appear to adopt the latter view that the virtual certainty of a consequence is of mere evidential significance. Some other cases appear to have agreed with this proposition.[72] Lord Bridge in *R v Moloney* was 'firmly of opinion that foresight of consequences, as an element … [of] any other crime of specific intent, belongs, not to the substantive law, but to the law of evidence',[73] but this statement was strictly obiter. Further, in *R v Nedrick*,[74] *R v Matthews & Alleyne*[75] and *R v Wollin*[76] it was held that 'foresight

66 *La Fontaine v The Queen* (1976) 126 CLR 62; *R v Crabbe* (1985) 156 CLR 464; *Buoghey v The Queen* (1986) 161 CLR 10; *R v Demirian* [1989] VR 97.

67 *Leonard v Morris* (1975) 10 SASR 528, 531–2.

68 *Zaburoni* (2016) 256 CLR 482, 491 [19].

69 Ibid.

70 (1963) 111 CLR 610, 649.

71 (1997) 71 ALJR 638, 642, 648.

72 See, eg, *R v Hughes* (1994) 76 A Crim R 177, 182 (Davies JA), 185 (Cullinane JA), citing *R v Willmot (No 2)* [1985] 2 Qd R 413; *He Kaw Teh v The Queen* (1985) 157 CLR 523, 570 (Brennan J); *R v Reid* [2007] 1 Qd R 64, 82–3 (Keane JA), 97 [111] (Chestennan JA); *R v Moloney* [1985] AC 905; *R v Matthews & Alleyne* [2003] 2 Cr App R 30.

73 *R v Moloney* [1985] AC 905, 917.

74 [1986] 1 WLR 1025.

75 [2003] 2 Cr App R 30.

76 (1998) 4 All Er 103, 107–8.

does not necessarily imply the existence of intention'.[77] However, it was unclear whether foresight of a virtually certain consequence is relevant only in evidence law or criminal law, at least until *Zaburoni*.

The majority clarified that foresight of a virtually certain consequence is of 'evidential significance'.[78] The awareness that the consequence of the conduct of the accused is virtually certain to come about can be evidence from which intention could be inferred. However, evidence of the virtual certainty of a consequence is not the proof of a specific intent itself;[79] at least this is the position in Australian criminal law. The issue that arises in most cases is that, absent any admission of actual intent to commit a crime, intention must usually be inferred from other evidence. Accordingly, it is apt to consider Kirby J's remarks in *Peters v The Queen*:

> Absent a comprehensive and reliable confession, it is usually impossible for the prosecution actually to get into the mind of the accused and to demonstrate exactly what it finds was there at the time of the criminal act. Necessarily, therefore, intention must ordinarily be inferred from all of the evidence admitted at the trail … But the search is not for an intention which the law objectively imputes to the accused. It is a search, by the process of inference from the evidence, to discover the intention which, subjectively, the accused actually had.[80]

Foresight of consequence cannot be a substitute for intent, as it would be an objective measure of a subjective question. The fault element determines the severity of the sanction in an offence, and it is crucial that punishment of such acts be proportionate to the offender's subjective state of mind. A punishment for an intent-crime decided and charged upon the foresight of a virtually certain consequence could therefore be disproportionate to the state of mind of the accused if the accused did not subjectively actually intend a particular result. Therefore, whether an accused has a specific intent must be considered carefully.

However, the evidence from which intent may be inferred from is compelling if the offender possessed knowledge of certainty, near certainty or virtual certainty regarding a particular consequence.[81] The distinction between evidence from which intention can be inferred, and evidence of intent itself, is negligible in such cases.

For example, Professor Williams' famous scenario is illuminating:

> suppose that a villain of the deepest dye blows up an aircraft in flight with a time-bomb, merely for the purpose of collecting on insurance. It is not his aim to

77 *R v Hancock* [1986] 1 All ER 641, 647.

78 *Zaburoni* (2016) 256 CLR 482, 490 [15].

79 *R v Willmot (No 2)* [1985] 2 Qd R 413, 418–19; See also, *R v Reid* [2007] 1 Qd R 64, 97 [111]–[114].

80 (1998) 192 CLR 493, 551.

81 *Zaburoni* (2016) 256 CLR 482, 490 [15].

> cause the people on board to perish, but he knows that success in his scheme will inevitably involve their deaths as a side-effect.'[82]

Lord Hailsham was of the opinion that the virtual certainty of the passengers' deaths will prove that the villain had intended it.[83] However, strictly speaking, if one were to take the common law concept of intention in this case, whether an inference of intention should be drawn depends upon the evidence accepted by the jury, and whether the cumulative effect of these evidences satisfies them of the defendant's subjective intent beyond reasonable doubt.[84] The virtual certainty of the deaths of those passengers itself would not and does not demonstrate specific intent of the accused. As a result of this negligible distinction, intention and recklessness are often conflated.

C *Conflation between Intention and Recklessness*

Justice Nettle appears to adopt the concept of oblique intention. Before entering into the discussion of Nettle J's decision, it is appropriate to consider what oblique intention is. Oblique intention is an English invention, generally defined as: 'a result foreseen as virtually certain is an intended result'.[85] This concept of intention developed as a result of the fault element for murder in England, which is limited to an intention to kill or cause grievous bodily harm and does not include a separate category of recklessness.[86] The English concept of oblique intention has overlapped with the concept of recklessness in Australia. Some Australian courts have impliedly adopted the concept of oblique intention,[87] but there has not been any express mention of oblique intention in courts' judgments. One reason why courts have avoided employing the phrase 'oblique intention' may be because it has never formed part of the criminal law of Australia.

In *Zaburoni*, Nettle J did not explicitly refer to oblique intention, but in effect his Honour's reasoning suggests that the concept was employed 'where it is proved that an accused foresaw that his or her actions would have an *inevitable or certain consequence, it logically follows that the accused intended* to bring about that consequence.'[88]

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82 Williams, 'Oblique Intention', above n 24, 423.

83 *Hyam v DPP* [1975] AC 55, 77.

84 *Peters v The Queen* (1998) 192 CLR 493, 551.

85 *R v Woollin* [1999] AC 82, 90.

86 Bronitt and McSherry, above n 24; see also J C Smith, *Smith and Hogan Criminal Law* (LexisNexis Butterworths, 10th ed, 2002) 359–61.

87 See eg, Bronitt and McSherry, above n 24, 175–6, 470–2; *R v Crabbe* (1985) 156 CLR 464, 469; *Vallance v The Queen* (1961) 108 CLR 56: the minority took a broad approach to the term 'intentional' under s 13 of the *Criminal Code 1924* (Tas).

88 *R v Crabbe* (1985) 156 CLR 464, 503 [66] (emphasis added). The *Criminal Code 1995* (Cth) s 5.2(3) adopts a similar definition of intent: 'A person has intention with respect to a result if he or she means to bring it about or is aware that it will occur in the ordinary course of events.'

In this case, the evidence fell short of proving that the appellant knew that by having regular unprotected sex with the complainant it was virtually certain (in consideration of the evidence as a whole) that he would transmit HIV to her. In fact, at trial there was evidence that there was only a 14 per cent chance of the complainant being infected,[89] so it cannot be said that he had knowledge that the consequence of his action was virtually certain, or intended to transmit the disease using this characterisation of 'intent'.

There is clear tension between Nettle J's reasoning and the majority's judgment. Glanville Williams illuminates the conceptual difficulty here: 'almost always a person who foresees an illegal consequence as the virtually inevitable result of his act will desire it'.[90] However, it must not be forgotten that the trier of fact must be satisfied beyond reasonable doubt that the requisite intent could be inferred from the evidence in its cumulative effect.[91] In *Zaburoni*, at most, it can only be shown that he was reckless.

The conflation between recklessness, which appears to be synonymous with oblique intention, and intention is a result of the conceptual distinction between criminal law and evidence law. In certain situations where an accused knew that it was virtually certain that his or her actions would bring about a particular result, he or she could be deemed to have had intended the result. For example, where a person shoots another in the head at point blank it seems absurd that that knowledge — that the other will without a doubt die — is not itself the test for whether that person intended to kill, but is instead only evidence from which an intention to kill can be drawn. For example, in Williams' above plane-bomb scenario, the virtually certain consequence that the passengers on that plane would die is evidence of the offender's intention to kill those passengers, but as a matter of strict law, the offender's knowledge of that inevitable result cannot itself prove his or her intent to kill them.

One reason why judges might extend the meaning of intention to include knowledge of a virtually certain consequence is policy. As Sir Anthony Mason explained:

> there has been the tendency of judges to extend the legal concept of intention to include the lesser mental state of foresight of consequences. This is done to ensure that offences defined by reference to intention comprehend facts and incidents which lead the public to expect a conviction and to be outraged if an acquittal occurred simply because intention did not comprehend foresight of a high degree of probability. In this respect, judges have given effect to their sense of community moral responsibility and what is necessary for state control and security, without discerning the requirements of subjectivity and *mens rea* which form part of liberal legacy.[92]

89 *Zaburoni* (2016) 256 CLR 482, 494 [31], 502–3 [61].

90 Williams, 'Oblique Intention', above n 24, 422.

91 *Peters v The Queen* (1998) 192 CLR 493, 551.

92 Mason, above n 24, 107.

However, Lord Bridge noted that the decision on the meaning of intention is best left to the jury.[93] This creates a larger issue in the criminal law because as it was held in *Doney v The Queen*, the 'drawing of inference extends beyond circumstantial evidence because the purpose and the genius of the jury system is that it allows for the ordinary experiences of ordinary people to be brought to bear in the determination of factual matters.'[94] Jurors often resort to a consideration of what a reasonable person might have intended, known or believed in the circumstances, which is effectively an objective test determining a subjective state of mind (intent).[95] Courts have accepted this as being unavoidable.[96]

This is because the law in this area is based upon a deeply entrenched approach to mental state attribution known as 'folk psychology',[97] which 'involves interpreting someone as a perceive with beliefs and desires which lead him to act in the world'.[98] The jury is being asked to assess a person's guilt, intention, knowledge or recklessness, and determine whether these mental states are attributable to the accused. Juries are comprised of cross-sections of everyday lay-citizens, and as human beings are inherently moral and social beings.

Therefore, drawing from Knobe and Malle's seminal study, 'The Folk Concept of Intentionality', based upon empirical evidence that jurors are likely to find intent if the consequences are of moral turpitude, moral judgments can influence findings of intent.[99] Therefore, the fault element being a purely subjective test is debatable.

To further muddy the waters, Lord Bridge in *R v Moloney* expounded that

> [t]he golden rule should be that, when directing the jury on the mental element necessary in a crime of specific intent, the judge should avoid any elaboration or paraphrase of what is meant by intent, and leave it to the jury's good sense to decide whether the accused acted with the necessary intent, unless the judge is convinced that, on the facts and having regard to the way that the case has been presented to the jury in evidence and argument, some further explanation or elaboration is strictly necessary to avoid misunderstanding.[100]

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93 *R v Moloney* [1985] AC 905, 926.

94 (1990) 171 CLR 207, 214.

95 Bronitt and McSherry, above n 24, 174.

96 *Pemble v The Queen* (1971) 124 CLR 107, 120.

97 Paul M Churchland, *Matter and Consciousness* (MIT Press, 1988) 59; See also Bronitt and McSherry, above n 24.

98 Peter Smith and O R Jones, *The Philosophy of Mind: An Introduction* (Cambridge University Press, 1986) 172; See also, Bronitt and McSherry, above n 24, 173 [3.3].

99 See generally, Joshua Knobe and Arudra Burra, 'The Folk Concepts of Intention and Intentional Action: A Cross-Cultural Study' (2006) 6 *Journal of Cognition and Culture* 113.

100 *R v Moloney* [1985] AC 905, 926 (Lord Bridge) (emphasis added).

It therefore appears that the scope of giving directions on the meaning of intention is restricted quite substantially, and on a practical level this can result in conflation between recklessness (or oblique intention) and intention. In Mr Zaburoni's trial, it appears that, as a result of the jury system, the element of subjective intent may have been assessed on an objective standard.[101]

Nevertheless, in the High Court, the majority and Gageler J correctly concluded that the jury could not

> exclude as a reasonable hypothesis that the appellant engaged in that sexual intercourse … not with an intention to transmit the disease … but selfishly for his own gratification, being reckless as to whether or not the complainant might become infected.[102]

The clarification of what intention is not, as provided in *Zaburoni*, will hopefully aid the prevention of conflation between recklessness and intention in the future. The High Court clarified the significance of the concept of virtual certainty so as to apply in the law of evidence, and not as a test of intention itself. Even though the distinction between the *inference of intention from evidence* and *evidence of intention* is subtle, it is crucial in preventing the conflation between intention and recklessness. The fault element determines the severity of the sanction in an offence of causing grievous bodily harm. Therefore, punishment of such acts must be proportionate to the offender's subjective state, *actus non facit reum, nisi mens sit rea*.[103]

VI Social Context

The social context surrounding the *Zaburoni* case mainly concerns the question of what inference could be drawn from the evidence brought by the prosecution, after the threshold for intent had been laid out in the judgments.

From the viewpoint of the Australian Federation of AIDS Organisations (AFAO), *Zaburoni* was a success for two reasons. First, it 'establishes that if an HIV-positive person has sex with someone without protection/condoms, it cannot be said or inferred [without further evidence] that they intended to transmit HIV.'[104] Secondly, the High Court did not jump to the same conclusion as the District Court and Court

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101 Bronitt and McSherry, above n 24, 174 [3.4].

102 *Zaburoni* (2016) 256 CLR 482, 503 [63].

103 See, E Hilton Jackson, *Latin for Lawyers* (Sweet & Maxwell, 3rd ed, 1960); *Fowler v Padget* (1798) 101 ER 1103, 1106: an act does not make a defendant guilty without a guilty mind.

104 *Zaburoni v The Queen Appeal Success* (6 April 2016) Australian Federation of AIDS Organisations <https://www.afao.org.au/news/zaburoni-v-the-queen-appeal-success#.V08xKyN961s>. This is even more significant when considering that just nine years ago in South Australia, the South Australian Supreme Court convicted a man of actually 'endangering the life' of his sexual partners by having unprotected sex

of Appeal that, because Mr Zaburoni, as an HIV-positive man, had unprotected sex with the complainant during their relationship and lied to her about his HIV status, he must have intended to infect her with it. When one considers the myriad reasons why people do not disclose their HIV status, for example the social stigma and shame attached to the disease, the fear of being, correctly or not, 'outed' as gay, a drug user or a sex worker, depression and anxiety issues following the diagnosis or, as appears possible in this case, simply being in denial,[105] this is clearly a positive development in the law.

Of course, there are good reasons for governments to criminalise the intentional, malicious transmission of HIV from one person to another. As a society it is necessary to condemn such a reprehensible crime, the consequences of which will be lifelong for its victims.[106] This High Court judgment has set the threshold of intention very high, so in future cases it should be clearer to prosecutors as to whether to prosecute an HIV-positive person for intentionally transmitting the disease.

However, while it was clear to the High Court that Mr Zaburoni could not be said to have *intended* to transmit HIV to the complainant, he still received a significant, albeit lesser, sentence for *recklessly* transmitting the disease. It therefore must be pointed out that s 320 of the *Code* and similar laws around Australia contradict UNAIDS's recommendation that 'any application of criminal law to HIV non-exposure should require proof, to the applicable criminal law standard, of intent to transmit HIV,'[107] and the United Nations Development Program's statement that criminalisation of HIV transmission is only ever justified in circumstances of malicious intent.[108] There are clear reasons for these recommendations — the AFAO contends that the prosecutions of high-profile cases such as *Zaburoni* undermine public health legislation by discouraging those who engage in high-risk behaviours from being regularly tested for HIV, so as to avoid the risk of recklessly, rather than unknowingly, passing on the disease.[109]

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with them: *R v Parenzee* [2006] SASC 127 (2 May 2006). This case is also infamous because of the AIDS-denialism argument run by Mr Parenzee's defence counsel in a later application to appeal: *R v Parenzee* (2007) 101 SASR 456.

105 Australian Federation of AIDS Organisations, HIV/AIDS Legal Centre and National Association of People with HIV Australia, 'Zaburoni v The Queen' (Joint Media Release, 6 April 2016).

106 Gina Mitchell, *Criminal Transmission of HIV: A Guide for Legal Practitioners in NSW* (HIV/AIDS Legal Centre Inc and DLA Phillips Fox, 1st ed, 2009) 17.

107 UNAIDS, 'Ending Overly Broad Criminalization of HIV Non-Disclosure, Exposure and Transmission: Critical Scientific, Medical and Legal Considerations' (Guidance Note, 2013) 26.

108 Global Commission on HIV and the Law, 'Risks, Rights and Health' (Report, United Nations Development Program, 2012) 24.

109 *Criminalisation* (20 October 2015) Australian Federation of AIDS Organisations <https://www.afao.org.au/what-we-do/policy-and-advocacy/advocacy-portal/criminalisation#.V080CiN95o4>.

Furthermore, as a society it seems like an almost hysterical reaction to the outbreak of the HIV/AIDS epidemic to impose gaol sentences on people who have not acted any differently from any other HIV-negative person, bar the fact that they have been unfortunate enough to have been infected with a life-long, stigmatised and difficult disease. While people in the complainant's circumstances clearly have cause to feel incredibly violated, apart from circumstances of clear, malicious, criminal intent — which did not exist in this case — the criminal law seems like a clumsy tool in the struggle to prevent the spread of HIV.

VII Conclusion

Zaburoni makes it clear that to intend to transmit HIV within the meaning of s 317(b) of the *Code* and similar offences, a person must have the transmission of HIV in mind as a purpose when engaging in the relevant sexual acts. Their Honours clarified that intention is distinct from desire and motive, and purpose appears to be the closest synonym to intention. Further, the Court also explained that the mere knowledge of the virtual certainty of a particular result is not the test of intention itself, but of evidential significance. Therefore, the decision is unequivocal that intention is not to be conflated with the foresight of harm. However, a precise definition of intention is very unlikely to be given by the High Court because, as above, '[t]he general legal opinion is that "intention" cannot be satisfactorily defined and does not need a definition, since everybody knows what it means';[110] and intention is best left to the jury to decide.[111]

In this case, an inference could not be drawn from the evidence of Mr Zaburoni's conduct that he intended to transmit HIV beyond reasonable doubt. However, Mr Zaburoni was still found guilty under s 320 of the *Code* for causing the complainant grievous bodily harm. The criminalisation of reckless conduct such as Mr Zaburoni's is questionable, and not in line with international guidelines.

110 See Williams, *Textbook of Criminal Law*, above n 39, 74; Anthony et al, above n 39.

111 *R v Moloney* [1985] AC 905, 926.