COMMENT:

The prosecution had argued (see [50]) that section 1(2)(b) of the 1990 Act only required proof of intent to disrupt the services of an aerodrome; there was no additional requirement to prove intent as to the consequences. The trial judge appears to have directed the jury on this basis (see [88]).

At [20], the prosecution listed 10 matters that they contended were individually and cumulatively likely to endanger safety. Having rejected (at [85]) the appellants’ submission that it was necessary to prove that each appellant intended all or any of these items, the Court of Appeal added:

“It would be sufficient for the Crown to prove that they intended to disrupt the services of the aerodrome in the knowledge and with the intention that there would be likely endangerment or jeopardy to airport safety in some shape or form”.

Yet it is by no means clear from the wording and layout of the statute that the *mens rea* extends to the endangerment (or likely endangerment) of airport safety, and the court’s rationale for concluding that this is a crime of ulterior intent is not explicitly set out. Section 1(2) is laid out as follows:

“(2) It is also, subject to subsection (4) below, an offence for any person by means of any device, substance or weapon unlawfully and intentionally –

(a) to destroy or seriously to damage –

1. property used for the provision of any facilities at an aerodrome serving international civil aviation (including any apparatus or equipment so used), or
2. any aircraft which is at such an aerodrome but is not in service, or

(b) to disrupt the services of such an aerodrome,

 in such a way as to endanger or be likely to endanger the safe operation of the

aerodrome or the safety of persons at the aerodrome.”

On one reading, this provision requires only an intent to destroy or seriously damage (s.1(2)(a)), or an intent to disrupt (s.1(2)(b)). The hyphen after “intentionally” suggests that the *mens rea* attaches only to the contents of paragraphs (a) and (b). The wording of Article 2 of the Montreal convention, to which section 1 was designed to give effect in domestic law, supports this interpretation. Instead, the Court of Appeal has interpreted section 1(2) as if it requires an intention to destroy/damage or to disrupt, intending in such a way to endanger or be likely to endanger safe operations or the safety of persons. In the present case, it was accepted that the appellants did not intend to endanger safety. On the Court of Appeal’s interpretation, the prosecution therefore had to prove they intended their conduct to be likely to endanger safety. Intending a likelihood is conceptually problematic, and Lord Burnett CJ’s use (at [85]) of the word “knowledge” (which does not appear in the statute) conceals this difficulty.

Having concluded that the *mens rea* extended to the endangerment or likely endangerment of the safe operation of the aerodrome, the court moved on to consider the meaning of “intention”. It was common ground both (at [50]) that it was not the appellants’ aim or purpose to cause any wider disruption, and (at [86]) that “intention may go beyond aim or purpose”. The ensuing discussion of oblique (or indirect) intent reflects the court’s view that the meaning of intent is still not settled outside the context of murder. The present judgment states (at [86]) that:

“There remains some debate as to whether foresight of ‘virtual certainty’ as opposed to ‘a very high degree of probability’ is required … ‘Virtual certainty’ derives from the judgment of Lord Lane CJ in [*R. v Nedrick* [1986] 1 W.L.R. 1025, CA],and probably still represents the law.”

As the Law Commission observed in its 2006 report *Murder, Manslaughter and Infanticide* (Law Com. No. 307), para. 3.37, “English law is averse to the use of degrees of probability to shape or confine fault elements” because “[d]etermining the meaning of ‘probable’ or ‘highly probable’ is fraught with difficulty” (Law Com. No. 305, 2007 report, *Participating in Crime*), para. 3.149.

The use of the term “virtual certainty” is settled and was approved by the House of Lords in *R. v Woollin*, CLW/98/28/8, [1999] 1 A.C. 82, in the context of a murder appeal. In that case, Lord Steyn stated (at p.90) that “it does not follow that ‘intent’ necessarily has precisely the same meaning in every context in the criminal law”, but the Crown Court Compendium (CLW/21/01/41) (at 8-1, footnote 291) notes that “the test appears to be applied across the criminal law”.

In the earlier case of *R. v Moloney* [1985] A.C. 905, HL, Lord Bridge (at 920F) regarded it as “of paramount importance to the due administration of criminal justice” that intention should bear the same meaning in any crime of specific intent. The contention in the present case that the meaning of intention remains a matter of debate was surely unnecessary and has the potential to generate future confusion.

Although the convictions were quashed, their Lordships rejected the contention that the defences of duress, necessity or prevention of crime ought to have been left to the jury. As in *R. v Jones (Margaret) and others*; *Ayliffe and others v DPP*; *Swain v Same*, CLW/06/13/7, [2006] UKHL 16, [2007] 1 A.C. 136, HL, the court noted (at [101]) that the appellants’ actions “had to be considered in the context of a functioning state governed by the rule of law”. Therefore, this decision has not lowered the bar for direct action protestors seeking to justify their actions.

**Natalie Wortley**