SCOTTISH LAW COMMISSION

(SCOT. LAW COM. NO. 80)

THE MENTAL ELEMENT IN CRIME

REPORT ON A REFERENCE UNDER SECTION 3(1)(*e*)
OF THE LAW COMMISSIONS ACT 1965

Presented to Parliament by the Secretary of State for Scotland
by Command of Her Majesty
November 1983

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The Scottish Law Commission was set up by Section 2 of the Law Commissions Act 1965 for the purpose of promoting the reform of the Law of Scotland. The Commissioners are:

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ISBN 0 10 190470 3

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Report on a reference under Section 3(1)(*e*) of the Law Commissions Act 1965

To: The Right Honourable George Younger, M.P.,
Her Majesty's Secretary of State for Scotland

We have the honour to submit our Report on the Mental Element in Crime.

(*Signed*) PETER MAXWELL, *Chairman*
R. D. D. BERTRAM
E. M. CLIVE
JOHN MURRAY
GORDON NICHOLSON

R. EADIE, *Secretary*
23rd August 1983

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PART I INTRODUCTION

1.1 On 21 May 1979 we received from you a reference under section 3(1)(*e*) of the Law Commissions Act 1965 in the following terms:

> "To consider, in relation to the law of Scotland, the Report of the Law Commission[1] on the Mental Element in Crime and to advise."

1.2 We have had the assistance of comments in relation to Scots law on the Law Commission Report and on the Law Commission Working Paper[2] which preceded it. We are grateful for and have taken into account these comments. Having regard to these comments and the rather special nature of this particular reference, we do not consider it necessary to adopt our usual procedure of publishing a formal consultative memorandum before proceeding to report our advice.

1.3 Scots law does not recognise any precise distinction between "crimes" and "offences" and, when we use either of these words in the course of our Report, we do not intend them to have any specialised significance. In particular we do not intend to draw distinctions of the kind made by Lord Reid in *Sweet* v. *Parsley*[3] between acts of a "truly criminal character" and "quasi-criminal acts".

1.4 Despite the width of its title, the Law Commission Report is limited in scope. It is not concerned with the mental capacity of an accused person or with the many problems which can arise in this connection; it is not concerned with the problems of mental element which can arise in the case of attempted crimes; nor is it concerned, at any rate directly, with the difficult problems of criminal responsibility direct or vicarious of corporations or other non-natural persons.[4] Except upon one matter it is concerned only with a desire to secure, as regards future legislation prescribing crimes, that the mental element required for the commission of the crime is not left in doubt. While we applaud this objective, we are unable to support the methods sought to achieve it in so far as they might affect Scotland by their application to purely Scottish or to United Kingdom legislation, and in general we do not support the Law Commission's recommendations. To avoid repetition we emphasise here that we do not seek to express any opinions on the Law Commission's recommendations as they relate to the law of England and Wales. Our lack of support is only intended to relate to any application of these recommendations, whether by United Kingdom statutes or otherwise, to the law of Scotland.

1.5 In outline the Law Commission's principal recommendations are as follows. First, three key words should be used to express mental element: these words are "intention", "knowledge", and "recklessness". Secondly, so far as possible these words (including their grammatical derivates) and no others should be used to express mental element. Thirdly, the proposed statutory definitions of these words should apply unless a different definition is expressly stated in legislation. Fourthly, in the case of crimes where no

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[1](1978) Law Com. No. 89.
[2]No. 31.
[3][1970] A.C. 132, at 149.
[4]See e.g., *Dean* v. *John Menzies (Holdings) Ltd.* 1981 S.L.T. 50.

mental element is expressed, there should be a statutory presumption that one or other of the three key words applies. All of the foregoing recommendations are to apply only in relation to future statutory offences. They are to be enacted in what will in effect be an interpretation statute which will in future have to be referred to in order to determine the mental element appropriate to any particular crime. Finally, in relation to existing as well as future crimes, certain recommendations are made as to the considerations which a court or jury should take into account in determining whether a person has committed a crime. In brief our reactions to the various recommendations are as follows.

1.6 In paragraph 99(3) of their Report[1] the Law Commission recommend:

> "In respect of an offence which is created by a provision in or under a statute passed on or after the appointed day, it should be expressly stated to what extent liability depends on intention, knowledge or recklessness, depends on an objective standard of conduct (whether expressed as liability for negligence or in some other way) or is intended to be strict."

In so far as that recommendation amounts to an exhortation to those framing future legislation creating or defining crimes to ensure that Parliament's intention as regards the mental element, if any, required for the commission of the crime emerges clearly from the legislation, we support it. As appears later, however, we do not support the Law Commission's concentration on the three key words or their views on the concept of neglegence.

1.7 In paragraph 99(2)(*b*)[2] the Law Commission recommend:

> "In the creation of new offences on or after the appointed day the use of terms, other than those which we have recommended for expressing the required mental element, should wherever possible be avoided."

For reasons explained more fully in Part III we are not entirely clear as to the intended scope of this exhortation. The terms expressly recommended in their Report for expressing a mental element appear to be confined to "intention", "knowledge" and "recklessness", and it is stated in paragraph 71 that "we hope that intention, knowledge and recklessness in the sense in which we have defined them would be sufficient for almost all future offences". But other indications in their Report suggest that it is accepted that expressions relating, or arguably relating, to mental elements other than those three words may well be required. We cannot agree with the suggestion that Parliament should in future endeavour to rely on only three words to express the necessary mental element for particular crimes and, for reasons more fully explained in Part III, we do not support this recommendation.

1.8 In paragraph 99(1)[3] the Law Commission set out their detailed recommendations as to the manner in which the three key words, namely intention, knowledge and recklessness, should be defined. It is made clear in the draft Bill annexed to their Report that the proposed definitions are to apply to the words in question in all their grammatical forms. Thus, for example, the definition of "intention" will apply also to the verb "intend" in any of its forms, and to "intent", "intentional" and "intentionally". For reasons expressed

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[1]See also para. 75.
[2]See also para 72.
[3]See also paras. 44, 49, 60 and 65.

at length in Part IV of our Report we do not support any part of this recommendation.

1.9 In paragraph 99(2)(*a*)[1] the Law Commission recommend:

> "Wherever a provision in or under a statute passed on or after an appointed day refers to intending, knowing or being reckless in relation to an offence, our recommendations as to those terms should apply unless the provision otherwise expressly provides."

Quite apart from the fact that we do not support the Law Commission's recommendations as to the definitions of these terms, we consider that this recommendation, coupled with that in paragraph 99(2)(*b*),[2] would, if complied with, unduly restrict the capacity of draftsmen to make their meaning clear and might tempt them to use the key words without sufficiently applying their minds to the shade of meaning which they intend to convey. This recommendation also raises a problem as to how Parliament is in future to express a different meaning for any of these terms should it wish to do so. Their Report does not say how this is to be done and it is not clear to us that it could in fact be done without some difficulty. We do not support this recommendation.

1.10 In paragraph 99(4)[3] the Law Commission recommend:

> "Wherever, in respect of any requirement of an offence which is created by a provision in or under a statute passed on or after the appointed day, there is no provision—
>
> (*a*) making liability strict, or
>
> (*b*) making liability depend on
>
> (i) the presence or absence of any particular state of mind or
> (ii) compliance with an objective standard of conduct,
>
> then, to the extent that no such provision is made, the offence should involve on the part of the defendant intention or recklessness in relation to any result and knowledge or recklessness in relation to any circumstance."

So far as the main substance of the proposal is concerned, we think that there is some merit in the suggestion that there should be a statutory presumption but on the whole we are inclined not to support it. We could not in any event support it in its present form since, as clause 5 of the draft Bill makes clear, this proposal will involve using the recommended definitions given elsewhere for intention, knowledge and recklessness. We deal with this matter in more detail in Part V.

1.11 In paragraph 99(5)[4] the Law Commission, again for the purposes of future legislation only, recommend:

> "(*a*) wherever in respect of an offence which is created by a provision in or under a statute passed on or after the appointed day, liability is subject to a defence or exception which does not amount to a provision making liability depend on
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> (i) the presence or absence of any particular state of mind or

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[1]See also para. 72.
[2]See para. 1.7 above.
[3]See also para. 89.
[4]See also para. 91.

(ii) compliance with an objective standard of conduct,

then the defendant should not be liable if, when the conduct required for the commission of the offence occurred, he believed that any circumstance existed which, had it in fact existed, would have provided him with the defence or the exception from liability.

(*b*) for the purposes of (*a*) above the requirements as to proof of a belief that a circumstance existed should be the same as those which relate to proof of a circumstance which the offence provides as a defence or an exception from liability."

This recommendation is at first sight a counterpart of the recommendation referred to in the immediately preceding paragraph. In fact this recommendation is really rather narrow and limited in its scope and, although we see some merit in the suggestion that is made, we are unable to support the recommendation in its present form. This is also dealt with in greater detail in Part V.

1.12 In paragraph 99(6)[1] the Law Commission recommend:

"(*a*) a court or jury, in determining whether a person has committed an offence, should decide whether—

(i) he intended a particular result of his conduct,
(ii) he was reckless as to such a result,
(iii) he foresaw that such a result might occur,
(iv) he knew that a particular circumstance existed, or
(v) he was reckless as to the existence of such a circumstance,

by reference to all the evidence, drawing such inferences from the evidence as appear proper in the circumstances; and

(*b*) it should be a relevant factor—

(i) for the purposes of (*a*)(i), (ii) and (iii) above that the result was a natural and probable consequence of that person's conduct,
(ii) for the purpose of (*a*)(iv) above that a reasonable man in his situation would have known that the circumstance existed, and
(iii) for the purpose of (*a*)(v) above that a reasonable man in his situation would have realised that there was a risk of the circumstance existing."

This recommendation is an exception to the remainder of the Law Commission's recommendations in that, as appears from the note to clause 7 of the draft Bill, it is intended to apply to past as well as future crimes. Moreover, as worded, it would apply to common law as well as statutory crimes. This may not, so far as the Law Commission are concerned, be a matter of significance since their Report is written as part of a comprehensive statutory codification of criminal law.[2] It would be inaccurate to say that we do not support the recommendation in paragraph 99(6) since, to some extent and in some circumstances, it might be said to reflect our existing law. Here too, however, the words of intention, knowledge and recklessness are to have the meaning assigned to them in their Report and, on that basis, we do not support this recommendation. In any event we do not support any attempt to give statutory expression so far as Scotland is concerned to this recommendation as regards

[1]See also para. 98.
[2]See paras. 1 and 97.

either existing or future statutory crime, and we would be even more strongly opposed to any attempt to give statutory expression to the recommendation as regards Scottish common law crimes.

1.13 In what follows in our Report we examine in greater detail the general approach adopted by the Law Commission and, taking them in turn, the specific recommendations which have been made.

PART II GENERAL CONSIDERATIONS

The background to the Law Commission's recommendations

2.1 In paragraph 3 of the Law Commission Report, it is stated:

> "Our hope is that, if our recommendations are adopted, the draft Bill will provide a first instalment of legislation setting out all the general principles of a new code of criminal law."

This hope is echoed in paragraph 97 where it is stated: "we envisage this Report as a stage in the creation of a comprehensive criminal code". We understand that to a very large extent the criminal law of England and Wales is already statutory, and that the recommendations are made in the expectation that in due course it will be wholly statutory. The situation is quite different in Scotland.

2.2 Statutory crimes in Scotland are, of course, very numerous and varied and, largely due to the prevalence of road traffic crimes, they occupy a large proportion of the time of the courts. Structurally, however, our criminal law is a common law system with the statutory crimes being, as it were, superadded. Most of what one might call the ordinary crimes—murder, assault, rape, theft, fraud, etc.—are governed wholly or largely by the common law.[1] We have no reason to suppose that this structure will change in the foreseeable future nor are we aware of any serious suggestion that our criminal law should be codified. We are unable to say whether a programme of complete codification, as envisaged by the Law Commission, demands legislation of the kind recommended in their Report but, if it does, there is no corresponding demand as regards Scots law.

2.3 Not only, therefore, is the basic background against which their Report is written absent in Scotland but the question must also immediately arise as to whether formulae designed to cover the whole, or almost the whole, field of criminal law could ever be appropriate for a system where they would only apply to a part of the law. For example, as mentioned below, while our common law crimes are not circumscribed by precise definitions, expressions referring to the mental element are in some instances commonly and on authority properly used in describing the crime (e.g. knowledge in reset, and recklessness in murder). Others may be implied by statute.[2]

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[1]There are a number of statutes of the Scots Parliament dealing, usually in short and simple terms, with crimes which are now generally looked on as common law crimes; but the elements now recognised as constituting such crimes are almost wholly developed from the writers and from case law.

[2]Criminal Procedure (Scotland) Act 1975, s. 48, repeating the provisions of Criminal Procedure (Scotland) Act 1887, s. 8.

2.4 It seems to us undesirable that words commonly used in one branch of the criminal law should have by statute a particular and, in our view, somewhat strained meaning, while they will bear a different meaning when employed in the common law. To give but one example, the proposed definition of recklessness would, we think, be wholly inappropriate to the use of that word as commonly used to describe the crime of murder in Scotland. An even greater difficulty, which we mention below,[1] arises because the recommendations[2] are to be confined to statutes passed on or after the appointed day. We note too that the recommendation in paragraph 99(6) appears to apply to common law as well as statutory crimes. This is not a matter of significance in England and Wales where there is little or no common law left, but as regards Scotland it would have a major and in our view undesirable impact on the common law as well as on statutory crimes.

Areas of uncertainty

2.5 Part III of the Law Commission Report sets out three areas of uncertainty which the recommendations are designed to clarify. Taking these in reverse order, the third refers to the fact that many statutes creating crimes are expressed without reference to any mental element, or to negligence, but also without any provision that the criminal liability should be strict. The courts are left, therefore, with the problem of deciding whether Parliament intended strict liability, or whether some requirement of culpability is to be implied and, if so, what. To meet this problem the courts of England and Wales have devised certain presumptions which are to be applied in certain cases depending on the characteristics of the statutory crime in question, but these judge-made rules are necessarily very general in their terms and uncertain in their application in particular cases.

2.6 Though the scope of this problem is less on this side of the Border simply by virtue of the fact that a smaller proportion of our criminal law is embodied in statute, it would be idle to pretend that the same problem does not exist here. The difficulties which this has caused are illustrated by one of the leading cases on the subject[3] in which, though there does not appear to have been disagreement in principle, a bench of seven judges was almost equally divided as to the result in the particular case. In that case the principle was stated by Lord Wark in the following terms: [4]

> "It is a well recognised principle of construction of a penal statute that it ought not to be read as importing an absolute obligation unless its language is such as to require the court to come to the conclusion that this is its intention, and that the ordinary rule that *mens rea* is required for the constitution of a criminal or quasi-criminal offence is excluded."

Much more recently the same principle has been voiced in the House of Lords in the case of *Sweet* v. *Parsley*[5] where Lord Reid said:[6]

> ". . . there has for centuries been a presumption that Parliament did not intend to make criminals of persons who were in no way blameworthy in

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[1]Para. 2.44 *et seq.*
[2]Except for that contained in para. 99(6): see para. 1.12 above.
[3]*Mitchell* v. *Morrison* 1938 J.C. 64.
[4]At p. 87.
[5][1970] A.C. 132.
[6]At p. 148.

what they did. That means that whenever a section is silent as to *mens rea* there is a presumption that, in order to give effect to the will of Parliament, we must read in words appropriate to require *mens rea.*"

2.7 While the foregoing principle is clear and well known, we accept that in Scotland, as in England, problems can arise not only in applying the principle itself, but also in determining the type of mental element that is appropriate in those cases which are held to require some form of *mens rea.* The problem is a long-standing one as is illustrated by the difficulty experienced by the court in *Anderson* v. *Rose*[1] and *Beattie* v. *Waugh.*[2] The problem has emerged in local as well as public and general statutes as can be seen in the case of *Fraser* v. *Heatly,*[3] a case which incidentally also illustrates the fact that Scottish courts will not always reach the same results as are arrived at south of the Border. As appears in *Duguid* v. *Fraser*[4] the matter is further complicated in some cases by a conceptual uncertainty as to whether a statute is concerned with strict liability of an individual or with vicarious criminal responsibility for the actings of another.

2.8 The second area of uncertainty referred to in the Law Commission Report arises from the fact that, where a statute requires a number of elements as a condition of the crime and expresses a mental element, for example, the element of knowledge, it is often unclear to which of the elements of the crime that mental element is intended to apply. One example of this which is given in their Report[5] is the offence of assaulting "a constable in the execution of his duty" contrary to section 51(1) of the Police Act 1964. (The comparable Scottish offence is to be found in section 41(1) of the Police (Scotland) Act 1967). The problem in such a case, it is said, is whether it is necessary for the prosecution to prove that the accused knew that the person whom he was assaulting was a constable and, if so, whether it is also necessary to prove that he knew that the constable was at the time acting in the execution of his duty. In Scotland this particular problem seems to have been approached more as a matter of objective fact than as one of knowledge on the part of the accused,[6] although the point has not so far come before the High Court for decision. We regard this sort of problem as being in a sense merely a variant of the case where there is no reference at all to a mental element. It is another example of legislation failing to make the intention clear, and here again the problem exists on both sides of the Border. We agree that these failures on the part of the legislative system are regrettable and should, if practicable, be remedied as regards future statutes; but we are not satisfied that the remedies proposed are the correct ones, at any rate as far as Scotland is concerned.

2.9 The first area of uncertainty discussed in the Law Commission Report is of a rather different order. It is said[7] that "there is no general agreement as to the precise meaning of the words used in statutes to denote a mental element" and that "where such words are used in an offence-creating provision

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[1]1919 J.C. 20.
[2]1920 J.C. 64.
[3]1952 J.C. 103.
[4]1942 J.C. 1.
[5]Para. 26.
[6]*Gunn and Ors.* v. *P. F. Caithness* (1845) 2 Broun 554; *Monk* v. *Strathern,* 1921 J.C. 4; but see *Annan* v. *Tait* 1981 S.C.C.R. 326.
[7]Para. 9.

there is usually no statutory guidance as to their meaning, either in the enactment itself or in any other enactment by which it can be interpreted". We have, at least so far as Scotland is concerned, reservations with regard to this generalisation as stating a problem demanding some overall solution. We would agree that some words used in statutes to denote a mental element are troublesome and would be better avoided in future. This is particularly true of a word such as "maliciously" which, over the years, has come to acquire in statutory use a meaning remote from its meaning as commonly understood;[1] but we are inclined to think that the difficulty arises from the inevitable fact that, if a word having a commonly understood meaning is used in a statute, it may require judicial interpretation against particular factual backgrounds.[2] The manner in which this problem is stated, and the proposed solution of providing a statutory lexicon, appears to us to overlook certain matters.

2.10 We believe it to be self-evident that legislation should, so far as practicable, use words in accordance with their everyday meaning as understood by the non-lawyer, and we consider this of particular importance in relation to criminal law which so often has to be understood and applied by juries. We accept that there are limitations on the extent to which this objective can be achieved. No doubt, as said by Lord Edmund-Davies in *R.* v. *Caldwell*:[3]

> "The law in action compiles its own dictionary. In time, what was originally the common coinage of speech acquires a different value in the pocket of the lawyer than when in the layman's purse."

The history of the word "malice" is no doubt a striking example of this. We do not pretend that this process, by which words of common usage acquire technical meanings, has not affected the Scots criminal law. An example of this may be found in the Scots common law crime of wilful fire-raising where "wilful" has come to mean something rather different from what one might expect. We think, however, that this process has perhaps affected the law in Scotland to a lesser extent than in England. We believe that it would be generally accepted in Scotland that it is a process which should be kept to a minimum, and that in criminal law statutes, commonly used words should be used in their commonly understood sense, so far as possible.

2.11 To say this is, however, to over-simplify. There is a commonly understood sense of words such as "intention", "knowledge" and "recklessness", but that sense is not always precisely the same. Such words are coloured by the context in which they are used. This point was put clearly by Devlin L.J. in the case of *Bearmans Ltd.* v. *Metropolitan Police District Receiver*[4] when he said:

> "The word 'interested' is not a word which has any well-defined meaning and anybody who was asked what it meant would at once want to know the context in which it was used before he would venture an opinion . . . just as in ordinary speech one would require to know the context, so in construing the word in an Act of Parliament it is essential . . . to look at the scope and purpose of the Act."

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[1] *Ward* v. *Robertson* 1938 J.C. 32.

[2] See speech of Lord Diplock in *Sweet* v. *Parsley* [1970] A.C. 132.

[3] [1982] A.C. 341, at p. 357.

[4] [1961] 1 W.L.R. 634 at 655, quoted with approval by Eveleigh L.J. in *Pennine Raceway* v. *Kirklees Council* [1982] 3 W.L.R. 987 at 991.

In our opinion a clear example is to be found in one of the words considered in our Report, namely "reckless". As we explain more fully in Part IV it is our view that the word has a different shade of meaning when, for example, it is used in relation to the activity of driving from that which it bears in relation to the making of a statement. In the former case the word characterises the act of driving itself and frequently bears an element of instant thoughtlessness, whereas in the latter case the word more clearly relates to a state of mind and carries at least some suggestion of forethought.[1]

2.12 Any attempt by statute to imprison the meaning of words within statutory definitions, whether they are the definitions proposed by the Law Commission or any other definitions, would we think necessarily result in their having meanings which in some contexts at least are technical, and different from what would normally be understood to be their normal meaning in such a context. No doubt in some contexts the suggested definitions would in fact coincide with the intended effect of the statute, but we think that in others it would not. We believe that for practical purposes in Scotland it would be far better to leave such words undefined. This would enable the court, in the comparatively rare cases where the precise meaning of the word is in issue, to have regard to the statutory context in which the word is used and to the particular facts of the case. As was said by Lord Hailsham in *R.* v. *Lawrence*:[2]

> "The search for universally applicable definitions is often productive of more obscurity than light."

We think that statutory definitions of the kind proposed, combined with an exhortation that normally mental element should be expressed by use of one of the defined words and no others, might impede rather than assist the underlying objective of the Law Commission's proposals, namely that Parliament should make clear its intention with regard to the mental element. It would tend to limit flexibility in providing wording appropriate to the context of the particular statute. We confess that we are also somewhat sceptical of the efficacy of simply using more words in an attempt to remove any inherent uncertainties. The words of the definition would no doubt in due course themselves become the object of judicial examination.

2.13 Before leaving the uncertainties that have been referred to in the Law Commission Report, we think it right to mention that, in some of the problem areas identified in their Report,[3] the problem is seen as arising because of the absence of any definition of words such as "knowledge" in relation to offences which involve a concept such as, for example, "possession". It is our view that, by concentrating on the concept of knowledge in such cases, insufficient attention is paid to what we regard as the true problem in such cases, namely the question of what will amount in law to the concept of possession in the circumstances of a particular crime. This is, in our opinion, a rather different problem and we refer to it in more detail in Part V later.

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[1]See also our discussion of the words "intention" (paras. 3.5 *et seq.* below) and "belief" (paras. 3.16 *et seq.* below).

[2][1982] A.C. 510, at 519; and see also the speeches, particularly of Lords Reid and Kilbrandon, in *Brutus* v. *Cozens* [1973] A.C. 854.

[3]Paras. 29–39.

The Scottish approach

2.14 Some crimes in Scotland, whether common law or statutory, raise fairly clearly the question of mental element. We have already mentioned, for example, the element of knowledge in reset, and recklessness in murder; and, of course, some statutory crimes necessarily require consideration of a mental element, for example where words such as "knowingly" or "with intent" are used. Further, it is no doubt true in theory that every common law crime requires *mens rea* of a kind, even if it is only in the very limited sense that the accused did what he did in the knowledge that he was doing it. It seems to us, however, that the Scots common law approach to mental element has historically been, and at the present day remains, rather different from that in England and Wales. Until comparatively recent times the only concept to express mental element in Scotland was that of "dole", described by Hume[1] as "that corrupt and evil intention, which is essential (so the light of nature teaches, and so all the authorities have said) to the guilt of any crime". While this rather moralistic concept of general wickedness has to some extent disappeared from Scots law, no doubt largely because of the proliferation of statutory crimes using express words of *mens rea,* it still remains as the background against which the mental element necessary for most common law crimes is to be measured. Indeed the concept of wickedness is still regularly, and on authority, used when describing the crime of murder.[2] This approach to mental element, coupled with the fact that so much of the criminal law of Scotland is still part of the common law, has had several consequences. It has made it unnecessary for courts to consider and to construe words of mental element in relation to a wide range of crimes, and this has in turn meant that Scotland has been spared the proliferation of judicial glosses on such words that has occurred in England. As a result Scottish courts and juries have usually been able to concentrate more objectively on the *actus reus* of a common law crime, and to draw more readily what appear to be appropriate inferences from these objective facts, than appears to have been the case in England. If a question involving mental element is raised in the course of a trial, that will usually be because an accused person has himself put it in issue by, for example, introducing the state of his belief in relation to a defence of self-defence. Even in such cases, however, the question of mental element rarely appears to give rise to problems.

2.15 By contrast, the impression which we form from the Law Commission Report and from our examination of English cases is that it is a feature of the system south of the Border that much elaborate, and to the Scots lawyer conceptually difficult, consideration is given to the problem of mental element. Despite this difference of approach we suspect that the end result in conviction or acquittal is more often than not much the same. One recent example, which we shall examine in more detail later, is to be found in the cases of *Allan* v. *Patterson*[3] and *R.* v. *Lawrence.*[4] Both were concerned with the interpretation of the word "recklessly" in sections 1 and 2 of the Road Traffic Act 1972. In the Scottish case a rather more objective approach was favoured by the High Court, whereas in the English case a rather more subjective

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[1] i. 21.
[2] See para. 2.32 below.
[3] 1980 S.L.T. 77.
[4] [1982] A.C. 510.

approach was taken. In the end the two approaches were not all that dissimilar and in the English case Lord Diplock said:[1]

> "I do not think that . . . the practical result of approaching the question of what constitutes driving recklessly in the way that was adopted by the Lord Justice-General in *Allan* v. *Patterson* is likely to be any different from the result of instructing a jury in some such terms as I have suggested above."

While in these cases the approach north and south of the Border was not in the end greatly dissimilar there are, so far as we can see, many other instances where the English courts, perhaps because of the statutory form of much of the criminal law involved, have had to consider the question of mental element to an extent, and in a manner, which finds no parallel in Scotland.

R.* v. *Hyam

2.16 We have the impression that any demand for a restatement or elaboration of the law on the subject of mental element in England and Wales itself arises from the fact that the question of mental element has been discussed so much by the courts and by writers, both in England and in countries whose criminal law stems from English law. It appears to be a problem which, as it were, feeds on itself. This is not a problem which figures largely in our system. In this connection we have considered with interest the English case of *R.* v. *Hyam*[2] referred to more than once in the Law Commission Report.

2.17 It would be impertinent of us to attempt to express opinions on the vast amount of English authority on the mental element in the crime of murder, a matter which Lord Cross of Chelsea described in *R.* v. *Hyam* as an "obscure and highly technical branch of the law".[3] We think, however, that it would be useful to consider at some length *R.* v. *Hyam,* and the developments which led to it.

2.18 For a long time murder south of the Border has been defined as killing with "malice aforethought". In *R.* v. *Hyam*[4] Lord Hailsham quoted with approval the following dictum of Cairns L.J. in the Court of Appeal in the same case:

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

Prior to 1957 malice aforethought appears to have meant either (*a*) killing with an intention to kill, (*b*) killing with an intention to commit grievous bodily harm, or (*c*) killing in the course of the commission of certain defined illegal activities. Section 1(1) of the Homicide Act 1957, which applies only in England and Wales, provides:

> "Where a person kills another in the course or furtherance of some other offence, the killing shall not amount to murder unless done with the same malice aforethought (express or implied) as is required for a killing to

[1] At p. 527.
[2] [1975] A.C. 55.
[3] At p. 97.
[4] At p. 66.

amount to murder when not done in the course of furtherance of another offence."

The side note to this section is "Abolition of constructive malice".

2.19 In *R.* v. *Vickers*[1] it was held that this provision removed from the scope of murder cases where the killing was done in the course of one of the defined unlawful acts, that is to say cases under (*c*) above, but not killing where the intent was to inflict grievous bodily harm, that is to say cases under (*b*) above. It was held that cases under (*b*) above were cases of "implied" as opposed to "constructive" malice.

2.20 The question of the intent necessary to constitute the crime of murder received further consideration in the case of *D.P.P.* v. *Smith*.[2] That was a case where a police officer tried to stop a car driven by a thief by holding on to the car. The thief drove off, dragging the police officer along. The police officer was eventually thrown to the ground in front of another vehicle which struck and killed him. The thief was found guilty of capital murder, the trial judge having said in the course of his summing up:

"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."

On appeal the conviction was quashed and a verdict of manslaughter was substituted 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. That decision was in turn appealed to the House of Lords which reversed the decision of the Court of Criminal Appeal and restored the verdict of capital murder.

2.21 This decision of the House of Lords caused widespread concern. Lord Hailsham in *R.* v. *Hyam* said that it would be "affectation in me not to recognise that the decision of this House in *Smith* has proved at all times highly controversial, has given rise to an extensive body of literature both here and in the Commonwealth, and has proved unusually difficult to interpret".[3] Following on, and because of, *D.P.P.* v. *Smith* the Law Commission issued a Report on the subject of Imputed Criminal Intent[4] and the recommendations of that Report were implemented, but only in part, in section 8 of the Criminal Justice Act 1967 which provides:

"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 the 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."

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[1][1957] 2 Q.B. 664.
[2][1961] A.C. 290.
[3][1975] A.C. 55 at 70.
[4](1967) Law Com. No. 10.

As appears from *R.* v. *Hyam,* that provision was less than wholly successful in clarifying the law.

2.22 In *R.* v. *Hyam* a woman, from motives of jealousy, deliberately set fire to the house of another woman. This resulted in the death, not of the other woman, but of two children. The trial judge directed the jury in the following terms:

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

The accused was convicted of murder. She appealed unsuccessfully on the ground of misdirection, but the Court of Appeal granted leave to appeal to the House of Lords certifying, as a point of general public importance, the question:

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

2.23 The House of Lords refused the appeal by a majority of three to two. Two points were raised in the appeal. The one which gave rise to dissents by Lord Diplock and Lord Kilbrandon appears to have been developed in the argument almost as an afterthought. It was whether the House should overrule *R.* v. *Vickers* and hold that intent to cause grievous bodily harm, as opposed to death, was not sufficient intent for murder. Lord Diplock and Lord Kilbrandon held that the House should do this and that it was able to do so having regard to section 1(1) of the 1957 Act. Lord Hailsham and Lord Dilhorne were both of the view that such a development in the law could only be effected by Parliament, and each appeared to have reservations as to whether such a change was desirable in the interests of justice. Lord Cross of Chelsea was uncertain on the matter but stated that he was not prepared to decide the point without "the fullest possible argument".

2.24 The other question considered, and the one which appears to have given rise to the appeal, was (put shortly and perhaps over-simply) whether knowledge of the probability, or a high degree of probability, of the outcome of death or grievous bodily harm, was equivalent to intention to bring about that outcome. Lord Hailsham was, as we understand it, firmly of the view that it was not. He said, *inter alia,* "I do not therefore consider, as was suggested in argument, that the fact that a state of affairs is correctly foreseen as a highly probable consequence of what is done, is the same thing as the fact that the state of affairs is intended".[1] He gave the by now well-known example of the surgeon who, in an endeavour to save a life, performs an operation on a person who is very ill, knowing full well that death is a highly probable result of the operation. We respectfully agree with Lord Hailsham. Any other view seems to us to be a distortion of language.

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[1] At p. 75.

2.25 While Lord Hailsham thought that a simple affirmative answer could not be given to the question posed in the point of law certified by the Court of Appeal, he proposed propositions in answer to that question as follows:[1]

> "Before an act can be murder it must be 'aimed at someone' as explained in *D.P.P.* v. *Smith* and must in addition be an act committed with one of the following intentions, the test of which is always subjective to the actual defendant:
>
> (i) the intention to cause death;
>
> (ii) the intention to cause grievous bodily harm in the sense of that term explained in *Smith* . . . i.e. really serious injury;
>
> (iii) where the defendant knows that there is a serious risk that death or grievous bodily harm will ensue from his acts, and commits those acts deliberately and without lawful excuse, the intention to expose a potential victim to that risk as the result of those acts. It does not matter in such circumstances whether the defendant desires those consequences to ensue or not, and in none of these cases does it matter that the act and the intention were aimed at a potential victim other than the one who succumbed."

2.26 These propositions avoid giving the word "intention" an unnatural meaning, and they solve the problem exemplified by the case of the surgeon by introducing the concept "without lawful excuse". However, they appear from the Scots point of view to be somewhat too elaborate as a basis for a direction to a jury. In any event, as we understand it, they cannot be said to represent the law as laid down in *R.* v. *Hyam* since they were not adopted, at least expressly, by any of the other Lords of Appeal. Lord Dilhorne found it unnecessary to decide whether knowledge that certain consequences are highly probable is to be treated as establishing intent since he considered that it was well established that such knowledge in any event demonstrated "malice aforethought". However, he expressed the view that knowledge did probably establish intent.

2.27 Lord Diplock said:[2]

> "I agree with those of your Lordships who take the uncomplicated view that in crimes of this class no distinction is to be drawn in English law between the state of mind of one who does an act because he desires it to produce a particular evil consequence, and the state of mind of one who does the act knowing full well that it is likely to produce that consequence although it may not be the object he was seeking to achieve by doing the act."

It is not entirely clear what Lord Diplock had in mind when he referred to "crimes of this class". Lord Cross of Chelsea's approach was similar to that of Lords Dilhorne and Diplock, though he accepted that linguistically it is not accurate to equate foresight of the consequences with intent. Like Lord Hailsham, he noticed that where the ground relied on was not intent in its normal sense but knowledge of the likelihood of the consequences, it was necessary to introduce the qualification that the act itself must be "unlawful". He also expressed the opinion that the trial judge's reference to the words

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[1] At p. 79.
[2] At p. 86.

"highly probable" when referring to what the accused must have known regarding the likely results was unduly favourable to the accused, and he thought the word "highly" could have been omitted. We refer in Part IV below to the difficulties we see in importing into the statutory definitions of words such as "intention" or "reckless" words denoting a question of degree such as "highly probable" or "no substantial doubt".

2.28 Lord Kilbrandon dealt briefly with this aspect of the case and said:[1]

> ". . . if murder is to be found proved in the absence of an intention to kill, the jury must be satisfied from the nature of the act itself or from other evidence that the accused knew that death was a likely consequence of the act and was indifferent whether that consequence followed or not."

This is similar to the Scottish approach to the problem and Lord Kilbrandon went on to say that, if the House of Lords was prepared to declare this as being the common law basis for the intention required to constitute murder under the Homicide Act 1957, then that would be a satisfaction to him because in his opinion "such a declaration would be in conformity with the common law of Scotland, where constructive malice has never formed part of the law of murder".

2.29 Lord Kilbrandon's short speech is of importance for present purposes for two reasons. He was obviously seriously concerned by the extent to which the subject had become entangled in legal, and possibly a semantic, argument. He said that "there is something wrong when crimes of such gravity, and I will say of such familiarity, call for the display of so formidable a degree of forensic and judicial learning as the present case has given rise to". He mentioned also that much difficulty arose from the special problem in the crime of murder rather than from any problem in crime generally. The special problem, of course, arose from the need to find a way of defining the distinction between unlawful killings which resulted in a fixed penalty (of death, or more recently of life imprisonment) and other unlawful killings. His suggested solution was to abolish the distinction entirely.

2.30 In the result, *R.* v. *Hyam* seems to have failed to provide a solution to all future cases where the question of intent was in issue. So far as we can see, the English courts have continued to be troubled by these problems, and they continue to beset the House of Lords itself.[2]

2.31 Murder, of course, being a common law and not a statutory crime in Scotland, would not be affected by the application to Scotland of any of the Report's proposals other than that contained in paragraph 99(6). However, we have referred to *R.* v. *Hyam* at some length because we think it illustrates a number of matters of significance in considering the implications for Scots law of the Law Commission Report.

2.32 First, it highlights the contrast between the English and Scottish approaches. Murder in Scotland is not a statutory crime and so is not defined. It is not a statutory crime in England either, but is subject to some statutory qualifications which do not apply to Scotland. Partly for that reason the way in which murder is commonly described in Scotland is very different in terms,

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[1] At p. 98.

[2] See, e.g., *R.* v. *Cunningham* (1981) 73 Cr.App.R. 253; *R.* v. *Miller* [1983] 2 W.L.R. 539.

though we believe not in substantial effect, from the way in which it is described in England in so far as that is ascertainable from *R.* v. *Hyam.* Murder is commonly described in Scotland, for the purpose of distinguishing it from culpable homicide, as having two limbs—(*a*) killing with the intent to kill, intent here being used in what we conceive to be the normal sense, that is as indicating purpose as opposed to mere foresight of the consequences, and (*b*) killing by an act which evinces such a gross degree of wicked recklessness as to show that the accused cared not whether his victim lived or died. When a jury has this description of the crime before it, it does not have to make a decision between the two limbs. It can convict on the ground that the case fell under one or other without deciding which. The jury's task in effect is to make a judgment on the quality of the act in the light of the whole evidence.

2.33 This approach may be criticised as being somewhat unsophisticated. Sheriff Gordon says:[1]

> "The principles are vague and flexible, or perhaps one should say commonsense and non-technical."

He notes that it demands a "moral judgment" by a jury. However, while theoretically a jury's function is to decide guilt leaving sentence as a matter for the judge, it is at least arguable that so long as unlawful killing is divided between those acts which command a fixed penalty and those which do not, there is something to be said for leaving that problem to laymen, at least in doubtful cases.

2.34 We would not pretend that the Scottish test of murder is beyond criticism, but it does have this merit that in practice it causes very few problems. There has been hardly any absorption of judicial time or the incurring of public expense or delay in decision because of a need to examine the precise mental element required. There have been hardly any cases where problems have arisen in the administration of justice because a trial judge has given the wrong direction. The Scottish approach does not provide a minefield where one false step by the trial judge is likely to blow up the case.

2.35 So far as we are aware, there has been only one reported case in the Court of Criminal Appeal since it was instituted in 1926 where the precise mental element in the crime of murder has been a matter of detailed consideration, and that was a case which involved the special problem of attempted murder.[2] In that case the accused fired rifle shots into a room in which he knew certain people had barricaded themselves. He appealed against the trial judge's direction that attempted murder did not require intent to kill but was satisfied by wicked recklessness. In rejecting his appeal the court held that the *mens rea* for attempted murder is the same as the *mens rea* for the completed crime. Although this decision has settled the law in Scotland on this matter, we have some reservations about it as regards the crime of attempted murder, and we note that in England an attempt apparently requires intent in the normal sense of that word.[3]

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[1] *Criminal Law*, 2nd edn., at p. 732.

[2] *Cawthorne* v. *H.M.A.* 1968 J.C. 32.

[3] See, e.g., *R.* v. *Whybrow* (1951) 35 Cr.App.R. 141; *R.* v. *Mohan* [1976] Q.B. 1; *R.* v. *Cunningham* (1981) 73 Cr.App.R. 253, per Lord Edmund-Davies at 265; and Criminal Attempts Act 1981, s. 1.

2.36 So far as the Scottish description of the crime of murder is concerned, no doubt one reason why it has caused so little difficulty in practice is that it is simple and straightforward. The absence of judicial time spent on its analysis would, of course, be an inadequate justification for its retention if in fact it was producing unacceptable results, but we are not aware of any substantial dissatisfaction in any quarter with the practical results of the Scottish approach to the question of mental element in this crime, or indeed in relation to crime generally. As no doubt occurs in other systems, there have been cases in relation to murder which have caused public disquiet, but we are not aware of any such disquiet having been caused by the way in which our system describes the mental element. We do not believe that there is any need to burden our courts with repeated philosophical analyses of the mental element in the way that appears to happen in England: and we doubt whether our courts as presently constituted could cope with the extra work that would be involved.

2.37 The second significant aspect of *R.* v. *Hyam* is that it suggests the possibility that the Law Commission Report, particularly in relation to the word "intention", may have been unduly influenced by the very special problems arising in the crime of murder. We respectfully agree with Lord Hailsham that intention should at least generally convey an element of purpose. We would be seriously concerned if that word were in statute always to have a meaning defined by foresight, irrespective of purpose, merely or mainly because it is necessary to distinguish between unlawful killings which result in a fixed penalty and other unlawful killings.

2.38 The third significant aspect of *R.* v. *Hyam* is that it appears to demonstrate the extreme difficulty of finding definitions of words in common use which are both inclusively and exclusively accurate and complete for all cases. None of the Lords of Appeal in that case was content to give an unqualified affirmative answer to the question certified by the Court of Appeal. In particular both Lord Hailsham and Lord Cross of Chelsea found it necessary to introduce an additional qualification that the act should be "unlawful" or "without lawful excuse". This, we think, re-inforces our doubt as to the suitability of statutory definitions of the kind proposed without reference to the context in which the words appear.

The charging of juries

2.39 Though the majority of the more serious crimes in Scotland are common law crimes, statutory crimes are frequently tried on indictment before a jury, either because they are serious in themselves or because, having regard to previous convictions, a conviction would justify a substantial custodial sentence, or because they are charged along with other more serious crimes in one indictment. It is the practice in Scotland, and in our view a most desirable practice, that the judge in charging a jury should, so far as practicable, confine himself to matters relevant to the issues arising in the case in question. It is necessary for the judge to inform the jury what the Crown has to establish to obtain a conviction in the particular case, and in doing so to state what are the essential elements of the crime charged so far as these elements are significant in the particular case; but it is thought unnecessary and undesirable for the judge to burden the jury with an academic exposition of the whole law on the particular crime in question. Such an exposition only serves to

confuse the jury and distract its mind from the often difficult but limited issues of fact which it has to resolve. In *R.* v. *Lawrence*[1] Lord Hailsham said:

> "The purpose of a direction to a jury is not best achieved by a disquisition on jurisprudence or philosophy or a universally applicable circular tour around the area of law affected by the case. The search for universally applicable definitions is often productive of more obscurity than light . . . a direction to a jury should be custom-built to make the jury understand their task in relation to a particular case."

We respectfully adopt that statement as expressing what we understand to be the proper approach to charging juries in Scotland.

2.40 Although this statement was made by the head of the English judiciary in a recent English case, and has been echoed more recently,[2] we have the impression that English practice in this respect differs somewhat from that adopted in Scotland, in that directions to juries in England seem to involve what one might call "disquisitions on jurisprudence" to a greater extent than on this side of the Border. We are struck by the number of English cases in which, because of what the trial judge has said to the jury, problems relating to the mental element in crime have been considered in great detail on appeal, although the real issue did not appear to require a resolution of those problems.[3] However appropriate this may be in a quite different system of criminal jurisprudence, we have no doubt that a development in this direction would be undesirable and inappropriate in our system.

2.41 As we have said, in practice in the great majority of cases the question of the mental element is not a live issue in Scotland and does not require to be considered by judge or jury. More often than not the only live issue before the court is what the accused did, not what he thought or may be presumed to have thought. The avoidance of what we would consider unnecessary directions to a jury on matters relating to mental element presents little difficulty in the context of common law crimes, since they are not subject to precise statutory definitions purporting to set out matters which have to be established in all cases before a conviction can be secured. It is relatively easy for a judge to explain the law relating to the crime in question by confining himself to those aspects of the relevant law which are applicable to the issues of fact in the particular case.

2.42 There is, however, a rather different problem when one is dealing with statutory crimes. It may be much more difficult for the judge charging a jury to refrain from setting before the jury for its consideration the whole statutory definition of the crime, including any part of the definition contained in an interpretation statute. We think, however, that it would be undesirable for juries to be regularly burdened with expositions of the meanings of words such as intention, knowledge and recklessness, and in this connection we respectfully agree with the observations in the opinion of the court in *Allan* v. *Patterson.*[4] Referring to an earlier definition of recklessness proposed by the Law Commission, which, as with that presently recommended, combined

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[1][1982] A.C. 510 at p. 519.

[2]For example, *R.* v. *Brooks,* (1983) 76 Cr.App.R. 66.

[3]See e.g., *Warner* v. *Metropolitan Police Commissioner* [1969] 2 A.C. 256; *D.P.P.* v. *Morgan* [1976] A.C. 182; *R.* v. *Pigg* [1982] 1 W.L.R. 762.

[4]1980 S.L.T. 77.

a subjective and an objective test, the court said that such a definition "if it did not confuse the judge would bemuse most juries". Whether such bemusement could be reduced by an attempt by the judge to expound still further the meaning of the statutory definition is at best doubtful.

2.43 Quite apart from the special problems relating to the charging of juries, it would be foreign to our tradition to consider all the elements of crimes in the abstract rather than to concentrate solely on the elements which are relevant to the issue in a particular case. No doubt to some extent all statutory crimes must trespass on that tradition, since by definition a statutory crime must set out the limits of the thing which is forbidden: but we would be opposed to a legislative method for Scotland which incorporated more into the statutory description of the mental element of the crime than is necessary having regard to the normal meaning of words.

Past and future statutes

2.44 Before turning to the proposals in more detail we would also mention one practical problem to which the Law Commission Report refers, but in regard to which we think it may underestimate the difficulties. The Report concludes that its recommendations as regards the meaning of "intention", "knowledge" and "recklessness" should be confined to statutes passed on or after the appointed day. Paragraphs 70 and 71 consider the choice between applying the proposed definitions to all crime-creating statutes and confining them only to new statutes passed after legislation giving effect to the Report is enacted. We agree with the reasons given for rejecting the former solution, but we think it significant that the Report concedes that prior statutes "might well have been differently formulated if those responsible had been aware of the meaning attached to the terms which they used". This fortifies us in the opinion that, depending on the context, the proposed definitions may not always be appropriate for the words in question. However, the alternative appears to us to be equally unsatisfactory.

2.45 We do not believe it would be desirable that common words such as "intention" should have one meaning in an old statute and a different (and in our view rather strained) meaning in a subsequent statute, especially if the context of the old and the new statute are the same or similar. We think this problem might be particularly acute if the new statute was in form or in substance an amendment of pre-existing statutory law.

2.46 Let us assume, for example, that the word "reckless" as used in road traffic legislation is in future to be given a special meaning of the kind proposed. That word has been employed in a number of Road Traffic Acts over the years, and it is likely that in the future Parliament will amend the road traffic code in a way which retains the concept of reckless driving. The definition proposed by the Law Commission does not correspond with the meaning of the word in existing road traffic legislation as explained in England in *R.* v. *Lawrence,*[1] and is even further removed from the meaning of that word in the same context as authoritatively explained in Scotland in *Allan* v. *Patterson.*[2] Assuming the recommendations in their Report were adopted, and

[1][1982] A.C. 510.
[2]1980 S.L.T. 77.

there was then some amendment of this part of the road traffic code which was intended to retain the concept of recklessness, the effect would presumably be that the new legislation would change the meaning of the word even though that might not have been what Parliament intended.

PART III RESTRICTION ON USE OF WORDS OF MENTAL ELEMENT

3.1 In paragraph 99(3) of their Report the Law Commission recommend:

> "In respect of an offence which is created by a provision in or under a statute passed on or after the appointed day, it should be expressly stated to what extent liability depends on intention, knowledge or recklessness, depends on an objective standard of conduct (whether expressed as liability for negligence or in some other way) or is intended to be strict."

In paragraph 75 it is said that it is hoped that intention, knowledge or recklessness will be the terms used wherever possible to indicate any mental state required and, in paragraph 99(2)(*b*), it is expressly recommended:

> "In the creation of new offences on or after the appointed day the use of terms, other than those which we have recommended for expressing the required mental element, should wherever possible be avoided."

From what is said in paragraph 71 of the Report it is clear that while the Law Commission do not preclude the use of the terms intention, knowledge and recklessness with a different sense from that recommended (provided that this was expressly stated) or indeed the employment of completely different terms to denote a mental element, they hope that "intention, knowledge and recklessness in the sense in which we have defined them would be sufficient for almost all future offences". The recommendation contained in paragraph 99(2)(*a*) gives effect to part of this when it states:

> "Wherever a provision in or under a statute passed on or after an appointed day refers to intending, knowing or being reckless in relation to an offence, our recommendations as to these terms should apply unless the provision otherwise expressly provides."

It seems, therefore, that the proposed restriction in paragraph 99(2)(*b*) is not merely to the use of three "permitted" words but to their use in the particular sense defined in the Report. While the recommendation in that paragraph is merely an exhortation and accordingly does not figure in the draft Bill, we have substantial difficulty in understanding how far it is meant to go.

The permitted words

3.2 One of the words which, as it were, is to be permitted for general use is "intention". Although the Report begins by discussing this word in a general way it goes on to consider it only in relation to an "intent to bring about a particular result" or an intention "in relation to any given event".[1] By the time the recommendations are reached the Report appears to concern itself only with intention as to a particular result.[2] The recommendation is as follows:

[1]See para. 12.
[2]See para. 99(1)(i).

"A person should be regarded as intending a particular result of his conduct if, but only if, either he actually intends that result or he has no substantial doubt that the conduct will have that result."

3.3 This use of the word intention appears to be adapted to the problems which have arisen in cases such as *R.* v. *Hyam*[1] where the question related to the accused's attitude of mind to a specific result which would or might follow from an act without further activity on her part. The recommendation with regard to the meaning of "intention" and the draft clauses are adapted for, and would be workable for, such cases; though even for such cases, for reasons given later, we do not support the recommendations.

3.4 What concerns us here, however, is that the word "intention" and its derivatives are frequently used in the common law and in criminal statutes where the issue is not in our view properly described as a question whether the accused intended a particular result and for which, as a consequence, the proposed definition is quite inappropriate.

3.5 In many cases the concept of intention is used to describe the situation where a person does one act having in mind that, having done it, he will be enabled and will endeavour to do a further act. Housebreaking with intent to steal is an example in our common law. Other instances are to be found in statute law. For example, section 5(3) of the Misuse of Drugs Act 1971 makes it an offence for a person "to have a controlled drug in his possession with the intent to supply it to another". The Firearms Act 1968, by section 16, makes it an offence to be in possession of a firearm "with intent by means thereof to endanger life". Section 17 of the same Act makes it an offence to make any use whatever of a firearm or imitation firearm "with intent to resist lawful arrest"; and section 18 makes it an offence for a person to have with him a firearm or imitation firearm "with intent to commit an indictable offence". Section 10(1) of the Prevention of Terrorism (Temporary Provisions) Act 1976 makes it an offence for a person to solicit or invite another person to give or lend money or property or to receive from another person money or property "intending that the money or property shall be applied or used for or in connection with the commission, preparation or instigation of an act of terrorism". Sections 57 and 58 of the Civic Government (Scotland) Act 1982 create offences if a person is found in certain circumstances, or has possession of certain things, from which circumstances or possession "it may reasonably be inferred that he intended to commit theft".

3.6 To none of these cases do we think that the expression "he intended a particular result of his conduct" is well adapted, and in each of these cases the second limb of the proposed definition seems wholly inappropriate. The likelihood or otherwise of the housebreaker succeeding in his intention to steal once he gains entry to a house is irrelevant to the question of his intention.

3.7 Section 169(1)(*a*) of the Road Traffic Act 1972 is an example of a provision which perhaps falls partly within, and partly outside, the circumstances which we understand are contemplated in the Law Commission Report. It provides that a person shall be guilty of an offence if "with intent

[1] [1975] A.C. 55.

to deceive" he "forges, or alters, or uses or lends to, or allows to be used by, any other person, a document or other thing to which this section applies". Assuming that "deception" without further specification is "a particular result" it could be argued that using or lending the document could be "with intent to deceive" if the accused has no substantial doubt that deception would follow his act; but the likelihood or otherwise of his succeeding in deception following on forgery or alteration would be wholly irrelevant to the question of his intent.

3.8 There are, in our opinion, other cases where an act is made criminal by reference to an intention even though no further acting on the part of the accused is necessary to give effect to the intention, but in which it is at least doubtful whether it could be said that a result was intended, and even more doubtful whether it could be said that a particular result was intended. In *R.* v. *Steane*[1] the accused, who was a British subject, was charged under the Defence (General) Regulations 1939 with doing acts likely to assist the enemy with intent to assist the enemy. In that case it was held on appeal that the likelihood of the acts in question assisting the enemy, though that might raise some presumption, did not of itself prove intent for the purposes of the regulations. It seems clear that the court thought, in the context of this particular regulation, that intent approximated to motive, and examples were given of instances where it would be quite inappropriate to equiparate the likelihood of the enemy being assisted with an intent under the regulation. Accordingly, even if the proposed definition of intention is meant to apply at all to cases such as this, the suggested definition would be inappropriate.[2] Be that as it may, the point which concerns us particularly is whether a case of this kind would come within the scope of the recommendations on intention at all. It is arguable that it is difficult to bring "assisting the enemy" within the concept of a result.

3.9 The problem is that there seem to be many instances in legislation where intent is used in a context which is not one which the Law Commission Report, in its recommendations on intention, has in contemplation at all, and for which, accordingly, the proposed definition, whatever its merits in other cases, seems inappropriate and indeed almost meaningless. If the purpose of the recommendation is to discourage for future statutes the use of the word intent and its derivations except in cases where these words are used in the context of intending a particular result, then it seems to us that compliance with the exhortation would deprive Parliamentary draftsmen of a particularly important and useful tool of their trade.

3.10 We encounter a similar problem in relation to the concept and proposed definition of recklessness. That definition is as follows:[3]

"(iii) a person should be regarded as being reckless as to a particular result of his conduct if, but only if,—

(*a*) he foresees at the time of that conduct that it might have that result and,

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[1][1947] K.B. 997.

[2]According to Professor Glanville Williams *(Textbook of Criminal Law,* p. 578) the case of *Steane* should have been decided on the matter of duress, and not on the absence of intent. Whether that is so or not, it does not detract from our argument.

[3]Para. 99(1).

(*b*) on the assumption that any judgment by him of the degree of that risk is correct, it is unreasonable for him to take the risk of that result occurring; and

(iv) where the enactment makes it an offence for a person to conduct himself in a specified way, being reckless as to whether a particular circumstance exists, he should be regarded as being reckless as to that circumstance if, but only if, —

(*a*) he realises at the time of that conduct that there is a risk of that circumstance existing and,

(*b*) on the assumption that any judgment by him of the degree of that risk is correct, it is unreasonable for him to take it."

As with intention, the word "particular" is to be noted in relation both to a result and to a circumstance.

3.11 Although the recommendations in the Law Commission Report are clearly limited to these rather narrow concepts of recklessness, it is clear, we think, that the concept has been used in statute in many cases which do not fall within either of these contexts, or with regard to which there is at least a doubt whether they fall within either. Indeed, such cases may in practical and numerical terms be more important than cases which clearly do fall within one or other of the contexts.

3.12 This point is noticed in the Report itself. In paragraph 21 it is stated that "there are very few statutory provisions which make use of this concept in relation to the results of a person's acts"; and the Report gives only one example clearly falling within this context, namely section 1(1) of the Criminal Damage Act 1971. As regards recklessness as to circumstances, paragraph 23 of the Report says that, so far, the use of recklessness in this context "appears to be largely confined to offences where the relevant circumstance is the falsity of a representation". In paragraph 21 it is suggested that sections 1 and 2 of the Road Traffic Act 1972 are "arguably" cases of recklessness as to result, but we find such an argument very difficult to sustain. Section 1 of the 1972 Act refers to "a person who causes the death of another person by the driving of a motor vehicle on a road recklessly"; and section 2 refers to a person who "drives a motor vehicle on a road recklessly". We do not think that any distinction for present purposes can be made between sections 1 and 2. Section 1 cannot, we think, be construed as referring only to the case where the accused is reckless as to whether death will result from the manner of his driving. As we read the section, the mental element of recklessness is the same in both cases. The difference is only that section 1 desiderates a particular factual result of the recklessness whereas section 2 does not.

3.13 Even if one adopts the approach to "reckless driving" set out in the speech of Lord Diplock in *R.* v. *Lawrence*[1] as opposed to the approach laid down for Scotland in *Allan* v. *Patterson,*[2] we do not think that the definitions proposed in the Law Commission Report are either designed for, or appropriate to, the concept of recklessness as used in sections 1 and 2 of the Road Traffic Act. In *R.* v. *Lawrence* Lord Diplock drew attention to section 1 of the Criminal Damage Act 1971 and noted that it was distinguishable from

[1][1982] A.C. 510.
[2]1980 S.L.T. 77.

"recklessness" as used in the Road Traffic Acts, partly on the ground that in section 1 of the Criminal Damage Act the *mens rea* of the offence is defined as being reckless whether *particular* (our emphasis) harmful consequences would occur, whereas in sections 1 and 2 of the Road Traffic Act 1972, as now amended, the possible harmful consequences of which the driver must be shown to have been heedless are left to be implied from the use of the word recklessly itself. We find it difficult to believe that when clause 1(3) of the draft Bill says that "the question of recklessness as to result means the question whether he was reckless as to whether his conduct would have any particular result", it is intended to cover the case where the "particular result" at issue is in some way to be discovered solely from the use of the word "reckless" itself. Lord Diplock proposed that the relevant result which could be inferred from the use of the word "reckless" in the Road Traffic Act was "causing physical injury to some other person who might happen to be using the road or doing substantial damage to property". While we would accept that, if it is necessary to find a thought process or lack of a thought process at all in this matter, Lord Diplock's proposed "results" would in practical terms cover most cases, we do not find justification in the statute for any attempt, however wide, to define the range of possible results. In any event, we do not understand, or at least it is not clear to us, that the broad concept of some wholly unspecified harm to persons or property falls within the concept of a "particular result" within the meaning of the draft clause.

3.14 With regard to recklessness as to circumstances it appears, as already mentioned, that the discussion in the Law Commission Report is largely directed to the particular problem raised by statutes dealing with the making of statements without sufficient regard to their truth: though it is also pointed out[1] that there can be overlap, depending on precisely how a statute is framed, between recklessness as to result and recklessness as to circumstances. Be that as it may, it appears to us that an important, and perhaps the most important, use of the concept of recklessness in statutes is where the word is used to describe conduct without any express reference to any particular result or circumstance. If the effect of the recommendations were to inhibit the use of the concept of recklessness in this sense, we again consider that it would make serious inroads into the capacity of Parliament to express its intentions in clear terms having regard to the context; and again the possibility of using the word "reckless" in a sense different from that contemplated in the Report does not adequately meet this objection, even assuming that a satisfactory technique could be found to enable this to be done.[2]

Use of other words of mental element

3.15 Apart from the uncertainty as to the intended scope of the recommendations on the concepts of intention and recklessness, we cannot support them in principle because we believe that, far from ensuring that Parliament will in future make its intention clear as regards mental element, any restriction on the scope of the English language available to the draftsman is likely to have the reverse effect. The Report mentions the words "maliciously" and "wilfully" which have commonly been used in the past, and may have caused difficulty. As already stated, we agree that "maliciously" has acquired such

[1]Para. 61.
[2]Cf. para. 1.9 above.

an artificial meaning that its use for the future would be better abandoned. We are less confident, however, about the word "wilfully". We accept that in some contexts it can cause difficulties (though the same might be said of almost any word chosen), but we are inclined to think that there may be contexts in which it performs a useful purpose. For example, the expression "wilful neglect" in relation to a child[1] perhaps conveys a shade of meaning which is not easily conveyed by any other expression.[2] Even in relation to obstruction of a highway which, in the Law Commission Report, is given as an example of circumstances where the word "wilful" can cause difficulties, we are not satisfied that the concept is better expressed by any of the three words preferred by the Report. We note that the word "wilfully" has been used in this context very recently, in section 53(*b*) of the Civic Government (Scotland) Act 1982. We are not satisfied that the Parliamentary draftsmen would have produced a more satisfactory formula if they had felt dissuaded from using that word.

3.16 "Belief" is not included among the Law Commission Report's preferred expressions, but we consider that this word may, in many cases, convey the most appropriate shade of meaning. The Report refers to section 22(1) of the Theft Act 1968[3] which makes "knowledge or belief" an element in the statutory crime of handling stolen goods. The Report[4] proposes that the word may be abandoned, as its content would be adequately covered by the word "knowledge" if the proposed definition of knowledge were adopted. That definition, as expressed in clause 3(1) of the draft Bill is:

> "Did the person whose conduct is in issue either know of the relevant circumstances or have no substantial doubt of their existence?"

As mentioned below, we are less than happy with any definition which by its own terms appears to say that a word means what it says and also means something different from what it says. We have even less confidence in the proposal that the use of this definition should lead to the abandonment of another word which, though in some cases it may have caused problems, has a well understood meaning in common usage, and may have the appropriate significance in particular contexts.

3.17 As a justification for this approach it is suggested that the word "belief" is equivocal and a contrast is drawn between the statements "I believe in the existence of God" and "I believe that X took the 8.30 train to London".[5] A contrast such as this is not in our view a justification for saying that a particular word should not in future be used, far less that it should be replaced by a word which, in our opinion, means something rather different. The fact that "believe" may have a different meaning where it is used with the preposition "in" simply demonstrates that a word must be construed in accordance with the context in which it is used. Quite apart from that it is our view that the word "belief" is capable of carrying a shade of meaning which may be desirable, if not indeed necessary, in some statutory contexts. We note, for example, that in section 1 of the Sexual Offences (Amendment) Act 1976[6] it

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[1]Children and Young Persons (Scotland) Act 1937, s. 12.
[2]Cf. *R.* v. *Sheppard and Another* (1981) 72 Cr.App.R. 82.
[3]This does not apply in Scotland, reset being dealt with by the common law.
[4]Para. 48.
[5]See fn. 159 on p. 28.
[6]Referred to in para. 96 of their Report.

was necessary for the legislature, in subsection (2), to use the word "believed" notwithstanding that in subsection (1) the mental elements prescribed for the offence were either knowledge or recklessness. We for our part consider that there is some logical inconsistency between the two subsections but, accepting that subsection (2) was thought to be necessary, we do not see how the concept which it embodies could have been expressed otherwise than by the use of the word "believed".

3.18 The necessity of using the word "belief" to express a particular shade of meaning is in fact recognised in the Law Commission Report. In the context of matters relevant to a defence, it is recommended[1] that in certain circumstances:

> ". . . the defendant should not be liable if, when the conduct required for the commission of the offence occurred, he believed that any circumstance existed which, had it in fact existed, would have provided him with the defence or the exemption from liability."

In footnote 222 on page 45 of the Report it is explained that, in relation to a defence, it would be inadequate and cumbersome to require a defendant merely to show that he did not know that the relevant circumstance did not exist. We agree, in so far as this means that the word "belief" has a shade of meaning that on occasions has to be used in preference to that of the word "knowledge": but we can see no reason why this valuable shade of meaning should be confined only to defences. We note, however, that even in this case it is intended that the word "belief" should be given a restricted meaning.

3.19 A further example of the need for the word "believe" is to be found in the Law Commission's recent Working Paper on Criminal Libel.[2] That contains a provisional proposal[3] setting out the elements of a proposed new statutory offence of criminal defamation. As regards the mental element of that new offence it is proposed that "the defendant must have intended to defame and must have known or *believed* (emphasis added) the statement to be untrue". The Working Paper[4] notices that the recommendations in the Report on the Mental Element in Crime have not been followed in this proposal. Two reasons are given for this. The first is that the Report on the Mental Element in Crime has not yet been adopted, and indeed the test of knowing or believing has been repeated in a very recent statute.[5] The second reason is that, having regard to two recent cases,[6] there is probably no significant difference between "knowing or believing" and the Report's proposed definition of knowledge. So far as Scotland is concerned, we think that the word "believe" may in some contexts (including the context of a degree of awareness as to whether goods are stolen) carry a shade of meaning which is significantly different from having "actual knowledge" or "no substantial doubt" that a circumstance exists. We are inclined to think that the Working Paper on Criminal Libel demonstrates such an example.

3.20 Another word in statutory use denoting a degree of awareness is "suspect". Thus, section 10(2) of the Prevention of Terrorism (Temporary

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[1]In para. 99(5)(*a*).
[2]No. 84.
[3]No. 10.4.
[4]Para. 8.23.
[5]Forgery and Counterfeiting Act 1981.
[6]*R.* v. *Griffiths* (1974) 60 Cr.App.R. 14; *R.* v. *Reeves* (1979) 68 Cr.App. R. 331.

Provisions) Act 1976 provides that "if any person gives, lends or otherwise makes available to any person, whether for consideration or not, any money or other property, knowing or suspecting that the money or other property will or may be applied or used for or in connection with the commission, preparation or instigation of acts to which this section applies" he is to be guilty of an offence. We consider that the concept of suspicion, as used in the Prevention of Terrorism Act, is not adequately catered for by the proposed definition of "knowledge".

3.21 The concept of "suspicion" has occasionally arisen in the course of judicial consideration of the concepts of possession (of, for example, a controlled drug) and permission (as, for example, in those statutes which make it an offence to cause or permit certain activities). As we observe later in our Report, it is our view that the real problem in such cases is to ascertain what Parliament had in mind when using the word in question in the context of the particular offence. It does not necessarily follow that knowledge will always be an element in every case of, for example, possession still less that, in those cases where knowledge is an appropriate element, it should always carry precisely the same shade of meaning. It would be unfortunate if, in such cases, the courts were to be precluded from making use of a concept such as "suspicion".

3.22 Apart from the examples which we have already given, many more examples are to be found in statutes where words of mental element, other than those preferred by the Law Commission, are used. Although some of these can give rise to problems on occasions, we consider that in many instances they express a shade of meaning which is appropriate to the offence concerned and which could not be adequately expressed in any other way.

3.23 Section 51(2) of the Civic Government (Scotland) Act 1982 makes it an offence to make, print, have or keep obscene material "with a view to its eventual sale". A similar phrase is used in section 52(1)(*b*) where it is stated to be an offence for a person to have an indecent photograph of a child in his possession "with a view to" its being distributed or shown by himself or by others. It remains to be seen whether these words will give rise to difficulties in practice but they do describe a mental element and they may be perfectly appropriate, and even the best that can be devised for the particular context. We can see no advantage in seeking to inhibit their use.

3.24 The words "with a view to" have, of course, been used in statutes since long before the passing of the Civic Government (Scotland) Act 1982. An example is to be found in section 7 of the Conspiracy and Protection of Property Act 1875 which makes it an offence for a person to engage in certain prescribed activities "with a view to compel any other person to abstain from doing or to do any act which such other person has a legal right to do or abstain from doing".[1] So far as this section is concerned, it is our opinion that the phrase "with a view to" conveys a shade of meaning which falls a little short of "intending to" in the normal sense but which would certainly not be accurately reflected in the definition of intention proposed in the Law Commission Report. One further example which, in our opinion, is open to the same comment is to be found in the phrase "calculated to" as used, for

[1] *Elsey* v. *Smith* 1982 S.C.C.R. 218.

example, in section 1(3)(*a*) of the Protection from Eviction Act 1977.[1] That section makes it an offence to do acts "calculated to" interfere with the peace and comfort of a residential occupier of premises. In this instance the contrast with the concept of intention is made clearer because the acts referred to become an offence only when they are additionally done "with intent to" cause the residential occupier to give up occupation of the premises.

3.25 Finally, in considering the scope of the Law Commission Report's recommendations, we turn to the concept of negligence. This is not included among the Report's preferred words expressing a mental element, but it is clear from the Report that it is not intended that words such as "negligence" or "neglect" should be avoided by Parliamentary draftsmen. As we understand it, the reason why negligence is excluded from the preferred list of words expressing a mental element is that the Law Commission did not look upon negligence as a concept expressing a mental element at all, and the reason for that is that negligence is tested by the objective test of the reasonable man.[2]

3.26 We, of course, agree with the Report that the concept of negligence should be available in appropriate cases. Consequently any difficulty which we have here is perhaps more one of words than of substance. However, we should say that the contrast between "a mental element" and "negligence" is one which, at least on the Scottish approach, is of doubtful validity. In the first place, it seems to confuse two issues, namely the question of the mental element required and the question of whether that is to be tested objectively or subjectively. Secondly, the Report's concept of mental element as opposed, for example, to negligence, appears to visualise in every case of mental element an actual thought process as opposed to the absence of any relevant thought process.

3.27 Whatever may be said of this approach in relation to knowledge or intention, we do not consider it workable in relation to recklessness. The Report's proposed definition of recklessness implies an actual application of the mind to the relevant circumstances. Even if the approach to recklessness adopted in Scotland in, for example, *Allan* v. *Patterson*[3] and *Gizzi and Another* v. *Tudhope*[4] is rejected, it seems clear that recklessness must be extended, at least in some contexts including the Road Traffic Acts, to cover cases of heedlessness, that is to say cases where the mind is not applied to the problem at all.[5] We find it difficult to see any realistic distinction in kind as opposed to degree between recklessness in that sense and negligence at least as it is properly used in some contexts. The Report, in paragraph 24, is disposed to reject an observation by Donovan J. equating recklessness with a high degree of negligence,[6] but in our view, at least in some contexts, that is how the word is commonly understood and has been applied in many cases in Scotland. The exclusion of negligence from the preferred words in the Report on the ground that it does not denote a mental element causes us further uncertainty as to

[1]Cf. *R.* v. *Phekoo* [1981] 1 W.L.R. 1117.
[2]See, e.g., paras. 38, 73, 77 and 86.
[3]1980 S.L.T. 77.
[4]1983 S.L.T. 214.
[5]Cf. *R.* v. *Lawrence* [1982] A.C. 510; *R.* v. *Caldwell* [1982] A.C. 341.
[6]*R.* v. *Bates and Another* [1952] 2 All E.R. 842.

the scope of the recommendation contained in paragraph 99(2)(*b*). Does that recommendation, for example, exhort the discontinuation of the use of the word "fraudulent"[1] or does that word fall outside the scope of the recommendation on the ground that it is not a word denoting a mental element?

PART IV THE LAW COMMISSION'S PROPOSED DEFINITIONS

4.1 In the preceding Parts of our Report we have considered some of the implications and consequences of the Law Commission's recommendation that, in future statutes, words expressing a mental element other than "intention", "knowledge" and "recklessness" should so far as possible be avoided. We now turn to consider in more detail the definitions which are proposed for these words.

Intention

4.2 The proposed definition of intention is stated in paragraph 99(1) of the Law Commission Report and is as follows:

> "A person should be regarded as intending a particular result of his conduct if, but only if, either he actually intends that result or he has no substantial doubt that the conduct will have that result."

In clause 2 of the draft Bill the "standard test" of intention is stated as:

> "Did the person whose conduct is in issue either intend to produce the result or have no substantial doubt that his conduct would produce it?"

The word "actually" in the recommendation is not reflected in the draft Bill but we assume that this difference is not of any significance. The word "particular" is, however, incorporated in the draft Bill because, as is stated in clause 1(3):

> " 'The question of intention' means the question whether he intended a particular result of his conduct."

4.3 As mentioned in the preceding Part of our Report, if the effect of the recommendation contained in paragraph 99(2)(*b*) is to inhibit in future statutes the use of the word "intention" except in the context of intending a particular result of conduct, we would, so far as Scotland is concerned, be strongly opposed to any such inhibition. If, however, this is not what is proposed, the result would be that the court would have to apply a statutory definition to "intention" in some contexts and not in others, and it might well be difficult to decide on which side of the line the use of the word fell in particular cases, thereby exacerbating any problems which may arise in this area. This consequence would, in our view, be almost as undesirable as the one which would follow if "intention" is in future to be used only in the context of intending a particular result.

4.4 So far as we are aware, the meaning of the word "intention" (or its corresponding verb or derivatives), whether used in statute or at common

[1] As used, e.g., in s. 170(2) of the Customs and Excise Management Act 1979.

law, has not given rise to problems in Scotland. Sheriff Gordon,[1] in a passage under the heading "Intention", cites numerous English cases and cases from countries whose law derives from English law. He cites very few Scottish cases, and none of those cases (which are, of course, relevant to the particular point for which he cites them) is concerned with the meaning of "intention". We view with some alarm the possibility that, because of problems which have arisen in England, difficulties might, through the medium of United Kingdom statutes, be brought into the law of Scotland on a matter which does not give rise to difficulties at the present time.

4.5 The proposed definition of intention gives, and avowedly gives, to that word a meaning which at least in most contexts is different from its normal and generally understood meaning. We agree with the Law Commission Report[2] that intention is usually something different from motive, though in some particular contexts it is arguably not all that far away from it.[3] We agree also with the statement in paragraph 42 of the Report that, for the reasons there given, it is at best pointless to define intention by the word "purpose".[4] On the other hand we have no doubt that in normal usage the word intention conveys what one might call a "purposive element" as opposed to merely a degree of foresight. The fact that something is foreseeable may, of course, be evidence of intention, but it is not the same thing as intention. Notwithstanding the view which seems to have been expressed by some of the Lords of Appeal in the case of *R.* v. *Hyam,*[5] it is our impression that this distinction is recognised not only in the ordinary everyday usage of the words, but also by the courts both in Scotland and in England.

4.6 Even in *R.* v. *Hyam* it is, in our opinion, by no means clear that an unqualified endorsement is given to the proposition that foresight means the same as intention. Indeed Lord Hailsham was at pains to emphasise that in his opinion intention is different from foresight. He quoted[6] with approval a passage in the judgment of Asquith L.J. in *Cunliffe* v. *Goodman*[7] where he said:

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

4.7 Lord Diplock, however, appears to have equated foresight with intention in *R.* v. *Hyam,* and we have the impression that in some instances the English courts have continued to adopt the same approach.[8] By contrast a different view appears to have been taken in cases such as *R.* v. *Belfon*[9] and *R.* v.

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[1] *Criminal Law,* 2nd edn., pp. 220–236.
[2] Para. 12.
[3] Cf. *R.* v. *Steane,* referred to in para. 3.8 above.
[4] *Brutus* v. *Cozens* [1973] A.C. 854.
[5] [1975] A.C. 55.
[6] At p. 74.
[7] [1950] 2 K.B. 237.
[8] See, e.g., *Lynch* v. *D.P.P. for Northern Ireland* [1975] A.C. 653; *D.P.P.* v. *Morgan* [1976] A.C. 182; *D.P.P.* v. *Majewski* [1976] 2 W.L.R. 623; *Whitehouse* v. *Gay News Ltd.* (1979) 68 Cr.App.R. 381.
[9] [1976] 1 W.L.R. 741.

Mohan.[1] In the former of these cases it was said that "juries do not seem to have experienced any difficulty in understanding the word 'intent' without further explanation" and that "prior to the case of *Hyam* one ventures to think that it would never have occurred to a judge to explain what 'intent' meant when directing a jury in a case of wounding with intent". We note that the editors of the current edition of Archbold[2] express the view that the decision in *Belfon* is "so plainly in conflict with all other previous authorities that it should be disregarded", but in our view the decision in that case merely tends to confirm our impression that the difficulties which have arisen in England in relation to the concept of intention have done so very largely because of the special problems associated with charges of homicide.

4.8 Looked at from the point of view of Scots law and practice, we consider it virtually beyond argument that it is highly undesirable, especially in the field of criminal law, that a word with a commonly understood meaning for both non-lawyers and lawyers should be deliberately given a different meaning in future statutes. No doubt those familiar with the obscurities of the development of the English law of murder, culminating in *R.* v. *Hyam,* would understand what lies behind the recommended definition, but those who did not enjoy this advantage would be mystified and, we think, possibly misled.

4.9 We are also concerned by the fact that the second limb of the proposed definition—"no substantial doubt"—introduces into the concept of intent a question of degree. We think that in the practical application of the law this would introduce in many cases an undesirable element of uncertainty. We consider it essential in this area to keep constantly in mind that judges have to direct juries. We think that in general a jury can readily grasp a direction that, before they can convict, they must be satisfied beyond reasonable doubt that the accused intended X. We would have much less confidence in a jury being able to cope adequately with a direction that, before they could convict, they must be satisfied beyond reasonable doubt that the accused intended X or, if they were not so satisfied, then they must be satisfied beyond reasonable doubt that the accused had no substantial doubt that X would occur as a result of his actions. We think that there is a considerable risk that juries would be confused in such a case, and might wrongly acquit on the grounds that there was, or may have been, a substantial doubt as to the outcome although in the particular case there was actual intention. Incidentally, we would not envy the judge who was requested by the jury to clarify the difference between "no reasonable doubt" and "no substantial doubt". This semantic problem may not arise in England where, although there is some authority[3] for the view that juries should always be directed in terms of "no reasonable doubt", the approved practice appears to be to direct that a jury should be satisfied of an accused's guilt "so that they are sure of it".[4]

4.10 On these matters we respectfully adopt the opinion of the Hon. Sir Cyril Salmon that:

> "It does not seem practical to expect a jury to inquire into whether a man appreciated that a result of his actions was certain rather than likely. Often,

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[1][1976] Q.B. 1.

[2]*Criminal Pleading, Evidence & Practice,* 41st edn., p. 996.

[3]See Archbold, *Criminal Pleading, Evidence and Practice,* 41st ed., p. 443.

[4]*R.* v. *Kritz* (1949) 33 Cr.App.R. 169; *R.* v. *Summers* [1952] 1 All E.R. 1059; *Walters* v. *The Queen* [1969] 2 A.C. 26; *R.* v. *Quinn,* The Times, 20 April 1983.

an almost imperceptibly fine line divides the certain from the likely. A jury have to be satisfied beyond reasonable doubt. They could hardly be satisfied that a man knew that it was certain rather than likely that serious harm would follow his act."[1]

4.11 The Law Commission Report's approach to the concept of intention is, of course, highly subjective and, as we observe elsewhere in our Report, such an approach is foreign to the tradition of, and unsuitable for, the criminal law of Scotland. We doubt if it is realistic, at any rate in many cases, to require either judges of juries to determine beyond reasonable doubt whether an accused in fact at a particular time had a degree of foresight which could be described as "no substantial doubt", as opposed to some perhaps slightly lesser degree of confidence. We believe that this applies generally but particularly in the cases of crimes committed on the instant, when there may well be a question whether any rational mental process really takes place at all.

4.12 In the Law Commission Working Paper two alternative definitions of intention were proposed. These were:

"A person intends an event not only when his purpose is to cause that event but also

[First alternative]
when he has no substantial doubt that that event will result from his conduct,

[Second alternative]
when he foresees that that event will probably result from his conduct."

It appears from paragraph 43 of the Report that the opinions of distinguished commentators on the Working Paper were fairly evenly divided as between these two alternatives, a fact which in itself causes us to query whether the whole approach to the word "intention" is correct.

4.13 The reasons stated in the Report[2] for preferring the first alternative are as follows:

"Given that it is, and is likely to continue to be, necessary for the purposes of some offences to distinguish between 'intention' and 'recklessness', the second version seems to us to extend 'intention' into the field of 'recklessness' and even some way beyond it. If 'recklessness' imports a combination of two ingredients, namely awareness of a risk and some ingredient indicating when the taking of that risk is unjustifiable, it would be strange if the area of intention were expanded so widely as to include a state of mind (foreseeing a probability as distinguished from being aware of a risk) not far removed from the first ingredient of recklessness but without its limiting second ingredient. Another and very important objection to the second version of the definition of intention is that it would push the legal meaning of 'intention' far beyond the ordinary meaning of the word; if a judge in his direction laid down that in law a man intends what he only foresees to be

[1]"The Criminal Law relating to Intent", 1961 C.L.P., p. 7; cf. the speech of Lord Cross of Chelsea in *R.* v. *Hyam*, where he expressed the opinion that the trial judge's reference to the words "highly probable" when referring to what the accused must have known regarding the likely results was unduly favourable to the accused: he thought the word "highly" could have been omitted.

[2]Para. 43.

probable, we think there would be a considerable danger that the jury would disregard or at least misunderstand it."

We have two comments on these reasons.

4.14 First, we think that the arguments against the second alternative probably apply in principle to both alternatives. The difference between them is in this respect only one of degree. Any misuse of the word "intention" is misuse, and we do not consider that a misuse can be justified because it is only the lesser of two misuses. If the extension of the meaning of the word "intention" carries it into the concept of recklessness, it seems to us that that applies in principle however one defines the requisite degree of foresight.

4.15 Second, and of much more practical importance, it seems to us that the reasons for the selection between the two alternatives is concerned with semantic arguments and is not related to the important practical question of which, if either, of the selected extended meanings of "intention" is appropriate for, or is one which Parliament would be likely to wish to use in relation to, crimes generally or any particular class of crime. It appears to us that the combination of the proposed definition with the exhortation that it should rarely be used with any other meaning, and then only if that other meaning is expressly made clear, means, first, that Parliament will at best be discouraged from using the word for conveying only its normal meaning (although experience shows that it has frequently and usefully been so used); and, second, that Parliament will at worst be encouraged to use the word with a particular extended meaning, though it is far from clear that that is a meaning which Parliament would often, if ever, wish to convey.

4.16 Quite apart from what Parliament may or may not wish to do in future, we do not consider that the "no substantial doubt" test is one which would often be appropriate to the criminal law in anything like its present form. In a case turning on facts similar to those in *R.* v. *Hyam* we consider that the actings in question would still amount to murder even if the woman was not sure that they would harm anyone, and it would not, in our view, be regarded as reasonable that her guilt or innocence should depend on whether or not she had some doubt whether death would ensue. We also note with interest that the Law Commission themselves have found it necessary to abandon this test of intention in their recent Report on Attempt, and Impossibility in Relation to Attempt, Conspiracy and Incitement.[1]

4.17 We, of course, accept that there can be conceptual difficulties in relation to the word "intention" if confined to what we have called its normal meaning. There is, for example, the distinction between what is sometimes called "specific" and "basic" intent, and it may be possible to refine this distinction even further so as to include what has been referred to as "ulterior" intent.[2] We do not believe that these problems would often in fact give rise to practical difficulties in Scotland in framing future legislation. In cases where the draftsman thought that such problems might arise, we would suppose that the difficulties could readily be overcome either by avoiding the use of the word altogether, or by using it in such a way that Parliament's meaning would be clear.

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[1](1980), Law Com. No. 102, at para. 2.17.

[2]See e.g., the speech of Lord Simon in *Lynch* v. *D.P.P. for Northern Ireland* [1975] A.C. 653.

Knowledge

4.18 The proposed definition of knowledge is stated in paragraph 99(1) of the Law Commission Report and is as follows:

> "A person should be regarded as knowing that a particular circumstance exists if, but only if, either he actually knows or he has no substantial doubt that that circumstance exists."

In clause 3 of the draft Bill the "standard test" of knowledge is stated as:

> "Did the person whose conduct is in issue either know of the relevant circumstances or have no substantial doubt of their existence?"

As with the other words of mental element which are defined in the draft Bill, the definition of knowledge is to extend to the verb "to know" in any of its forms, and to "knowledge" and "knowingly". As with "intention" it is recommended in paragraph 99(2) that the definition of "knowledge" should apply to all future statutes unless the provision otherwise expressly provides, and that, in the creation of new offences, the use of terms other than those recommended should wherever possible be avoided.

4.19 The general approach which has been taken by the Law Commission is to treat knowledge in the same way as intention,[1] and the proposed definition of knowledge is very similar to that for intention. This similarity of treatment is made clear by the explanatory notes to clause 3 in the draft Bill where it is stated:

> "The standard test of knowledge applies not only when any of the 'knowledge' words . . . is used, but also . . . when any of the 'intention' words . . . is used so as to imply that knowledge of circumstances is required for liability."

It follows that many of the observations which we have already made in relation to the proposed definition of "intention" apply equally to the proposed definition of "knowledge". For example, we view with considerable apprehension the prospect that a judge may have to direct a jury that they should be satisfied beyond reasonable doubt that an accused person had no substantial doubt that certain circumstances existed.

4.20 To some extent knowledge is an essential element in any crime other than those imposing strict liability. Sometimes indeed knowledge in one form or another will be what distinguishes a crime from mere accident. Thus, for example, if a person pushes open a door so as to strike someone standing behind it, the question whether or not that is a crime will depend at least in part on whether or not he knew that there was anyone behind the door. In general, we do not think that knowledge in this context has created problems and the Law Commission Report does not appear to be concerned with knowledge in this sense.

4.21 The main thrust of the Law Commission Report is directed to those crimes where the word "knowledge" in any of its forms is used in a statute. As we have already observed, much of the English criminal law is in statutory form and the concept of knowledge seems frequently to be included in the statutory definition of particular crimes. In Scotland, on the other hand, the descriptions of common law crimes, as given to juries, rarely require to make

[1] See para. 47.

use of the word, though there are some exceptions such as, for example, the crime of reset. It might be thought that Scottish courts would have experienced the same difficulties that have arisen in England in the interpretation of concepts such as "knowingly" where these words do appear in a statute. In practice we do not think that this has been so: Scottish courts have traditionally recognised that the definition of a mental element such as knowledge is inseparable from the means whereby it may be proved. Scottish courts have recognised, we think rightly, that a subjective state of mind can be proved only by objective evidence, and where that gives rise to a convincing presumption that the required state of mind exists, then it will be for the accused to prove the contrary,[1] or at least to put the matter in reasonable doubt.[2]

4.22 The Law Commission Report deals with the matter of knowledge in paragraphs 19 and 45 to 49. Paragraph 45 refers to two possible definitions of knowledge which were canvassed in the earlier Working Paper. These are:

> "A person knows of circumstances not only when he knows that they exist but also when
>
> [First alternative]
> he has no substantial doubt that they exist
>
> [Second alternative]
> he knows that they probably exist."

These alternatives are similar to the ones canvassed in the Working Paper in relation to intention[3] and they appear to have provoked a similar difference of opinion among those consulted on the Working Paper. The first alternative gives an extended meaning to the word "know" while the second uses the ordinary meaning but changes the character of what has to be known. We are unimpressed with both alternatives, and neither of them in our view makes any adequate provision for what is commonly referred to as "wilful blindness". We deal with that particular problem later.[4]

4.23 We begin by considering the proposed definition of "knowledge" in the context of those offences where the word is expressly used in the description of the offence itself. For reasons which we shall amplify later, we regard such offences as being in a different position from those which do not use the word "knowledge" in their description but for which "knowledge", or at least some sort of state of awareness, is a necessary element.[5]

4.24 Although, as we have previously observed, much of the Scots criminal law is based on the common law, there are nonetheless many examples of statutory offences applicable to Scotland where the concept of "knowledge" is used in the description of the offences concerned. So far as we can discover words such as "knowingly" have consistently been construed as meaning just what they say, and the actual concept itself has not given rise to any problem of interpretation. This has, for example, been the approach in relation to

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[1]See, e.g., *Fox* v *Patterson* 1948 J.C. 104.
[2]*Lambie* v. *H.M.A.* 1973 S.L.T. 219.
[3]See para. 4.12 above.
[4]See para. 4.27 below.
[5]See para. 5.4 below.

"knowingly possessing explosives",[1] "knowingly making a false statement",[2] "knowingly harbouring uncustomed goods",[3] and "knowingly permitting drunkenness on licensed premises".[4] So far as the law of Scotland is concerned, we can see no advantage in the courts being required in future to construe a word such as "knowingly" in a different way from what to which they have been accustomed.

4.25 So far as we can see much of the difficulty that is thought to have arisen in England and Wales in relation to definitions of "knowledge" has arisen not where a word such as "knowingly" is expressly used but where some sort of state of awareness is, or may be, relevant to a quite different concept such as "possession" or "permission". To deal with such cases the Law Commission propose[5] that in future, where there is no provision (*a*) making liability strict, or (*b*) making liability depend on (i) the presence or absence of any particular state of mind, or (ii) compliance with an objective standard of conduct, then, to the extent that no such provision is made, the offence should involve on the part of the defendant intention or recklessness in relation to any result and knowledge or recklessness in relation to any circumstance. We deal with the wider implications of this recommendation in Part V of our Report. For present purposes, however, we note that, although this is not explicitly stated in the Law Commission Report, it appears to be intended that these terms, arising as presumptions, should themselves be defined in accordance with the proposed definitions given elsewhere in the Report.[6] The consequence of this is that the proposed definition of "knowledge", and of the other two defined terms, will apply in all future offences whether the words of mental element are used expressly or only by necessary implication. We have considerable reservations about the proposed definition of "knowledge", and we would have even greater reservations about a proposal to extend that same definition to offences where the legislature has not itself seen fit to prescribe a particular mental element.

4.26 A further aspect of this problem which causes us concern is that, while the state of awareness required in such cases is often referred to as "knowledge", to think of it solely as "knowledge" and then to attempt to import into that concept a definition which may be appropriate only to offences where a word such as "knowingly" is actually used may, in our opinion, at best be unhelpful and at worst positively misleading. For example, in many cases relating to the unlawful possession of drugs, the real question, as we understand it, has not been to define "knowledge" but rather to define "possession" either as constituting an absolute offence or by reference to the degree or extent of actual awareness which that term normally implies.[7] As we have pointed out in Part III of our Report, the concept of suspicion may be just as useful as that of knowledge in determining Parliament's intentions.

4.27 So, too, in cases involving "permission" the question in our opinion has not so much concerned a definition of "knowledge" as a definition of

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[1] *Black* v. *H.M.A.* 1974 S.L.T. 247; and cf. *R.* v. *Hallam* [1957] 1 Q.B. 569.

[2] *Napier* v. *H.M.A.* 1944 J.C. 61.

[3] *McQueen* v. *McCann* 1945 J.C. 151; and cf. *R.* v. *Hussain* [1969] 2 Q.B. 567.

[4] *Noble* v. *Heatly* 1967 J.C. 5; cf. *Vane* v. *Yiannopoullos* [1965] A.C. 486.

[5] Para. 99(4).

[6] See, e.g. fn. 205 on p. 38.

[7] See, e.g., *Warner* v. *Metropolitan Police Commissioner* [1969] 2 A.C. 256; *Sweet* v. *Parsley* [1970] A.C. 132; *McKenzie* v. *Skeen* 1983 S.L.T. 121.

"permission" itself, and in particular whether knowledge in the strict sense is required at all or whether something of the order of negligence or recklessness (normally referred to as "wilful blindness") will suffice.[1] The Law Commission have taken the view that their extended definition of "knowledge" will be sufficient for such cases. In paragraph 47 of the Report it is stated:

> "With regard to the position of the person who is shown deliberately to have shut his eyes to the existence of the relevant circumstances of an offence, and claims that he did not actually know of their existence, we consider that a jury or court would generally infer, and so find as a fact, that he had no substantial doubt that those circumstances existed."

We are unable to understand how it can be said that a person had no substantial doubt about something when he may not have applied his mind to the matter at all. Although we ourselves have some reservations about the appropriateness of the concept of "wilful blindness" and consider that it would be preferable if statutes could be so framed as to render it unnecessary, we do not consider that the Law Commission's recommendations on knowledge provide a satisfactory way of dealing with the concept when it does arise; and there are many reported cases where, in our view, the proposed definition of "knowledge" would not have been at all helpful to the court and would have produced the wrong result.[2]

4.28 Before leaving the proposed definition of "knowledge" we should make one further comment. Just as a certain state of mind, which may in certain circumstances amount to some degree of knowledge, can be a necessary element in concepts such as possession and permission, so too can some degree of knowledge or awareness of circumstances be a necessary element in intention and recklessness. We have already referred[3] to the explanatory notes to clause 3 of the draft Bill which imports the proposed definition of "knowledge" into the earlier definition of "intention". There is no comparable linking of the "knowledge" definition to that for "recklessness" but that latter definition uses the word "foresee" in relation to a result, and "realise" in relation to the existence of certain circumstances.[4] The reasons for not using the word "know" in these instances are given in paragraphs 52 and 66 respectively of the Report. Regardless of the merits of the reasoning contained there, we think that this yet again illustrates the inadequacy and the danger of trying to rely on only three words to express mental element. If, in relation to one of these words itself, it is necessary to seek other words in order to express the desired shade of meaning, that may be much more necessary in the descriptions of actual crimes.

Recklessness

4.29 The Law Commission Report contains separate, though similar, definitions of two types of recklessness. One is recklessness as to a particular

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[1]See, e.g., *Clydebank Co-operative Society* v. *Binnie* 1937 J.C. 17; *Houston* v. *Buchanan* 1940 S.C. (H.L.) 17; *Mackay Brothers* v. *Gibb* 1969 S.L.T. 216; *Smith of Maddiston* v. *Macnab* 1975 S.L.T. 86.

[2]See, e.g. *Knox* v. *Boyd* 1941 J.C. 82; *Mackay Brothers* v. *Gibb loc. cit.; Macnab* v. *Alexanders of Greenock Ltd.* 1971 S.L.T. 121; *Smith of Maddiston* v. *Macnab loc. cit.*

[3]In para. 4.19 above.

[4]See paras. 4.29 *et seq.*

result, and the other is recklessness as to the existence of a particular circumstance. The proposed definitions are to be found in paragraph 99(1)(iii) and are as follows:

> "A person should be regarded as being reckless as to a particular result of his conduct if, but only if,
>
> (*a*) he foresees at the time of that conduct that it might have that result and,
>
> (*b*) on the assumption that any judgment by him of the degree of that risk is correct, it is unreasonable for him to take the risk of that result occurring; and
>
> where the enactment makes it an offence for a person to conduct himself in a specified way, being reckless as to whether a particular circumstance exists, he should be regarded as being reckless as to that circumstance if, but only if,
>
> (*a*) he realises at the time of that conduct that there is a risk of that circumstance existing and,
>
> (*b*) on the assumption that any judgment by him of the degree of that risk is correct, it is unreasonable for him to take it."

Clause 4(4) of the draft Bill contains a further provision as follows:

> "The question whether it was unreasonable for the person to take the risk is to be answered by an objective assessment of his conduct in the light of all relevant factors, but on the assumption that any judgment he may have formed of the degree of risk was correct."

4.30 The Law Commission's recommendations in relation to recklessness were arrived at shortly after the decision of the House of Lords in the case of *D.P.P.* v. *Morgan*[1] but some years before a number of authoritative English decisions to which we shall refer below.[2] Had the later English decisions been known before the Report was prepared the recommendations for a definition of recklessness might possibly have taken a rather different form.

4.31 In relation to recklessness the danger of trying to find a universally applicable definition is particularly apparent when one comes to consider road traffic offences, and in particular the offence of reckless driving under either section 1 or section 2 of the Road Traffic Act 1972, as amended. In large measure the problem here arises from the Report's insistence on seeking to define recklessness in relation either to a particular result or in relation to a particular circumstance. This difficulty is adverted to in the Report itself[3] but its significance has been clearly pointed out in the Scottish case of *Allan* v. *Patterson*.[4] In that case the attention of the High Court was drawn to a passage in Wilkinson's Road Traffic Offences,[5] where the editor referred approvingly to the Law Commission's earlier proposed definition of the term

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[1][1976] A.C. 182. Although the case of *Morgan* has recently been followed in Scotland (*Meek and Others* v. *H.M.A.* 1982 S.C.C.R. 613) that was only in respect of the question whether or not a belief in consent need be founded on reasonable grounds. The court did not, as we understand it, give consideration or approval to the approach taken by the House of Lords in relation to the concept of recklessness.

[2]Paras. 4.35–4.37.

[3]At para. 21.

[4]1980 S.L.T. 77.

[5]At p. 287.

"recklessness". That definition is similar to the one which now appears in the Report. After expressing disapproval of the subjectivity of the proposed definition Lord Justice-General Emslie, delivering the opinion of the Court, went on to say:

> "Apart from this it appears to us that the editor falls into the error of failing to appreciate that the proposed definition is apparently intended, as it says, to define a reckless person. What this statute is defining or seeking to define is a manner of driving—a very different matter."

4.32 We entirely agree with the foregoing observation. The difficulty is that, as we have observed, the proposed definition of recklessness is related either to recklessness as to a particular result, or to recklessness as to the existence of a particular circumstance. We have already dealt with this problem at some length in paragraphs 3.12 and 3.13 above. We accordingly content ourselves at this stage with stating that we would be opposed to any definition of recklessness which had to be contorted in order to meet the circumstances of such an offence.

4.33 Even in cases which do not present the foregoing difficulties, we are of opinion that the proposed definitions of recklessness are misconceived and inappropriate. In the first place they adopt a highly subjective approach which requires a court or a jury to enquire into the actual state of an offender's mind at the time when an alleged offence was committed. For reasons which we have expanded in earlier parts of this Report we regard such an approach as being impossible to achieve in practice as well as being at odds with established Scottish authority. Moreover, the definitions, confusingly in our view, involve a mixture of subjectivity and objectivity. This is clear from the proposed provision in clause 4(4) of the draft Bill referred to above. According to that clause, as we understand it, a judge or a jury will be required, firstly, to determine by applying a subjective test the nature of any judgment which an accused person may have formed of the degree of risk in the particular case, and then, by applying an objective test, to determine whether it was unreasonable for the person to take the risk. This mixture of objectivity and subjectivity is further expanded in paragraph 56 of the Report. We have considerable difficulty in understanding this process and we very much doubt whether it could ever be explained in a satisfactory way to a jury.

4.34 A second objection to the proposed definitions is that, by concentrating in the main on the subjective state of mind of the offender, they make no allowance for those cases in which an offender has simply not applied his mind at all to the circumstances of a case or to the possible risks involved. This was clearly the Law Commission's intention. In paragraph 51 of the Report it is stated, in relation to a person who is reckless as to a result of his conduct, that:

> "If he does not advert to the risk at all, he cannot in our view be said to be reckless, given that 'recklessness' is to be treated as a mental state, although one falling short of intention."

In the same paragraph the Report goes on to consider how this might operate in relation to a charge under section 1 of the Criminal Damage Act 1971. That section provides that:

> "A person who . . . destroys or damages any property belonging to another intending to destroy or damage any such property or being reckless as to

whether any such property would be destroyed or damaged shall be guilty of an offence."

In relation to the question of recklessness arising in a charge under that section the Report says:

"It ought in our view to be regarded as sufficient, so far as the necessary foresight is concerned, to prove that the defendant, at the time when he acted, foresaw that property belonging to another might be destroyed or damaged by his conduct."

4.35 In fact, when section 1 of the Criminal Damage Act 1971 came to be considered subsequently by the House of Lords, the approach recommended by the Law Commission does not appear to have commended itself to the House. In *R.* v. *Caldwell*[1] Lord Diplock said:

"'Reckless' as used in the new statutory definition of the *mens rea* of these offences is an ordinary English word. It had not by 1971 become a term of legal art with some more limited esoteric meaning than that which it bore in ordinary speech—a meaning which surely includes not only deciding to ignore a risk of harmful consequences resulting from one's acts that one has recognised as existing, but also failing to give any thought to whether or not there is any such risk in circumstances where, if any thought were given to the matter, it would be obvious that there was."

4.36 In the subsequent case of *R.* v. *Lawrence*[2] the question in issue was the meaning of the word "recklessly" as it occurs in sections 1 and 2 of the Road Traffic Act 1972, as amended. In giving the leading speech in the House of Lords Lord Diplock said:[3]

"In my view, an appropriate instruction to the jury on what is meant by driving recklessly would be that they must be satisfied of two things:

First, that the defendant was in fact driving the vehicle in such a manner as to create an obvious and serious risk of causing physical injury to some other person who might happen to be using the road or of doing substantial damage to property; and

Second, that in driving in that manner the defendant did so without having given any thought to the possibility of there being any such risk or, having recognised that there was some risk involved, had nonetheless gone on to take it."

It is sometimes thought that the decision of the House of Lords in the case of *Lawrence* is very much at odds with the Scottish approach as shown in the case of *Allan* v. *Patterson* because, it is said, the English approach is to define "recklessly" in a subjective manner whereas the Scottish approach is to define the word objectively. There is certainly, as we understand it, a substantial difference between the approach taken by the House of Lords and the approach recommended by the Law Commission, and, as we have previously observed,[4] there is some difference as a result of Lord Diplock's desire to relate reckless driving to a particular result. That apart, however, we doubt

[1][1982] A.C. 341 at 353; and see *Elliott* v. *C (a Minor).* [1983] 1 W.L.R. 939.
[2][1982] A.C. 510; see also *R.* v. *Seymour,* [1983] 3 W.L.R. 349.
[3]At p. 526
[4]Paras. 3.12 and 3.13 above.

whether there is in fact very much of a gap between the definition given by Lord Diplock and that given by the court in *Allan* v. *Patterson,* namely:

> "Judges and juries will readily understand . . . that before they can apply the adverb 'recklessly' to the driving in question they must find that it fell far below the standard of driving expected of the competent and careful driver and that it occurred either in the face of obvious and material dangers which were or should have been observed, appreciated and guarded against, or in circumstances which showed a complete disregard for any potential dangers which might result from the way in which the vehicle was being driven."

In the case of *Lawrence* Lord Diplock said:[1]

> "I do not think that . . . the practical result of approaching the question of what constitutes driving recklessly in the way that was adopted by the Lord Justice-General in *Allan* v. *Patterson* is likely to be any different from the result of instructing a jury in some such terms as I have suggested above."

We agree with that observation.

4.37 To complete this survey of recent English cases, mention may be made of the case of *R.* v. *Pigg.*[2] That was a case of rape where one of the issues considered by the Court of Appeal was the meaning of the term "reckless" in section 1 of the Sexual Offences (Amendment) Act 1976. Under that Act a man commits rape if, among other things, he knows that the woman does not consent to the intercourse or he is reckless as to whether she consents to it. In delivering the judgment of the court Lord Lane C.J. said:[3]

> "But, in the end, it seems to us that in the light of that decision [i.e. *Lawrence*], so far as rape is concerned, a man is reckless if either he was indifferent and gave no thought to the possibility that the woman might not be consenting in circumstances where if any thought had been given to the matter it would have been obvious that there was a risk that she was not or he was aware of the possibility that she might not be consenting but nevertheless persisted regardless of whether she consented or not."

4.38 All of these cases recognise the importance of heedlessness on the part of a person alleged to have been reckless. This is, in relation to recklessness, much the same as "wilful blindness" in relation to knowledge. In contrast to the Law Commission's recommendations the approach adopted by the House of Lords and by the Court of Appeal is, in our view, much closer to the approach that has been taken in Scotland in the relatively few cases where the word "reckless" has come under judicial scrutiny. We have already referred to the decision in *Allan* v. *Patterson.* Three other cases may also be referred to. In *Quinn* v. *Cunningham*[4] Lord Justice-General Clyde said that the degree of culpability and recklessness required to constitute a crime at common law (in cases where an intention to commit a wrong was not present) was "an utter disregard of what the consequences of the act in question may be so far as the public are concerned". That observation was referred to with

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[1]At p. 527.
[2][1982] 1 W.L.R. 762.
[3]At p. 599.
[4]1956 J.C. 22 at p. 24.

approval in the more recent case of *W.* v. *H.M.A.*[1] In that case an accused was charged with culpably and recklessly dropping or throwing a bottle from the fifteenth floor of a block of flats which bottle struck and severely injured another person. In giving the judgment of the court Lord Hunter said:[2]

> "It emerges . . . that the degree of culpability and recklessness which is required to constitute the necessary mental element is high, and that it is of the essence that there should be criminal recklessness in the sense of a total indifference to and disregard for the safety of the public."

A similar approach appears to have been taken by the court in the most recent case of *MacPhail* v. *Clark.*[3]

4.39 The Law Commission's recommendations are at odds with the recent English decisions to which we have referred and are plainly at odds with those Scottish cases which we have mentioned. For that reason, and for the other reasons to which we have earlier referred, we consider that the recommendations would be inappropriate and misleading for any offences which may be prosecuted in Scotland.

PART V THE LAW COMMISSION'S PROPOSED PRESUMPTIONS

No strict liability

5.1 As we have observed earlier in our Report[4] there is agreement between the criminal laws of Scotland and England that a criminal statute will not be read as imposing strict liability unless it is clear that this was Parliament's intention. In determining whether or not strict liability was intended it is relevant to consider the statutory context of the offence, the object of the statute, having regard to contemporary social conditions, and the nature of the penalty imposed.[5] If it is not clear that strict liability was intended, then it will be presumed that *mens rea* is necessary.[6] The difficulty in that event is that it is not always easy to be sure what mental element is required, or was intended, for the commission of the offence in question; and it would be idle to pretend that this has not given rise to problems in Scotland just as it has in England. To deal with this difficulty the Law Commission have recommended certain presumptions some of which are to apply to determine the mental element required for the commission of an offence, and some of which are to apply to determine the mental element required to establish a defence.

Presumption as to mental element required for an offence

5.2 In relation to the mental element required for an offence, it is recommended[7] that:

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[1]1982 S.C.C.R. 152.
[2]At p. 155.
[3]1982 S.C.C.R. 395.
[4]See para. 2.6.
[5]See the Law Commission Report, para. 30.
[6]*Mitchell* v. *Morrison* 1938 J.C. 64, per Lord Wark at p. 87; *Sweet* v. *Parsley* [1970] A.C. 132, per Lord Reid at p. 148.
[7]In para. 99(4)

"Wherever, in respect of any requirement of an offence which is created by a provision in or under a statute passed on or after the appointed day, there is no provision—

(*a*) making liability strict, or

(*b*) making liability depend on

(i) the presence or absence of any particular state of mind, or

(ii) compliance with an objective standard of conduct,

then, to the extent that no such provision is made, the offence should involve on the part of the defendant intention or recklessness in relation to any result and knowledge or recklessness in relation to any circumstance."

This recommendation is given effect in clause 5 of the draft Bill and, according to subsection (1), is to have effect unless the provision creating the offence declares that it is not to do so.

5.3 While we have some sympathy for this attempt to deal with what can be difficult cases, we are not able to support the Law Commission's recommendations. They depend, particularly as to the requirements for an offence, on the concepts of intention, knowledge and recklessness as already defined elsewhere in the Law Commission Report; and for the reasons which we have given elsewhere this alone would provide an insuperable objection to our approving these recommendations. Moreover, we have some difficulty in understanding the use of the word "any" in relation to results and circumstances. Although, in Part III of our Report, we have expressed some concern about what we regard as a restrictive use of the word "particular" in relation to results and circumstances, that concern was directed to the use of that word in the proposed definitions of intention, knowledge and recklessness. In the present context we think that the word "any" may be going too far in the opposite direction, since a person's actions may have many results and may depend on many circumstances, not all of which will be relevant to the particular crime in issue. Furthermore, since the proposed definitions of intention, knowledge and recklessness are to be applied in this context as well as where such words are used expressly, we suspect that the contrast between "any" and "particular" in relation to results and circumstances might well give rise to difficulties in practice.

5.4 Even if these problems could be overcome, we would still be unhappy with these recommendations. In considering the necessity for such presumptions the Law Commission found in particular on the difficulties which have arisen in cases such as *Warner* v. *Metropolitan Police Commissioner,*[1] *Sweet* v. *Parsley,*[2] and *Alphacell Ltd.* v. *Woodward.*[3] These were, in the first two cases, instances where it was necessary for the court to consider the concept of "possession", and in particular to consider the extent to which knowledge should be a necessary element in that concept. The case of *Alphacell* was one where what was in issue was the mental element appropriate to the concept of "causing", the statutory offence in question being that created by section 2(1)(*a*) of the Rivers (Prevention of Pollution) Act 1951. That section makes any person liable who "causes or knowingly permits to enter a stream any poisonous, noxious or polluting matter." Scotland has not escaped the

[1][1969] 2 A.C. 256.
[2][1970] A.C. 132.
[3][1972] A.C. 824.

problems that have arisen in these cases and, in general the concepts of causation and permission have received a similar interpretation in Scotland as in England.[1] It is to be noted, however, that all of the cases to which reference has been made were concerned with the concepts of causation and possession in particular contexts. Possession was being considered in the context of the relevant, and largely identical, statutes which deal with the misuse of drugs, and causation was being considered in the particular context of a provision relating to pollution.[2] Whether or not the recommended presumptions would have assisted the courts in the cases referred to we cannot say. What we do say, however, is that in our view it would be undesirably restrictive to require the courts to construe concepts such as possession and causation in precisely the same way whenever these concepts were used, without having any regard to the context in which they were used. As we have observed in Part III of our Report, it is our view that it is misguided to attempt to find universal definitions of words such as "intention", "knowledge", and "recklessness" which can then be applied in every instance, where what is truly in issue is the interpretation of a quite separate and distinct concept such as possession or permission, and where the particular context may require the use of some other word such as "suspicion" or "belief" to denote the appropriate type of mental element.

5.5 The Law Commission Report, of course, also contains a recommendation[3] that Parliament should expressly state to what extent liability depends on certain mental elements or is intended to be strict. On the assumption that effect will be given to that recommendation the Report concludes[4] that the need for statutory presumptions will only arise in exceptional situations. While we entirely support that recommendation, the assumption on which it is based is in our view somewhat unrealistic. In paragraphs 80 and 81 the Report sets out what appear to be the major arguments for and against having a presumption as to the mental element required for an offence. Unlike the Law Commission we think that there is more force in the arguments against such a presumption, and in particular we consider that there is force in the argument that the presumptions may tempt those responsible for presenting Bills to Parliament not to go to the trouble of spelling out the requirements as to fault or strict liability which would in any event follow by reason of the operation of the presumptions. It is our view that not only might this result (as the Report recognises[5]) in a misleading form of legislation where the reader would have to look elsewhere for its true meaning, but it might also tempt those responsible for presenting Bills to Parliament to give no proper attention to the mental element which should be involved in particular offences. In our view, if a solution to the problems highlighted in the Report is to be found, it is more likely to come about by a presumption creating a defence of general application.[6] For the reasons already given, however, we do not support the recommended presumptions as to the mental element required for an offence.

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[1]See, e.g., *Lockhart* v. *N.C.B.* 1981 S.L.T. 161; *McKenzie* v. *Skeen* 1983 S.L.T. 121.

[2]The Scottish case of *Lockhart* was concerned with s. 22(1) of the Rivers (Prevention of Pollution) (Scotland) Act 1951 which is in the same terms as the statutory provision considered by the House of Lords in *Alphacell*.

[3]In para. 99(3).

[4]In para. 82.

[5]See para. 81(*f*).

[6]See para. 5.9 below.

Presumption as to mental element required for a defence

5.6 In relation to the mental element required for a defence, the Law Commission Report recommends[1] that:

> "(*a*) Wherever, in respect of an offence which is created by a provision in or under a statute passed on or after the appointed day, liability is subject to a defence or exception which does not amount to a provision making liability depend on
>
> (i) the presence or absence of any particular state of mind, or
> (ii) compliance with an objective standard of conduct,
>
> then the defendant should not be liable if, when the conduct required for the commission of the offence occurred, he believed that any circumstance existed which, had it in fact existed, would have provided him with the defence or the exception from liability.
>
> (*b*) For the purposes of (*a*) above the requirements as to proof of a belief that a circumstance existed should be the same as those which relate to proof of a circumstance which the offence provides as a defence or an exception from liability."

This recommendation is given effect in clause 6 of the draft Bill, and this contains a similar provision to that in clause 5 whereby the recommendation is to have effect unless the provision creating the offence declares that it is not to do so.

5.7 Upon examination this is in fact a rather narrow and restricted recommendation. It is to apply only in those cases where the words of an offence themselves contain some sort of defence or exception and, in such cases, a belief in the existence of the necessary circumstances will suffice to enable the accused to escape liability. The Report itself quotes only one example where this recommendation would apply,[2] and that is the now repealed provision in section 2 of the Intoxicating Liquors (Sale to Children) Act 1901 which made it an offence knowingly to sell intoxicating liquor to a child under fourteen "excepting such intoxicating liquors as are sold or delivered in corked and sealed vessels".[3] We have been unable to find any current statutory provision to which the Law Commission's recommendation would apply, and we accordingly doubt whether it is likely to be of much practical relevance.

5.8 In making the foregoing recommendation the Law Commission note that problems can arise in relation to the burden of proof in those cases which do provide for a defence or an exception. Is it for the prosecution to disprove the defence or exception, or is it for the defence to discharge an evidential, or at least a persuasive, burden? In relation to this the Report merely states that there should be the recommended presumption "taking account of the particular burden of proof which may be appropriate in the circumstances". In fact, as framed, the recommendation (in sub-paragraph (*b*)) does make certain provision as to the requirements for proof of a belief that a circumstance existed. The effect of this part of the recommendation is not immediately clear to us, and we rather suspect that in some instances it may really beg the question.

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[1] In para. 99(5).
[2] Para. 90.
[3] See *Brooks* v. *Mason* [1902] 2 K.B. 743.

5.9 By contrast with the relatively few instances where the words of an offence themselves contain some sort of defence or exception, there are many examples in contemporary legislation of defences being expressly provided for in cases where the relevant offences would otherwise impose strict liability.[1] Many of those who assisted us with their comments on the Law Commission's earlier Working Paper expressed their support for a wider, and more consistent, use of this technique in relation to statutory offences.[2] For the present we are, of course, concerned only to express our views on the Law Commission's existing recommendations. In our view, however, if Parliament is unwilling in future to express the mental element necessary for the commission of a crime, a more satisfactory result may well be found in a presumption as to the existence of a defence based, for example, on showing that all due diligence has been used to avoid the commission of the offence. Within the context of our present Report we have not examined this possibility in detail.

PART VI THE MENTAL ELEMENT AND THE REASONABLE MAN

6.1 Having considered the meaning to be given to certain words, and the possibility of presumptions importing these words into certain offences where a mental element is not prescribed, the Law Commission Report finally considers the position which arises once it is clear that a particular mental state is required in relation to an offence. What then, asks the Report, should be sufficient to establish that a defendant has the particular mental state in question?

6.2 The Report refers to the provisions of section 8 of the Criminal Justice Act 1967, which followed on the decision of the House of Lords in *D.P.P.* v. *Smith*[3] and of section 1 of the Sexual Offences (Amendment) Act 1976 which followed on the decision in the case of *D.P.P.* v. *Morgan.*[4] These statutory provisions prescribe the factors which are to be taken into account by a judge or jury in considering certain types of mental element. The Report concludes that the general principle, of which these provisions are particular applications, should be given statutory formulation, and the reason given for this is that "we envisage this Report as a stage in the creation of a comprehensive criminal code".[5]

6.3 On this matter the Report accordingly recommends:[6]

"(*a*) A court or jury, in determining whether a person has committed an offence, should decide whether—

(i) he intended a particular result of his conduct,

(ii) he was reckless as to such a result,

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[1]See. e.g., Trade Descriptions Act 1968, s. 24. Similar examples are to be found in legislation relating to factories, mines and quarries, food and drugs, etc.

[2]A view that was apparently shared by Lord Reid in *Tesco Ltd.* v. *Nattrass* [1972] A.C. 153, at pp. 169, 170.

[3][1961] A.C. 290.

[4][1976] A.C. 182.

[5]See para. 97.

[6]In para. 99(6).

(iii) he foresaw that such a result might occur,
(iv) he knew that a particular circumstance existed, or
(v) he was reckless as to the existence of such a circumstance,

by reference to all the evidence, drawing such inferences from the evidence as appear proper in the circumstances; and

(*b*) it should be a relevant factor—

(i) for the purposes of (*a*)(i), (ii) and (iii) above that the result was a natural and probable consequence of that person's conduct,
(ii) for the purpose of (*a*)(iv) above that a reasonable man in his situation would have known that the circumstance existed, and
(iii) for the purpose of (*a*)(v) above that a reasonable man in his situation would have realised that there was a risk of the circumstance existing."

Effect is given to this recommendation in clause 7 of the draft Bill.

6.4 In some respects, as we mentioned in Part I of our Report, we would accept this recommendation as reflecting in principle what a judge would in fact consider, or would direct a jury to consider, in certain cases. The recommendation of course follows from the earlier recommendations in the Law Commission Report and accordingly incorporates all of the recommended definitions for words of mental element. For the reasons which we have already given at length we could not support this recommendation if these definitions are to be applied to it. Moreover, this recommendation appears to apply to common law as well as to statutory offences, and to past as well as future offences. If applied in Scotland, with the recommended definitions, this would have a far-reaching effect and would, for the future, require a wide range of common law crimes and offences to be construed in a manner which would not only, in our view, be undesirable in itself but would be wholly inconsistent with established Scottish authority. We are not, in any event, persuaded that there is any obvious or compelling reason for incorporating this recommendation in a statute. As we have previously observed in our Report, problems of mental element rarely arise in practice in Scotland. When they do, in our view it is preferable to leave the matter to the trial judge, having regard to the circumstances of the particular case, rather than to give him statutory instructions as to what he should take into account, or what directions he should give to a jury. The latter course is likely to lead to a lack of flexibility of approach which, in some instances, could be most undesirable.

PART VII CONCLUSION

7.1 As we stated at the outset it has been no part of our task to comment on the suitability of the Law Commission Report's recommendations for English law; and, in so far as we may from time to time have appeared to do so, it was in an attempt to clarify or explain some particular difficulty or obscurity. Equally, it has not been part of our task to propose definitions for, or the possible application of, words of mental element in the criminal law of Scotland. In general, we do not believe that our system would benefit from such a step. Our primary concern, however, has been to examine the possible implications for the law of Scotland if all, or any, of the Law Commission's

recommendations were to be implanted on our law in something like the form in which they are expressed in the Report. For the reasons which we have given throughout our Report we do not advise the adoption in the law of Scotland of any of these recommendations.

7.2 Having said that, there are certain practical consequences which have to be faced on the assumption that the Law Commission's proposals were not to be adopted for the law of Scotland but were to be adopted for the law of England and Wales. In relation to those crimes which, in Scotland, are governed by the common law, we do not foresee problems. As we have endeavoured to show throughout our Report, such crimes have traditionally been approached by the courts in Scotland in a manner which is often significantly different from the manner in which parallel crimes (usually in statutory form) have been approached by the courts in England and Wales. This does not appear to have given rise to difficulties, and we would not expect it to do so in future, even if words of mental element had to be construed in England and Wales in accordance with the Law Commission's recommendations. Statutory crimes may, however, be in a different position.

7.3 Some statutory crimes and offences are enacted separately for Scotland and for England and Wales though in more or less identical terms,[1] while others are to be found in statutes which apply throughout Great Britain or the United Kingdom.[2] While in many instances the Scottish courts have in the past construed such statutes in the same way as courts in England and Wales,[3] there have been other instances where conflicting interpretations have been expressed. In some cases the differences may have been of degree rather than substance,[4] but in other cases the differences have been much more fundamental. Thus, to take some recent examples, the definition of "firearm" in section 57(1) of the Firearms Act 1968 has been construed in Scotland[5] as excluding a replica revolver which was incapable of being fired, whereas a contrary view has been taken in England.[6] In relation to section 5(1) of the Misuse of Drugs Act 1971 it was at one time held in England[7] that, to constitute possession, any drug found must be of a usable quantity: that view, and the case which expressed it, have subsequently been disapproved in Scotland.[8] Similar differences of construction by Scottish and English courts are to be found in the plethora of cases which followed the introduction of breath tests by road traffic legislation.[9] Older examples of statutes being construed differently in Scotland and in England are also to be found.[10]

7.4 If the Law Commission's recommendations on mental element were to be implemented in a manner which would require English courts to comply with them even when construing United Kingdom legislation while Scottish

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[1]e.g. Rivers (Prevention of Pollution) Acts 1951; see para. 5.4 above.
[2]e.g. Road Traffic Acts.
[3]e.g. *Alphacell* v. *Woodward* [1972] A.C. 824; *Lockhart* v. *N.C.B.* 1981 S.L.T. 161.
[4]e.g. *Allan* v. *Patterson* 1980 S.L.T. 77; *R* v. *Lawrence* [1982] A.C. 510.
[5]*Kelly* v. *McKinnon* 1982 S.C.C.R. 205.
[6]*R.* v. *Freeman* [1970] 1 W.L.R. 788.
[7]*R.* v. *Carver* [1978] 2 W.L.R. 872, subsequently overruled in *R.* v. *Boyeson* [1982] A.C. 768.
[8]*Keane* v. *Gallacher*, 1980 S.L.T. 144.
[9]See, e.g. *Rowlands* v. *Hamilton* [1971] 1 All E.R. 1089 and *Ritchie* v. *Pirie* 1972 J.C. 7; *R.* v. *Chapman* [1969] 2 W.L.R. 1004 and *Brennan* v. *Farrell* 1969 J.C. 45.
[10]See, e.g., *Smith* v. *Neilson* (1896) 2 Adam 145; *Farmer* v. *Mill* 1948 J.C. 4.

courts were not required to do likewise, there would be a theoretical possibility that the occasions for differences of construction would increase in the future. While that would be regrettable we think it is unlikely that the practical results would often be very different,[1] and we are firmly of the view that it does not provide any acceptable justification for requiring Scottish courts to approach the matter of mental element in a manner which, as we have endeavoured to show, would be likely to produce more problems than it would solve. It might, of course, be suggested that, if the Law Commission's recommendations were to be implemented, they should apply to Scotland only in relation to those statutory crimes and offences which are common to both jurisdictions. In our opinion such a course would be every bit as undesirable as implementing the recommendations throughout the Scottish criminal law, since it would result in words of mental element having to be construed in one way in some statutory provisions and in another way in other statutory provisions as well as in the whole range of Scottish common law crimes and offences.

[1]See, e.g., *Allan* v. *Patterson* and *R.* v. *Lawrence,* referred to in para. 4.36 above.

Printed in Scotland by HMSO Press, Edinburgh
Dd 735728 C17 11/83 (212207)