
# THE LAW COMMISSION

## IMPUTED CRIMINAL INTENT (DIRECTOR OF PUBLIC PROSECUTIONS v. SMITH)

*Laid before Parliament by the Lord High Chancellor pursuant to section 3(2) of the Law Commissions Act 1965*

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The Law Commission was set up by section 1 of the Law Commissions Act 1965 for the purpose of promoting the reform of the law. The Commissioners are—

The Honourable Mr. Justice Scarman, O.B.E., *Chairman.*
Mr. L. C. B. Gower, M.B.E.
Mr. Neil Lawson, Q.C.
Mr. N. S. Marsh.
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## IMPUTED CRIMINAL INTENT

(*Director of Public Prosecutions* v. *Smith*)

*To the Right Honourable The Lord GARDINER,*
*Lord High Chancellor of Great Britain*

### A. INTRODUCTION

1. Item XIII of the Commission's First Programme reads as follows:

> "The decision of the House of Lords in *Director of Public Prosecutions* v. *Smith* [1961] A.C. 290 raises important and controversial issues as to the nature of the intent required in criminal offences.
>
> A differing view of the law has been taken elsewhere in the Commonwealth, and the question arises as to the possible effect of the decision generally in the law of crime.
>
> *Recommended:* That an examination be made of the effect and implications of the decision in *D.P.P.* v. *Smith.*
>
> *Examining agency:* the Commission."

2. *D.P.P.* v. *Smith* is also referred to in the Commission's introductory note accompanying the First Programme in which it is stated that the doctrine of imputed intent as expounded in that case calls for examination.

3. The facts in *D.P.P.* v. *Smith*, the summing-up at first instance and the decisions of the Court of Criminal Appeal and the House of Lords, may be summarised as follows. The accused, Smith, was driving a car containing stolen goods. It was stopped in the normal way by a police officer on point duty, at which stage Constable Meehan, who knew the accused, approached the car and told him when the traffic was released to draw in to his near side. Instead of doing so, the accused accelerated away with the police constable hanging on. After the car had hit three other cars, the police constable was shaken off, falling in front of a fourth car and receiving fatal injuries. At the trial actual intent to kill was not alleged by the Crown and the issue for the jury was whether the prosecution had established an intent to cause grievous bodily harm, such an intent being an alternative to the intent to kill in the malice aforethought required in murder.

In summing-up the trial judge (see [1961] A.C. at pp.325–6) said:

> "The intention with which a man did something can usually be determined by a jury only by inference from the surrounding circumstances, including the presumption of law that a man intends the natural and probable consequences of his acts."

He also said:

> "If you feel yourselves bound to conclude from the evidence that the accused's purpose was to dislodge the officer, then you ask yourselves this question: could any reasonable person fail to appreciate that the likely result would be at least serious harm to the officer? If you answer that question by saying that the reasonable person would certainly appreciate that, then you may infer that that was the accused's intention."

In a later passage he said to the jury:

> "It may well be the truth [that] he did only want to shake [the constable] off; but if the reasonable man would realise that the effect of doing that might well be to cause serious harm to this officer, then, as I say, you would be entitled to impute such an intent to the accused, and, therefore, to sum up the matter as between murder and manslaughter, if you are satisfied that when he drove his car erratically up the street, close to traffic on the other side, he must as a reasonable man have contemplated that grievous bodily harm was likely to result to that officer still clinging on, and that such harm did happen, and the officer died in consequence, then the accused is guilty of capital murder . . . . . On the other hand, if you are not satisfied that he intended to inflict grievous bodily harm upon the officer—in other words, if you think he could not as a reasonable man have contemplated that grievous bodily harm would result to the officer in consequence of his actions—well, then, the verdict would be guilty of manslaughter."

The jury found the accused guilty of capital murder. In the Court of Criminal Appeal a verdict of manslaughter was substituted for that of capital murder ([1961] A.C. 290 at p.303) on the ground that the summing-up might have led the jury to consider that they were entitled to infer guilty intent merely from what a reasonable man would think to be likely, instead of treating the latter only as a pointer to the actual state of mind of the accused. The House of Lords reversed the decision of the Court of Criminal Appeal and restored the verdict of capital murder.

4. The main issues raised by the decision in the House of Lords appear to be the following:

(*a*) Where murder is alleged, should the jury be bound to infer the intent to kill or to inflict grievous bodily harm, which is under the present law necessary for a killing to amount to murder, if "an ordinary man capable of reasoning" (Viscount Kilmuir L.C. at p.331 of *D.P.P.* v. *Smith*) would in the position of the alleged murderer have foreseen death or grievous bodily harm as the natural and probable consequence of his act? Alternatively, should the requirement of intent necessitate proof of the actual intent of the person alleged to have committed murder, and should the natural and probable consequence of his act only provide a basis from which such intent may be inferred? The first alternative, which would appear to have been approved by the House of Lords in *D.P.P.* v. *Smith*, may for convenience be called the "objective" approach to intent; the second may be called the "subjective" approach.

(*b*) Apart from its application to intent in murder should the objective or subjective approach to intent, or, where relevant, to foresight, be adopted in the criminal law generally? There are in the speech of Viscount Kilmuir in *D.P.P.* v. *Smith* certain indications that the objective view there taken of the intent required in murder might have wider application to crimes other than murder; thus, at p.324, Viscount Kilmuir says that the case is concerned with the proper direction of the jury as to intent in murder *and* in cases under s.18 of the Offences Against the Person Act 1861. It is true that it is possible to read this remark as referring to a passage in his speech at p.334 where he is dealing with the definition of grievous bodily harm. This view appears to have been

taken in *Reg.* v. *Metharam* (1961) 45 Cr. App R. 304, where the subjective test was clearly applied (at p.308). However, in *D.P.P.* v. *Smith* at pp.331–2 Viscount Kilmuir also made a distinction between crimes where what he called "actual intent" or "overall intent" is necessary, with regard to which a subjective view of intent was admitted to be correct, and other crimes where it would appear that an objectively determined intent would suffice.

(*c*) Should the requirement of intent in murder, whether ascertained subjectively or objectively, be satisfied by either an intent to kill or an intent to inflict grievous bodily harm? In *D.P.P.* v. *Smith* Viscount Kilmuir at p.335 rejected the contention that s.1(1) of the Homicide Act 1957 had abolished the implied malice constituted by a proved intent to inflict grievous bodily harm, thus confirming Lord Goddard C.J. in *Reg.* v. *Vickers* [1957] 2 Q.B. 664 where he said (at p.671):

> "[the prisoner] inflicted grievous bodily harm on her [the victim], perhaps only intending to render her unconscious but he did intend to inflict grievous bodily harm . . . . He is guilty of murder because he has killed a person with the necessary malice aforethought being implied from the fact that he intended to do grievous bodily harm."

## B. THE OBJECTIVE AND SUBJECTIVE TESTS OF INTENT IN MURDER

5. The Royal Commission on Criminal Law of 1834 in its 7th Report (Parliamentary Papers 1843, vol. XIX: Command Paper 448) at p.23 stated:

> "The degrees of likelihood or probability being in truth infinite, it is clear that no assigned degree of likelihood or probability that an injurious consequence will result from any act can serve as a test of criminal responsibility. Such a degree of likelihood or probability admits of no legal mode of ascertainment, and it would, if capable of being ascertained, afford no proper test of guilt, for it is not the precise degree of likelihood or probability in such cases, but the *knowledge or belief* that the thing is likely or probable which constitutes the *mens rea*, although the greater or less degree of probability may afford important evidence as to the real intention of the party."

Over a hundred years later the Royal Commission on Capital Punishment, 1949–1953 (1953, Cmd. 8932) at paragraph 107 formulated the same principle in stating that:

> "Persons ought not to be punished for the consequences of their acts which they did not intend or foresee."

It was on this basis that they recommended the abolition of "constructive malice" which was subsequently effected by s.1 of the Homicide Act 1957.

6. *D.P.P.* v. *Smith*, however, envisages that a man may be guilty of murder who did not intend death or grievous bodily harm, provided that death or grievous bodily harm was, by an objective assessment, the natural and probable consequence of his acts. It is true that at p.331 of *D.P.P.* v. *Smith* Viscount Kilmuir said:

> "Whether the presumption is one of law or of fact, or, as has been said, of common sense, matters not for this purpose."

But in a later passage on the same page he also said:

> "Provided that the presumption [that a man intends the natural and probable consequence of his acts] is applied, once the accused's knowledge of the circumstances has been ascertained, the only thing that could rebut the presumption would be proof of incapacity to form an intent, insanity or diminished responsibility."

And in an earlier passage in his speech at pp.326–7 Viscount Kilmuir said:

> "[the Court of Criminal Appeal] were saying that it was for the jury to decide whether, having regard to the panic in which he said he was, the respondent in fact at the time contemplated that grievous bodily harm would result from his actions or, indeed, whether he contemplated anything at all. Unless the jury were satisfied that he in fact had such contemplation, the necessary intent to constitute malice would not, in their view, have been proved. This purely subjective approach involves this, that if an accused said that he did not in fact think of the consequences, and the jury considered that that might well be true, he would be entitled to be acquitted of murder.
>
> My Lords, the proposition has only to be stated thus to make one realise what a departure it is from that upon which the courts have always acted. The jury must, of course, in such a case as the present make up their minds on the evidence whether the accused was unlawfully and voluntarily doing something to someone. The unlawful and voluntary act must clearly be aimed at someone in order to eliminate cases of negligence or of careless or dangerous driving. Once, however, the jury are satisfied as to that, it matters not what the accused in fact contemplated as the probable result or whether he ever contemplated at all, provided that he was in law responsible and accountable for his actions, that is, was a man capable of forming an intent, not insane within the M'Naghten Rules and not suffering from diminished responsibility. On the assumption that he is so accountable for his actions, the *sole question* is whether the unlawful and voluntary act was of such a kind that grievous bodily harm was the natural and probable result. *The only test* available for this is what the ordinary responsible man would, in all the circumstances of the case, have contemplated as the natural and probable result." (Our italics)

In our view the effect of these passages is to suggest that in a case of murder there is an irrebuttable presumption that a man intends the natural and probable consequences of his actions. This proposition is subject to the same objection as that which persuaded the legislature to abolish "constructive malice", namely the undesirability of satisfying *as a matter of law* the requirement of intent in murder by reference to factors which may be at variance with the actual state of mind of the accused.

7. Furthermore, we think that there should not be even a rebuttable presumption in murder that a man intends the natural and probable consequences of his actions. Such a presumption would imply as a matter of law: (*a*) that, once the prosecution has shown that death or grievous bodily harm is the natural and probable consequence of the actions of the accused, the onus shifts to him to show on a balance of probabilities that he did not intend such consequence; and (*b*) that, if the accused is not able to prove on a balance of probabilities that he did not intend the natural and probable consequences of his actions, the jury must find that he had such an intent. In our view any rebuttable presumption of this kind would be inconsistent with the underlying principle of the criminal law

enunciated by the House of Lords in *Woolmington* v. *D.P.P.* [1935] A.C. 462, and in particular with two passages in Lord Sankey's speech (with which Lord Atkin, Lord Hewart C.J., Lord Tomlin and Lord Wright concurred). Lord Sankey said:

> "Throughout the web of the English Criminal Law one golden thread is always to be seen, that it is the duty of the prosecution to prove the prisoner's guilt subject to . . . . the defence of insanity and . . . . any statutory exception." (p.481)

He also said:

> "If at any period of a trial it was permissible for the judge to rule that the prosecution had established its case and that the onus was shifted on to the prisoner to prove that he was not guilty and that unless he discharged that onus the prosecution was entitled to succeed, it would be enabling the judge in such a case to say that the jury must in law find the prisoner guilty and so make the judge decide the case and not the jury, which is not the common law." (p.480)

8. We consider that, in ascertaining the existence of the intent necessary under the existing law for a killing to amount to murder, a finding that the death of, or grievous bodily harm to, a person was the natural and probable consequence of the accused's actions may justify, but should not require in law, the inference that the accused intended to kill or to inflict grievous bodily harm. We fully appreciate that in many cases the inference of intent to be drawn from the natural and probable consequences of an act may as a matter of common sense and experience be very strong; and in such cases it would be open to the judge in his summing up so to instruct the jury. In other words, the inferences as to a man's intent to be drawn from the natural and probable consequences of his actions should be *permissible* only; they should not be *mandatory*, either in a conclusive or qualified sense.

9. In reaching the above conclusion we have had regard in particular to the following considerations:

(*a*) The assertion that a subjective approach should be adopted as regards intent in murder is not to suggest the reversal of a long-standing and firmly established practice of the criminal law. The conclusion reached by the House of Lords in *D.P.P.* v. *Smith* has, as an exposition of the existing law, been subjected to an exceptional degree of criticism and explanation, and the basis of authority on which the case rests has been extensively doubted.

(*b*) Cases subsequent to *D.P.P.* v. *Smith* show readiness to distinguish, or imply or express disapproval of, the decision in that case. The cases fall under three headings:

(i) *English Courts.* Notwithstanding *D.P.P.* v. *Smith*, which as a decision of the House of Lords is binding on all inferior English tribunals, the courts appear to have confined the objective test within the narrowest possible limits—not only as regards offences other than murder[1] but even in murder cases. A survey of murder

[1] *Reg.* v. *Metharam* (1961) 45 Cr. App. R. 304;
*Reg.* v. *Grimwood* [1962] 2 Q.B. 621 (C.C.A.);
*Hardy* v. *Motor Insurers' Bureau* [1964] 2 Q.B. 745;
*Reg.* v. *Hudson* (1965) 49 Cr. App. R. 69;
*Wilkins* v. *An Infant* "The Times", 21st October 1965 and 109 Sol. J. 850.

trials since *D.P.P.* v. *Smith* carried out by Mr. R. J. Buxton (see "The Retreat from Smith", [1966] Crim. L.R. 195) in which he relied on transcripts and newspaper reports, where available, shows that trial courts have tended to put the issue of intent to the jury without apparent regard to the ruling in *Smith's* case, and in a way which generally suggests a subjective rather than an objective approach. It is the argument of the author, with which we agree, that, if the limited material available to him fairly represents the true position, there is an unfortunate disparity between the law administered at first instance and that laid down by the House of Lords.

(ii) *The Judicial Committee of the Privy Council.* In *Reg.* v. *Sharmpal Singh* [1962] A.C. 188, which involved a murder charge, the Judicial Committee made it clear that the issues raised in *D.P.P.* v. *Smith* were not involved; but the reasoning of the Board, as expressed by Lord Devlin, suggests a lack of sympathy with the principle apparently enunciated in *D.P.P.* v. *Smith.*

(iii) *The High Court of Australia.* In *Parker* v. *The Queen* (1963) 111 C.L.R. 610 Sir Owen Dixon C.J., in a passage expressly approved by all the other members of the Court, said at pp.632–3:

"In *Stapleton* v. *The Queen* (1952) 86 C.L.R. 358, at p.365, we said: 'The introduction of the maxim or statement that a man is presumed to intend the reasonable consequences of his act is seldom helpful and always dangerous.' That was some years before the decision in *Director of Public Prosecutions* v. *Smith* [1961] A.C. 290, which seems only too unfortunately to confirm the observation. I say too unfortunately for I think it forces a critical situation in our (Dominion) relation to the judicial authority as precedents of decisions in England. Hitherto I have thought that we ought to follow decisions of the House of Lords, at the expense of our own opinions and cases decided here, but having carefully studied *Smith's* case I think that we cannot adhere to that view or policy. There are propositions laid down in the judgment which I believe to be misconceived and wrong. They are fundamental and they are propositions which I could never bring myself to accept. I shall not discuss the case. There has been enough discussion and, perhaps, I may add, explanation, to make it unnecessary to go over the ground once more. I do not think that this present case really involves any of the so-called presumptions but I do think that the summing-up drew the topic into the matter even if somewhat unnecessarily and therefore if I left it on one side some misunderstanding might arise. I wish there to be no misunderstanding on the subject. I shall not depart from the law on the matter as we had long since laid it down in this Court and I think *Smith's* case should not be used as authority in Australia at all. I am authorised by all the other members of the High Court to say that they share the views expressed in the foregoing paragraph."

(*c*) Our consultations with the judges of the Queen's Bench Division of the High Court of Justice through the Lord Chief Justice, with the Law Officers and the Director of Public Prosecutions, with the Home Office, with the Law Society, with the sub-committee on Criminal Law

Reform of the Society of Public Teachers of Law, as well as with individual members of the Bar through the Bar Council, show general agreement with the conclusion reached in paragraph 8 above that the test of intent in murder should be subjective.

## C. PROOF OF INTENT AND FORESIGHT IN THE CRIMINAL LAW GENERALLY

10. Reference has been made in paragraph 4(*b*) above to the doubts raised by the decision in *D.P.P.* v. *Smith* whether the objective test of intent applies in crimes other than murder. It is true that there is case law since *D.P.P.* v. *Smith* supporting the view that in such crimes *mens rea*, where required, has to be proved subjectively (see paragraph 9 (*b*) (i) above). All those, however, who have been consulted take the view that it is desirable, in the interests of the clarification of the law, to put on a statutory basis a rule that, where intent or foresight is required in the criminal law, such intent or foresight must be subjectively proved; that is to say, the matter in issue should be the actual state of mind of the accused. We appreciate that the practice of the Courts since *D.P.P.* v. *Smith* has to some extent avoided the full impact of the objective approach to intent enunciated in that case, and that it may therefore be said that legislative action is not necessary, or at least not urgent. We think, however, that an apparent discrepancy between the law as laid down by the House of Lords and that in fact applied by tribunals of first instance is unsatisfactory and should be removed.

11. The first of the draft clauses set out in the Appendix requires therefore a subjective approach in ascertaining not only intent in murder but also intent or foresight in all other offences where these elements are required.

## D. SHOULD INTENT IN MURDER INCLUDE INTENT TO INFLICT GRIEVOUS BODILY HARM?

12. In paragraph 4(*c*) above it has been pointed out that in *D.P.P.* v. *Smith* the existence of the intent to inflict grievous bodily harm as an alternative to the intent to kill in murder was confirmed by the House of Lords. The questions to be considered under this heading are therefore:

(*a*) whether any change in the existing law is desirable, and

(*b*) if so, what should be the nature of the change.

13. The main arguments in favour of retaining the intent to inflict grievous bodily harm as an alternative to the intent to kill in murder are as follows:

(*a*) It is in accord with the general sense of justice of the community that a man who causes death by the intentional infliction of grievous bodily harm, although not actually intending to kill, should not only be punished as severely as a murderer, but should be treated in law as a murderer.

(*b*) Grievous bodily harm is a relatively simple concept which can be readily explained to a jury. Any attempt to define "grievous bodily harm" as, for example, "harm likely to endanger life", or further to require that the accused should *know* that the harm inflicted is likely to endanger life, would make the judge's direction more difficult for the jury to follow.

(*c*) It is true that, with the suspension of the death sentence, a person who kills while intending to inflict grievous bodily harm could, if such an offence were only manslaughter, receive as a maximum the same sentence, namely life imprisonment, as that which would remain obligatory for murder. But the judge might face practical difficulties in such a case of manslaughter in ascertaining the intent to inflict grievous bodily harm, which he would require to know in order to fix the appropriate sentence. These difficulties would be most acute if the prosecution had accepted pleas of not guilty of murder but guilty of manslaughter, when the judge would have to rely on the depositions; but they would also exist to some extent where the accused had been tried on a count of murder but had been found guilty of manslaughter, in which event the judge would have heard the evidence in the case, but would have no verdict of the jury on the question whether the killing followed an act intended to inflict grievous bodily harm. Admittedly, it would be possible to overcome these particular difficulties by the creation of a specific type of manslaughter of causing death by an act intended to inflict grievous bodily harm, but such a new offence would further complicate the already very involved law of homicide.

(*d*) To eliminate the intent to inflict grievous bodily harm from the intent to kill in murder would encourage the ruthless criminal who kills in the furtherance of some purpose other than killing and, it may be said, does not intend to kill, but only to inflict such grievous bodily harm as will enable him to carry out that purpose.

14. It should be added that it is possible to admit that the present law relating to the intent to inflict grievous bodily harm in murder is unsatisfactory, but at the same time to take the view that any change in the law should await a general review of the whole law of homicide, having regard particularly to the unsatisfactory state of the present law of manslaughter.

15. The main arguments for changing the present law, which prescribes intent to inflict grievous bodily harm as an alternative to the intent to kill in murder, are as follows:

(*a*) Murder is commonly understood to mean the intentional killing of another human being; and, unless there are strong reasons which justify a contrary course, it is generally desirable that legal terms should correspond with their popular meaning.

(*b*) To limit intent in murder to the intent to kill is not to disregard the very serious nature of causing death by the infliction of grievous bodily harm, but, since the suspension of the death sentence, if such an offence were to be treated as manslaughter only, it could nevertheless be punished by a maximum penalty as severe as the penalty prescribed for murder, namely, imprisonment for life.

(*c*) If the intent to inflict grievous bodily harm is to be retained in the law of murder at all, it should at least be clear that the bodily harm referred to is harm likely to kill. Viscount Kilmuir in *D.P.P.* v. *Smith*, however, specifically declined to make a distinction between grievous bodily harm in its relation to intent in murder and in connection with the statutory offence of inflicting grievous bodily harm under s.18 of the Offences

Against the Person Act 1861 (in which latter context it is clear that it is not limited to bodily harm likely to kill). Thus at p.334 Viscount Kilmuir said:

> "My Lords, I confess that whether one is considering the crime of murder or the statutory offence, I can find no warrant for giving the words 'grievous bodily harm' a meaning other than that which the words convey in their ordinary and natural meaning. 'Bodily harm' needs no explanation and 'grievous' means no more and no less than 'really serious'."

And at p.335 he added:

> "It was said that the intent must be to do an act 'obviously dangerous to life' or 'likely to kill'. It is true that in many of the cases the likelihood of death resulting has been incorporated into the definition of grievous bodily harm, but this was done, no doubt, merely to emphasize that the bodily harm must be really serious, and it is unnecessary, and I would add, inadvisable, to add anything to the expression 'grievous bodily harm' in its ordinary and natural meaning."

(*d*) Furthermore, a man should not be regarded as a murderer if he does not *know* that the bodily harm which he intends to inflict is likely to kill. From the decision in *D.P.P.* v. *Smith*, however, it is not clear that the accused need know even that the harm was serious, let alone that it was likely to kill. If there is any special deterrent effect in the label "murder" as distinguished from manslaughter, it should be attached to an act done with intent to inflict bodily harm which the accused knows is likely to kill.

(*e*) If there are practical difficulties in determining what harm is likely to endanger life and in ascertaining the accused's knowledge of such likelihood, it does not follow that the present law must therefore remain unchanged. It may precisely for this reason be desirable to eliminate altogether the intent to inflict grievous bodily harm as an alternative to the intent to kill in murder.

(*f*) The difficulties which in certain circumstances, it is said, might face the judge in fixing the appropriate sentence in a case of manslaughter, allegedly caused through the intentional infliction of grievous bodily harm, are not basically different from those with which he has to deal in sentencing for many other offences.

(*g*) The view that the intent to inflict grievous bodily harm, as an alternative to the intent to kill in murder, covers the case of the ruthless criminal who does not stop at killing in furtherance of some other purpose is too indiscriminate in its approach. A distinction must be made between the man who is not willing to kill, even if he intends to inflict grievous bodily harm which in fact results in death, and the man who is willing to kill, even if he hopes to avoid, or is indifferent whether he causes, death.

16. Consultation with those referred to in paragraph 9(*c*) above on the issues raised in paragraphs 12-15 has shown a wide variety of opinion. The main views are as follows:

(*a*) Some are in favour of retaining the intent to inflict grievous bodily harm as an alternative to the intent to kill in murder.

(*b*) Some would limit intent in murder to the intent to kill without further qualification.

(*c*) Another view would in effect retain the intent to inflict grievous bodily harm as an alternative form of *mens rea* in murder but define it as harm which is likely to endanger life.

(*d*) A further view, which is supported in particular by the Law Society, would replace the intent to inflict grievous bodily harm in murder by an intent to inflict bodily harm which *the accused knows* is likely to endanger life.

(*e*) The majority of the sub-committee on Criminal Law Reform of the Society of Public Teachers of Law would confine *mens rea* in murder to an intent to kill, defined as the state of mind of one who (i) desires to cause death, or (ii) foresees that his act is certain to cause death, whether he desires to do so or not. If this proposal by itself were not acceptable, some members of this sub-committee would add as an alternative form of *mens rea* in murder an intent to cause grievous bodily harm, defined as harm that the accused foresees is likely to involve the victim in danger of death.

(*f*) The other main view on the above sub-committee would define intent in murder to include the state of mind of one who foresees that he is likely to kill.

17. Having considered these different views we think that the simplest, most practical and logical criterion, and the one which most closely accords with the underlying ethical assumptions of the criminal law, is the intent to kill. In our view the essential element in the intent to kill should be willingness to kill. Where it was a man's purpose to kill in any event, there can be no doubt about his willingness to kill; but where it was not his purpose to kill in any event, the essential question on a charge of murder should be whether, at the time when he took the action in fact resulting in death, he was willing by that action to kill in accomplishing some purpose other than killing. A man may hope that he will not kill, or he may be indifferent whether he kills or not, but if he is willing to kill, and does in fact kill, we think he should be guilty of murder.

18. In reaching this conclusion we have had in mind the following considerations:

(*a*) So long as a distinction between murder and manslaughter is to be maintained, there must be a defensible criterion for distinguishing between them. In our view the essential element in murder should be willingness to kill, thereby evincing a total lack of respect for human life. A man who drives a car at an excessive speed down a crowded street, thereby killing a pedestrian, may know that by his reckless folly he runs the risk of killing that pedestrian, but, although he is aware of the risk, he may not be willing to kill him. He may be guilty of manslaughter because he has run an extreme risk; he is not guilty of murder if he was not willing to kill. On the other hand, it is desirable to bring within the definition of a murderer a man who (to take an example cited during the Commission's consultations) plants a powerful time-bomb in an aeroplane in order to blow it up in flight with the aim of recovering the proceeds of insurance on the cargo. Although

he has a purpose other than killing (namely, the recovery of the insurance money) it is clear from the circumstances that at the time when he planted the bomb, he was willing to kill those in the aeroplane in accomplishing his purpose of recovering the insurance money. There will of course be cases (for example, the thief who to evade arrest shoots a pursuing policeman in the leg, as a result of which the latter subsequently dies) where the question of the accused's willingness to kill will be more difficult to decide. However, we think that the inquiry into the state of mind of a man accused of such a serious crime as murder must necessarily be a searching one and that its difficulties must be faced.

(*b*) There is much to be said for the replacement of the intent to inflict grievous bodily harm in murder by an intent to inflict bodily harm which the accused knows is likely to endanger life. This change admittedly would remove two undesirable elements in the present law: first, that it does not unequivocally require that the harm in question should be likely to endanger life; secondly, that it does not require that the accused should know that the harm is likely to endanger life. There are, however, serious practical objections to this solution. Any test of intent has ultimately to be applied by a jury. Whether bodily harm is "likely to endanger life" depends not only on the seriousness of the injury inflicted but also on all the surrounding circumstances—for example, whether or not it is inflicted in a place readily accessible to medical aid. It is difficult therefore for a jury to determine whether there was a likelihood, as opposed to a possibility, that life would be endangered; it is still more difficult for the jury to ascertain that the accused *knew* that the harm was likely to endanger life. Moreover, apart from its practical difficulties, we think that this solution is deficient in principle in that it would define intent in murder by reference to likelihood to kill rather than willingness to kill; it would fail to recognize that to inflict bodily harm, even knowing that life will be endangered, does not necessarily show willingness to kill.

19. The second of the draft clauses set out in the Appendix gives effect to the proposal put forward in paragraph 17 above.

20. We have reached the conclusion expressed in paragraph 17 only after anxious deliberation. We recognize that some of those consulted would leave the law unchanged, and that most of those who would support change adopt a variety of solutions different from our proposal. We have had particularly in mind the objections of the judges of the Queen's Bench Division of the High Court to an earlier proposal which we made, and we have endeavoured to clarify it in the light of their and other criticisms. In that proposal we included in the intent to kill the state of mind of a man who both foresaw that he might and was prepared to kill. We recognize that the concept of "preparedness to kill" might be taken to apply only to a previously planned killing; we think that "willingness to kill" is not so limited in its application, while still emphasizing what we have made the central point of our proposal, namely, a total lack of respect for human life. And, in so far as a man cannot will in the abstract but must at least envisage the subject matter of his will, we consider that the reference to foresight was unnecessary and perhaps misleading, in laying too much emphasis on the likelihood of, rather than on the willingness to cause, death.

21. We fully recognize the need to reconsider the law of homicide as a whole especially in view of the present uncertain state of the law of manslaughter. And we see considerable weight in the argument that our proposal, in so far as it might lead to the reclassification as manslaughter of certain cases which would now be murder, might be left until a general review of the law of homicide is undertaken. But we put forward our proposal as a first step in this process of review, believing that murder, as a type of homicide, should be confined to cases in which the accused, being willing to kill, has a total lack of respect for human life.

## E. SUMMARY OF PROPOSALS

22. (*a*) A "subjective" and not an "objective" test should be applied in ascertaining the intent required in murder. A jury should be free to infer such an intent from the fact that death or grievous bodily harm (if the intent to inflict grievous bodily harm be retained in murder) was the natural and probable consequence of the accused's actions, and often the case for such an inference will as a matter of common sense and experience be very strong; but the jury should not be bound to draw such an inference (paragraph 8).

(*b*) The same "subjective" test should be applied in regard to all other offences where it is necessary to ascertain the existence of intent or foresight (paragraph 10).

(*c*) An intent to inflict grievous bodily harm should no longer be retained as an alternative to an intent to kill in the crime of murder. A killing should not amount to murder unless there is an intent to kill. But it should be made clear that, where a man does not have the purpose to kill in any event, he may nevertheless have the intent to kill, if, at the time when he takes the action in fact resulting in death, he is willing by that action to kill in accomplishing some purpose other than killing (paragraph 17).

(*d*) Draft clauses giving effect to these proposals are set out in the Appendix to this Report.

LESLIE SCARMAN, *Chairman*
L. C. B. GOWER
NEIL LAWSON
NORMAN S. MARSH
ANDREW MARTIN

HUME BOGGIS-ROLFE, *Secretary*

*12th December*, 1966.

# APPENDIX

## DRAFT CLAUSES

Proof of criminal intent.

1. A court or jury, in determining whether a person has committed an offence,—

(a) shall not be bound in law to infer that he intended or foresaw a result of his actions by reason only of its being a natural and probable consequence of those actions; but

(*b*) shall decide whether he did intend or foresee that result by reference to all the evidence, drawing such inferences from the evidence as appear proper in the circumstances.

Nature of intent in murder.

2. (1) Where a person kills another, the killing shall not amount to murder unless done with an intent to kill.

(2) A person has an "intent to kill" if he means his actions to kill, or if he is willing for his actions, though meant for another purpose, to kill in accomplishing that purpose.

(3) It is immaterial whether the intent to kill is an intent to kill the person in fact killed or any particular person, so long as it is an intent to kill someone other than himself; and references to killing in subsection (2) above shall be construed accordingly.

(4) Section 1 of the Homicide Act 1957 is hereby repealed.

(5) This section shall not have effect in relation to an offence where an indictment for the offence has been signed before the date when the section comes into force or a court-martial for the trial of the offence has been ordered or convened before that date; but, subject to that, this section shall have effect in relation to offences committed wholly or partly before that date as it applies in relation to offences committed after that date.



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