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THEORETICAL UNDERPINNINGS OF THE DOCTRINE OF TRANSFERRED MALICE

1. INTRODUCTION

Transferred malice¹ is a concept the definition of which has proven elusive for both academic writers and judges. In its classic forms, the doctrine of transferred intent applies when the defendant intends to kill one person but mistakenly kills another. The intent to kill the intended target is deemed to transfer to the unintended victim so that the defendant is guilty of murder. The paper contends that the theoretical rationale for transferred malice rests upon three pillars: first, the intent of the defendant; second, the consequence that befalls the unintended victim; and finally, public intuitions with regard to resulting harm. My purpose is to signal a handful of theoretical and philosophical conundrums which inevitably spring up to existence upon a closer examination of the doctrine. I will express my personal inclinations with regard to some of the questions, whilst others will remain open.

One notable feature of transferred malice is that it is a legal fiction which effectively conflates the *actus reus* (or, to be precise, the act) performed towards the unintended victim and the *mens rea* towards the intended or foreseen object². Even though the phenomenon of transferred intent has not featured heavily in the case law, a lot of academic ink has been spilt on the subject. In this article, drawing more from judicial consideration of the topic, I will argue that in practice

¹ In this article, terms “transferred intent” and “transferred malice” are used interchangeably, the latter being more common in English law. In the literature, the term “transferred *mens rea*” can also be encountered. Cf. J. Richardson (ed.), *Archbold: Criminal Pleading, Evidence and Practice*, London 2011, paras 17–24; D. Ormerod, A. Hooper (eds.), *Blackstone’s Criminal Practice*, Oxford 2011, paras A2.13.

² The term “legal fiction” in the context of transferred malice has gained ground even among the judiciary. See, for instance, *Pederson v Hales* [2000] NTSC 74.

only a few questions are pertinent to deciding whether a particular defendant shall be held liable.

As I will seek to demonstrate below, there is a significant amount of confusion around the proper conceptual treatment of the doctrine. In particular, a number of academic writers have advanced opinions that terms “extension” or “replication” of intent better reflect the real operation of the concept. Also, there are difficulties in transferring intent where *mens rea* and *actus reus* of the offence do not correspond perfectly. Additional problems are triggered by differing outcomes in cases where the defendant is more deserving of punishment, in the eyes of the jury or the judges, taking account of the particular set of facts in play and the identity and circumstances of the victim. Several alternative explanations have also been suggested to rationalize the exact workings of the concept of transferred malice, particularly centred around negligence, recklessness or remoteness. In short, it is conceivable to argue that instead of talking about transferring or replicating intent (or other form of *mens rea*) the correct and more practical manner of spelling out the particulars of the phenomenon is to accept that defendants should be liable not only for the immediate consequences of their actions but also for more long-term, far-fetched ramifications that their actions brought about.

2. INTENT. TRANSFER AND EXTENSION

The phenomenon of transfer pertains to “*mens rea*, whether intention or recklessness”³. Traditionally, two types of transferred intent cases are distinguished: those of so-called “bad aim” and mistaken identity. In the former scenario, A intends to cause harm to B but misses and injures C. In cases of mistaken identity A intentionally harms C thinking they are harming B.

As P. Westen observes, commentators have put forward two contrasting viewpoints concerning bad-aim cases. First, it is urged that bad-aim actors be punished for crimes of intentional harm against C, whether by means of transferred intent or the impersonality doctrine. The second idea suggests that bad-aim actors be punished for attempts of causing harm to B⁴. For the purposes of the article, we could reduce those positions to saying that it is either intent or the actual consequences which befall the unintended victim that govern liability in transferred malice scenarios.

³ J. C. Smith, K. Laird, D. Ormerod, B. Hogan (eds.), *Smith and Hogan's Criminal Law*, Oxford 2015, p. 151.

⁴ P. Westen, *The Significance of Transferred Intent*, “Criminal Law and Philosophy” 2013, Vol. 7, issue 7, p. 337.

The division between intent and the actual consequence is perhaps displayed most vividly in the contrast between the impersonality doctrine and what M. Bohlander has termed the concretization approach⁵. It is here that the interplay between intent and consequences for the eventual victim comes to light. For A, according to the impersonality doctrine, is guilty of murdering a third party C so long as he intended to murder (or, in English law, cause grievous bodily harm) anybody whatsoever. The exact identity of B is irrelevant – intent to murder a human being is sufficient to attribute culpability to A who, having misaimed or mistaken the identity of his victim, harmed another person⁶. Concretization, on the other hand, stipulates that it is a crime to harm a person while acting with intent to harm that particular person⁷.

With some caution, the corollaries prompted by our discussion of bad aim cases may be applied by analogy to the mistaken identity context. Here, it is impossible, in my view, to conceive of a scenario where the impersonality doctrine would find its application⁸. For A will always determine the identity of their intended victim B before attempting to harm them, eventually causing injury to C. Within the category of specific intent, an important question to ask is whether, in order for intent to transfer, we need object-specific intention or type-specific intention. Andrew Ashworth adopted the object-specific view, i.e. based on an intention to harm a particular object. In his opinion, the defendant in a mistaken identity case in fact intends to harm the actual object (the eventual victim), whilst in bad aim scenarios there are two separate objects⁹. In this connection, however, he appears to overlook the fact that in reality there are two different people in a mistaken identity situation too: A has an object-specific intention to harm a particular person B, yet by mistake injures C. It is evident that he only has a type-specific intention to harm C – in plain terms, even though he intended

⁵ M. Bohlander, *Transferred Malice and Transferred Defenses: a Critique of the Traditional Doctrine and Arguments for a Change In Paradigm*, “New Criminal Law Review” 2010, Vol. 13, No. 3, p. 555 *et seq.* Other writers have espoused a dichotomy of general intent (impersonality) and specific intent (concretization), e.g. J. Horder, *Transferred Malice and the Remoteness of Unexpected Outcomes from Intentions*, “Criminal Law Review” 2006, p. 383.

⁶ J. Horder invokes the classic *Agnes Gore’s Case* (1611) 9 Co Rep 81 as an example of the impersonality paradigm. There, A put poison in a drink intended for her husband, but it ended up killing another man who drank it by accident. Cf. J. Horder, *Transferred Malice and the Remoteness of Outcomes from Intentions*, (in:) J. Horder (ed.), *Homicide and the Politics of Law Reform*, Oxford 2012, p. 179.

⁷ M. Bohlander, *Transfer of Defences*, (in:) A. Reed, M. Bohlander (eds.), *General Defences in Criminal Law: Domestic and Comparative Perspectives*, London, New York 2016, pp. 58–59.

⁸ In line with A. J. Ashworth, *Transferred Malice and Punishment for Unforeseen Consequences*, (in:) P. R. Glazebrook (ed.), *Reshaping the Criminal Law – Essays in Honor of Glanville Williams*, London 1978.

⁹ *Ibidem*.

to harm a human being (a specific type), it was not the particular human being (the specific object) he intended¹⁰.

It is pertinent to note that courts at times purport to rely on general intent to invoke transferred malice for the purposes of finding a particular defendant guilty, whilst they in fact merely interpret a statute. In other words, it is the intricate wording of a statute that truly governs a case. A principal example appears to be *Latimer*¹¹, which, coincidentally and in my view, mistakenly, is often considered a clear-cut, if not outright classic, case of transferred malice¹². There, A aimed a blow at B but missed and hit C, resulting in an accusation of malicious wounding, contrary to section 20 of the Offences Against the Person Act 1861. The court appeared to employ the impersonality doctrine as it found A guilty without taking into account the precise content of A's intention¹³. However, what it in fact did was to purposively interpret an element of the *actus reus* of the offence – wounding “any other person” to render guilty an attacker who had an intention to wound anybody whatsoever¹⁴. Even though intent does play an important role in bad aim and mistaken identity cases (for it is the intent that is transferred from one victim to another), its impact should not be overstretched to cover cases which can be explained by adopting a wider, purposive definition of an offence. Neither should such cases be interpreted as examples of impersonality *per se*. I believe it is conducive to the cogency and purity of the doctrine itself to confine it to cases where statutes are silent as to its potential operation. Otherwise, we could talk about Parliament's intention to favour either impersonality or concretization, which, it is submitted, would be misplaced.

For intent to transfer, *actus reus* and *mens rea* of the eventual offence committed by the defendant must correspond. This means that, for example, A who intended to inflict property damage but mistakenly struck a person B, would not be liable on the basis of transferred malice¹⁵. For a combination of the *actus*

¹⁰ To the same effect S. Eldar, *The Limits of Transferred Malice*, “Oxford Journal of Legal Studies” 2012, issue 32(4), pp. 637–638.

¹¹ (1886) 17 QBD 359.

¹² N. Monaghan, *Criminal Law Directions*, Oxford 2014, p. 74; J. Martin, T. Storey, *Unlocking Criminal Law*, London 2015, pp. 72–73; T. Storey, A. Lidbury, *Criminal Law*, London, New York 2012, p. 23.

¹³ (1886) 17 QBD 359, Lord Coleridge CJ: “It is common knowledge that a man who has an unlawful and malicious intent against another, and, in attempting to carry it out, injures a third person, is guilty of what the law deems malice against the person injured, because the offender is doing an unlawful act, and has that which the judges call general malice, and that is enough”.

¹⁴ M. Seneviratne, *Pre-Natal Injury and Transferred Malice: The Invented Other*, “The Modern Law Review” 1996, Vol. 59, issue 6, pp. 886–887; M. Molan, *Cases & Materials on Criminal Law*, London, Sydney, Portland 2005, p. 91.

¹⁵ An interesting case in point is *Blackburn v Bowering* [1994] 3 All ER 380, where the defendant was convicted of assaulting a bailiff, contrary to section 14(1)(b) of the County Courts Act 1984. His defence was that he genuinely believed the victim was a trespasser, against whom he was using reasonable force. Whilst this was rejected by the court, with the offence in issue held

reus of battery (application of unlawful physical force) and *mens rea* of criminal damage (intention or recklessness as to the destroying or damaging of property belonging to another) does not constitute a separate offence¹⁶. A point akin to that has been raised by professors Smith and Hogan in the context of abortion, where they argued that a person who kills an unborn child whilst intending to kill or inflict grievous bodily harm (*mens rea* for murder) does not have the *mens rea* for murder in this particular case, since the intention is not directed against what they termed a person in being¹⁷.

Some authors prefer to talk about extension of intent¹⁸ or replication of intent¹⁹ instead of transfer of intent. G. Williams has formulated a proposition that “The actor can be taken to intend not only the consequence that he positively desires, but also other consequences known to be inseparable from the consequence he desires, even though they are not themselves desired”²⁰. According to this view, intent (or recklessness) covers not only the crime originally intended, but also consequences, whether foreseeable or ones which have “immediate physical effect” upon the actual victim. If we were to accept the phenomenon of finding defendants guilty of and punishing them for hurting unintended victims, in both bad aim and mistaken identity cases (more on this below), and label it as extension of intent rather than transfer of intent, the problem outlined above, where *actus reus* and *mens rea* must correspond for the doctrine to function, could be eliminated. Instead of delving into the details of an offence’s elements, we could objectively second-guess what consequences the attacker should have contemplated whilst perpetrating the offence, and punish him accordingly. Therefore, in a case like *Blackburn v Bowering*²¹, where the defendant assaulted an officer of the court believing it was an ordinary citizen, such a belief should not have been a defence. The judge’s opinion in that case excessively stressed the genuineness of the belief, instead of its reasonableness – it made the exercise of attributing

to be one of strict liability (assault of an officer of the court), Sir Thomas Bingham MR held that if the defendant had been charged with an “ordinary” assault (or indeed any offence against the person not of strict liability) he would have had a defence.

¹⁶ J. Child, D. Ormerod, *Smith and Hogan’s Essentials of Criminal Law*, Oxford 2015, p. 132; N. Monaghan, *Criminal Law...*, p. 75; R. Heaton, C. de Than, *Criminal Law*, Oxford 2011, p. 85; M. Molan, Bloy D., Lanser D., *Modern Criminal Law: Fifth Edition*, London, Sydney, Portland 2013, p. 81; M. J. Allen, *Textbook on Criminal Law*, Oxford 2015, pp. 105–106.

¹⁷ *Smith and Hogan’s Criminal Law*, London 1992, p. 329.

¹⁸ According to M. Tebbit (*Philosophy of Law: An Introduction*, Hove 2005, p. 172), such ideas were prominent as early as in mid-19th century in the works of Jeremy Bentham, who considered extending intention and liability beyond the confines of the directly intended results of acts to include those that are “contemplated as likely”. Also, in the literature it has been suggested that mistaken identity cases shall be subsumed under the category of extension of intent. Cf. H. Morris (ed.), *Freedom and Responsibility: Readings in Philosophy and Law*, Stanford 1961, p. 226.

¹⁹ Phrase used most notably by M. Bohlander, *Transfer of Defences...*, pp. 58–59.

²⁰ G. Williams, *The Mental Element in Crime*, Jerusalem 1965, pp. 12–13.

²¹ [1994] 3 All ER 380.

liability too subjective, giving defendants an easy way out in case of all defences except those of strict liability. Also, a transposition of this principle to almost any other facts exposes its unfairness. Suppose defendant D fires a sniper rifle at V1 believing him to be the head of a bank which D owes a substantial amount of money. That the person shot turns out to be a beggar should not have, I would argue, any bearing upon D's liability.

3. CONSEQUENCES FOR THE ACTUAL VICTIM

W.R. LaFare distinguishes four general types of cases where a consequence of an offence is unintended: unintended victim, unintended manner, unintended type of harm and unintended degree of harm²². The question of unintended victims is best dealt with by discussing intention (see my discussion of impersonality and concretization above). For proponents of impersonality would argue that it is the very function of transferred malice to show liability where an unintended victim is harmed, by transferring (or extending) the defendant's intent to harm another onto the third party. To put it plainly, unintended victims are clearly covered by the doctrine in question, and it lies at the core of its nature and purpose that it pertains to them. LaFare treats the problem of unintended manner as an issue of causation, and one where a policy question appears as to the desirability and fairness of the imposition of liability on the defendant²³. The last two questions LaFare perceives as "a matter of the required concurrence between the mental state and harm"²⁴. In specifying his line of thinking, he argues that, similarly to the principle that *actus reus* and *mens rea* of an offence must correspond with each other for transferred malice to operate, "the rule is that ordinarily an intention to cause one type of harm cannot serve as a substitute for the statutory or common-law requirement of intention as to another type of harm"²⁵, with the exception of constructive liability offences (e.g. felony murder in US law or straight murder in English law since *R v Cunningham*²⁶). Arguably, the matter of consequences for the unintended victim could be understood through the prism of the need for *actus reus* and *mens rea* to correspond. Suppose A intends to hit B but misses and hits C. A intended to merely batter B by slapping him on the forehead, however with C, since she's shorter, A's hit landed in her eye, causing her grievous bodily harm by stripping her of sight. LaFare would say two things:

²² W. R. LaFare, *LaFare's Criminal Law, 5th (Hornbook Series)*, St Paul 2010, pp. 264–266.

²³ *Ibidem*.

²⁴ *Ibidem*.

²⁵ *Ibidem*.

²⁶ [1981] 3 WLR 223.

first, *mens rea* for the offence was not present (intention or recklessness as to the causing of some harm, according to s. 20 of the Offences Against the Person Act 1861); second, even if A, following the incident, intended to cause grievous bodily harm to either B or C, but lacked this intent at the moment when C was struck, there was no concurrence between the mental state of A and harm he caused, and therefore intent could not transfer (or extend) to cover C. Doubtless, this is correct from a theoretical point of view. I would suggest, however, that there is at least one alternative explanation: there is no causation between the consequence the victim sustained, and the source of that consequence (i.e. A's hit)²⁷.

Even though I do believe that both this and the next category constitute the "policy aspect" of transferred malice, I have distinguished the two, for two principal reasons. First, there are differences in treatment of cases based on the identity of the actual victim. The weaker the eventual victim, the more inclined the courts are to hold the defendant liable for the harm they sustained. Second, I have discovered that discussion of resulting harm is often more general, addressed to and aimed at the "public" at large, and not reduced to a particular victim. For the sake of brevity, I will only tentatively illustrate the weight accorded to the consequences for the actual victim by the judges by reference to a few seminal cases.

In *R v Kingston*²⁸, a defendant with a propensity for paedophilia was involuntarily intoxicated to then perform a sexual act on a child. Interestingly, transferred intent was in this case applied not in relation to an intended victim and a third party, but in relation to two malicious acts of one defendant: subjection to severe intoxication and performing a sexual act on a child. Lord Mustill remarked: "First that the absence of the necessary consent is cured by treating the intentional drunkenness (or more accurately, since it is only in the minority of cases that the drinker sets out to make himself drunk, the intentional taking of drink without regard to its possible effects) as a substitute for the mental element ordinarily required by the offence. The intent is transferred from the taking of drink to the commission of the prohibited act. The second rationalisation is that the defendant cannot be heard to rely on the absence of the mental element when it is absent because of his own voluntary acts. Borrowing an expression from a far distant field it may be said that the defendant is estopped from relying on his self-induced incapacity"²⁹.

²⁷ LaFave admits this is a possibility (W. R. LaFave, *LaFave's Criminal Law*, 5th (Hornbook Series), St. Paul 2010, p. 288), however he goes on to say that "the more fundamental question is whether the required mental states of recklessness and negligence should somehow be interchangeable from crime to crime, so that one who knows or should know of a particular kind of risk might on that basis be held liable when the harm that actually occurs is of an unharmed type or unexpected degree".

²⁸ [1994] 3 All ER 353.

²⁹ *Ibidem*, p. 369.

The case of *Farrant*³⁰ will be used as an example of employing the doctrine of transferred intent where the exact circumstances in which the victim was hurt are uncertain. It appears that a defendant is punished for their negligence or recklessness in bringing about a dangerous situation which materialized into an infliction of harm, even if unintentional. Although *Farrant* was nominally a case of constructive murder and not transferred intent *per se*, it can be explained in terms of the latter. The defendant arrived at the victim's house and drove the victim's friends away with a rifle, forcing the victim to stay. Then, according to the defendant's account, he strove to have a conversation with the girl, having put the rifle in the kitchen. Since she cried and could not calm down, he put the rifle back in his pocket. At some point, the rifle fired. The Supreme Court of Canada upheld the defendant's conviction of constructive murder on the basis that he first brought about the victim's confinement, an offence in and of itself which then culminated in the victim being killed³¹. The Court did not delve into the details of how exactly the victim was killed, or indeed whether the defendant had the requisite *mens rea*. It is clear that the defendant's negligence in not keeping the rifle away from the victim influenced the court's decision – if death had not eventuated, the defendant would still have been tried and potentially convicted of a lesser offence (e.g. false imprisonment), but death was a contingency which escalated the defendant's liability.

In this context *R v Gnango*³² has broken new ground. A shooting between the defendant and an unidentified man (called “the Bandana Man” in the judgment) ended abruptly when a shot fired by the Bandana Man killed a passer-by. Here, the court also accorded significant weight to the fact that having a shootout in daylight in a public place is so beyond the realm of reasonable, socially acceptable behaviour, that the defendants should bear responsibility for the ramifications of their actions³³.

The most theoretically challenging proposition *Gnango* stands for is the construction adopted by the majority in that case which goes as follows: by tak-

³⁰ (1983) 46 N.R. 337 (SCC).

³¹ In first instance, the judge said (this was approved in the Supreme Court): “So the question you must determine first of all is whether or not this accused was confining Shannon Russell. If you do so find, I suggest to you that there has been no indication that he had any lawful authority to so confine her (...). The second requirement is that there must be a death of a human being and I think you will find that this did take place. But most important is the third requirement, and that is that the death must be caused while he was either committing or attempting to commit the offence of unlawful confinement” ((1983) 46 N.R. 337 (SCC), para 11).

³² [2011] UKSC 59.

³³ In technical terms, the majority opined that the initial encounter between *Gnango* and the Bandana Man constituted an affray (an offence under section 3 of the Public Order Act 1986), from which intent was transferred to the killing of the unintended victim. In case of Bandana Man, an alternative explanation would be that his intention to kill *Gnango* was transferred to the third party that ended up being killed.

ing part in the affray with Bandana Man, Gnango was an accessory to his own murder. Therefore, by virtue of joint enterprise and transferred malice, he was liable for the offence that the principal (Bandana Man) committed, i.e. killing the eventual victim³⁴. Even though it is Bandana Man who fires the crucial shot, by this structure Gnango could be convicted of murder. Without going too deeply with critical analysis, the same result could be achieved by holding that Gnango's participation in an affray created a dangerous situation and, since an unintended victim was hurt as a result of it, he should bear responsibility regardless of who actually dealt the decisive blow.

Another difficulty from a moral point of view was that it was Bandana Man, and not the defendant, who fired the fatal shot that killed the victim. In *Commonwealth v Gaynor*³⁵, in the course of a duel between A and B, A shot a third party. The court concluded that intent was referred based on the principle of transferred intent. Whatever basis of liability one chooses to espouse – be it liability for foreseeable consequences, negligence, replication of intent – the conviction seems safe, provided an objective assessment of the defendant's *mens rea* is maintained. On no account can the court inquire into the actual state of mind of the attacker.

Apart from the question of intent, there is a logical argument to make that the consequences which befall the victim may be less serious in cases of bad aim, as opposed to mistaken identity. Suppose a following set of circumstances: in a crowded place, defendant D, a sniper placed on the rooftop of a nearby building, is aiming at V1, yet he is aware of the fact that he may miss the intended target and hit V2. This may prompt D to apply less force to his attack. Contrast this with a situation where D is aiming at V1 and is absolutely positive that he can target V1 precisely. Convinced that V1 is the intended target, he will not shy away from using maximum force, unaware of the fact that V1 is in fact an unintended victim V2.

4. PUBLIC PERCEPTION OF RESULTING HARM

P.H. Robinson has it that “there are two ways that the criminal justice system may deviate from the community's intuitions about appropriate criminal laws: by failing to punish actions that the community thinks are morally wrong, and by punishing actions that the community regards as morally innocent”³⁶. Following a survey of case law from common law jurisdictions, it seems indisputable that

³⁴ *Gnango*, paras 53–54.

³⁵ (1994) 538 Pa. 258, 648 A.2d 295.

³⁶ P. H. Robinson, J. M. Darley, *Intuitions of Justice: Implications for Criminal law and Justice Policy*, “Southern California Law Review” 2007, Vol. 81, issue 1, p. 23.

a judge's subjective moral assessment of the facts of a particular set of facts, where transferred malice could potentially apply, often proves a decisive factor in determining the basis of a defendant's liability. To coin a phrase, this "policy aspect" of transferred malice has been described thus in the literature: "an actor is not guilty of 'murder' unless, in addition to acting with a murderous intent that often suffices for attempted murder, he actually brings about the fearful harm of causing another person's death. Rape, kidnapping, battery, maiming, and destruction of property are also explicitly predicated on resulting harms. And the public is aware of it. The public understands that when the state condemns an actor for 'murder' it is stigmatizing him for actually killing a human being, not merely for trying to kill him. And the public understands that when the state condemns a person for attempted murder, it spares him the stigma that accompanies murder"³⁷.

The Alberta Provincial Court in Canada has ruled on one occasion that a defendant who, whilst trying to violently pour beer onto another person lost grip of their mug and hit a third party with it, causing them severe injuries, was guilty on the grounds of transferred malice, however the court did devote a sizable amount of space to discussing how people ordinarily behave in pub establishments and how this particular defendant's actions constituted "moral opprobrium"³⁸. A suggestion that the defendant ought to be liable for the harm that ultimately results from his behaviour was based on an assumption that it was so egregious and so out of place that, for the sake of justice, such a person shall bear responsibility for all the consequences of their actions. Examples of such egregious behaviour, as demonstrated by notable case law, include: spitting on a police officer³⁹, engaging in a shootout in the middle of which an innocent by-stander is shot and killed⁴⁰, killing another whilst attempting to commit suicide⁴¹, or setting fire to a piece of paper which ultimately resulted in a house being burnt down⁴². It is almost universally accepted that attempting or colluding to murder another is a sufficient basis for extending liability to cover unintended victims. Not surprisingly, public intuitions concerning resulting harm, or, to be more precise, concerning the justifiability of making the defendant liable for resulting harm, apply to both bad aim and mistaken identity cases.

The courts do not seem to put excessive emphasis on the way in which unintended victims sustained harm. J. Horder has argued that "What should matter (...) is not only that the actual victims were unintended victims, but also that they died

³⁷ P. Westen, *The Significance...*, p. 327.

³⁸ *R. v Davis (M.)* (1995), 170 A.R. 238. The judge in that case remarked: "Where the intended assault is only with the contents of the mug, a charge of assault with the mug itself does not preclude the intent accompanying the contents transferring to the unintended victim, always assuming that the underlying crime is of sufficient gravity to import significant moral opprobrium".

³⁹ *Pederson v Hales* [2000] NTSC 74.

⁴⁰ *R. v Gango* [2011] UKSC 59.

⁴¹ *R. v Spence (George)* (1957) 41 Cr. App. R. 80.

⁴² *Byrne v HM Advocate* (2000) S.C.C.R. 77.

in an unanticipated way⁷⁴³. Therefore, according to this proposition the defendant would be expected to apply their mind not only to potentially harm an unintended victim, but also to the manner in which that harm is brought about. Not surprisingly, this would narrow the scope of liability and would result in acquitting defendants in numerous high profile transferred intent cases, most notably *Gnango* where the defendant could not anticipate the eventual victim to die from a gunshot to her head.

The degree of premeditation appears to be one element judges hold highly in determining whether a defendant should be liable for harm suffered by the actual victim. So, if the defendant contemplated killing another, shared his plans with others or attempted to contract a murderer to kill another, the courts have been quick to assume that such a level of moral depravity points towards liability for harm to an actual victim⁴⁴. The notion of culpability is often utilized. To quote a classic exposition of criminal law philosophy, “intending to cause some harm H is more culpable than merely foreseeing that some act A will cause H, or being willing to risk that A will cause H”⁴⁵.

5. ALTERNATIVE EXPLANATIONS FOR TRANSFERRED INTENT

It is submitted that cases, where typically the doctrine of transferred has been applied, could be conceptualized as situations where the defendant is liable for causing harm to a third party (unintended victim) where that harm was, objectively speaking, likely to occur or foreseeable⁴⁶. The standard of foreseeability coupled with causation was embraced by Glanville Williams in his early work. He proposed that the defendant should be found liable only if he was negligent in harming the actual victim⁴⁷. The entire test, therefore, would be objective:

⁴³ J. Horder, *Transferred Malice and the Remoteness of Unexpected...*, pp. 385–390.

⁴⁴ *R. v Droste* (1984) 52 N.R. 176 (SCC).

⁴⁵ M. S. Moore, *Intention as a Marker of Moral Culpability and Legal Punishability*, (in:) R. A. Duff, S. Green (eds.), *Philosophical Foundations of Criminal Law*, Oxford 2013, p. 184.

⁴⁶ See the Scottish case of *Roberts v Hamilton* 1989 JC 91 (High Court of Justiciary), where the plaintiff was mistakenly struck by a pole “some 4 feet in length” whilst trying to separate the defendant’s cohabitee and her son who had been fighting with each other. The Court held that that whether the matter was approached from the point of view of transferred intent or whether it was approached from the point of view that the result which happened was likely to occur the sheriff had been entitled to find the appellant guilty in this case.

⁴⁷ G. Williams, *Criminal Law: The General Part*, 2nd ed., London 1961, pp. 133–34. It is worth noting that G. Williams subsequently changed his view on the subject, holding in his *Textbook of Criminal Law* (2nd ed., London 1983), p. 181 that the preferred test for the application of transferred malice ought to be based on the “immediate physical effect” of the defendant’s action upon the actual victim.

“D’s capacity to behave reasonably or to appreciate the risk in question should not be taken into account in determining whether D was negligent”⁴⁸. A question to be answered in this connection is: in a case like *Gnango*, at what point in time should we proceed to assess the reasonableness of the steps the defendant took or should have taken to meet the standard of negligence applicable? Is the mere fact of engaging in an exchange of gunfire a breach of reasonableness? Or should a snapshot be taken later on, when the altercation is underway, and we should demand from its participants that they do all they can to prevent resulting harm from happening? In line with what appears to be opinion of the Supreme Court of the United Kingdom, I believe the former proposition is sounder⁴⁹. Dogmatic doubts aside, and there could be many, if we accept that both *Gnango* and the *Bandana Man* fell short of the standard of reasonableness at the moment they started shooting, holding them liable for any resulting harm is just a consequence of that fact. This should be correct especially since the presence of negligence is assessed objectively, and it is undeniable that an officious bystander would consider a setting where guns are brandished by two men likely to shoot a breach of conduct rules giving rise to potential liability in negligence should harm eventuate.

Horder’s approach favours remoteness over foreseeability as a way to curtail the influence of the doctrine of transferred malice. However, just as Williams, he does not question the conceptual basis of the doctrine (even when reformulated as extension or replication of intent). What both of those writers have done is seeking to find a justice-based tool to correct the often unfair results of rigid application of the concept. In the literature, it has been forcefully argued that in reality it is the factor of probability that directly affects the level of foreseeability⁵⁰. The choice

⁴⁸ R. Card, J. Molloy, *Card, Cross and Jones Criminal Law*, Oxford 2016, p. 105.

⁴⁹ As I made it clear above (see note 34), the Court held that the initial affray between *Gnango* and *Bandana Man* could provide a foundation of *Gnango*’s liability for the killing of the unintended victim.

⁵⁰ S. Eldar, *The Limits of Transferred Malice...*, pp. 653–654. Eldar stresses that the question whether remoteness should be allowed to govern cases of transferred intent is not only one of policy, but also of logic. He considers two examples given by Williams and Horder respectively. In Williams’s hypothetical, D shoots at V1 intending to kill him, but the shot misses V1 and injures V2 who, unknown to D, was behind a curtain at the time. Horder envisages a situation where D aims at V1 but hits a munitions factory hidden behind a curtain, causing the death of V2. Eldar suggests that the latter example stretches the principle of remoteness further “because the mathematical probability of there being both a munitions factory and a person behind the curtain is, logically, lower than the probability of there being just a person behind the curtain, since the first possibility is contained in the second”. As much as this conclusion fits the rather improbable model, let me suggest a slight modification of Horder’s example: D shoots at V1 but misses and hits V2 after the bullet bounces off a wall which was behind the curtain. In such circumstances, it seems Eldar’s argument does not hold – it is not on the grounds of logic that a difference in probability between there being a person or a wall behind a curtain should be discerned. Admittedly, it is difficult to point to anything more consistent than public intuitions with regard to resulting harm and the gravity of consequences suffered by the victim.

of remoteness purports to signal a shift from objective factual and causal contingencies that govern foreseeability to the difference between what the defendant intended or envisaged as a consequence of his actions and what materialized in reality.

Mary Seneviratne has contended that the *mens rea* in most offences is so broadly delineated that transferred malice is in a vast majority of cases obsolete⁵¹. What this proposition in fact constitutes is an endorsement of the impersonality doctrine. Here, I believe, we have encountered the crux of the difficulty in laying out the particulars of the theory of transferred intent. Williams, Horder, Seneviratne and other writers, in striving to find alternative explanations for cases where the question of *mens rea* on the facts is not straightforward, in fact suggest either applying a strictly literal, if not pedantic construction of statutes, a purposive interpretation, or confining the limits of transferred malice by putting more emphasis on such concepts as remoteness, foreseeability and negligence. The matter gets particularly convoluted with regard to the extension of the concept of intention since *R v Woollin*⁵². The defendant's actions which would normally be subsumed under negligence or recklessness, now fall under the stretched definition of intention, provided that death or serious bodily harm was a "virtual certainty (barring some unforeseen intervention) as a result of the defendant's actions and that the defendant appreciated that such was the case"⁵³.

6. CONCLUSION

It is high time academic commentators and judges accepted that there is a significant policy aspect which comes into consideration when deciding cases where an unintended victim was harmed in the process or as a consequence of a defendant behaving recklessly or negligently, or simply not foreseeing his actions could have an anticipated, long-term effect. Far from providing a definitive account of all applicable rationalizations, it is at least arguable that intent has been transferred (or replicated or extended) in cases where other more practical and less theoretically convoluted devices could have been proffered. Notably, as *Latimer* shows us, at times a meticulous construction of a criminal statute spares an interpreter the plight of striving to differentiate general intent from specific intent. Similarly, *Gnango* mistakenly resorts to the idea that one's intention to kill themselves (even though no such intent was shown on the facts) can be transferred to the killing of a third party, instead of simply proclaiming that participation

⁵¹ M. Seneviratne, *Pre-Natal Injury and Transferred...*, p. 888.

⁵² [1998] 3 W.L.R. 382.

⁵³ *Ibidem*, p. 96.

in an affray creates a dangerous situation and if, as a result, an unintended victim is hurt, the defendant's liability covers that evil too. It is the intention or recklessness as to the participation in an affray that should transfer to the killing of a third party. Whilst it remains undisputed that the courts continue to refer to transferred intent in their judgments, I have sought to shed some light on the influence the circumstances of an immediate case have upon their reasoning. Understandably, it is the situation of the victim, i.e. their identity and the resulting harm they happen to sustain, that have their place in explaining why defendants should be held liable for inflicting harm they never contemplated to inflict, on victims they were not even aware they existed at the time they committed a lesser offence. The main advantage of allowing factual contingencies to impact the courts' treatment of transferred intent scenarios is staying true to what offences should be charged, and therefore – promoting justice.

Summary

Mistaken identity and bad aim have been traditionally accepted as the two textbook situations where the doctrine of transferred malice has found application. By reference to a cross-section of academic sources as well as case law from a number of common law jurisdictions, three core elements of transferred malice are identified: the intent of the defendant, the consequence that befalls the unintended victim, and public intuitions with regard to resulting harm. The overarching conclusion of the considerations consists in reaffirming the role of factual contingencies in deciding cases as well as the existence of a significant policy element which has caused, the paper submits, judges to subsume under the umbrella term of transferred malice cases which could satisfactorily be explained by means of other legal concepts, most notably remoteness, foreseeability or negligence.

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KEYWORDS

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