HOMICIDE: THE MENTAL ELEMENT

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> In contrast [to the civil law system], in a system such as our own which has never experienced a radical break with the past, where there has been 'no wholesale wiping out of the legal wisdom of centuries, no division of the law into a pre- and post- revolutionary era,' the criminal law appears as a continuum that spans the ages and accordingly, as a phenomenon that ought to be approached historically as well as analytically, with an eye to its evolutionary processes as well as its current arrangements.
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> (McCauley and McCutcheon, *Criminal Liability, A Grammar*, *vii*)

The authors of a recent Irish work on criminal liability thus draw attention to the importance of recognising the historical perspective when analysing difficult topics in the criminal law. This certainly applies with particular force to the topic which I have chosen to discuss: the mental element in homicide.

Reading judgments from various common law jurisdictions on this area of the law would make one long at times for the simplicity of the biblical injunction, "Thou shalt not kill". But, apart from any other considerations, that attractively simplistic approach breaks down when one turns

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to the facts of some of the cases with which judges and juries have had to wrestle in many countries over the centuries.

Take for example the American case of *Commonwealth v. Malone*,[1] dating from 1946. That was a "Russian roulette" case: the defendant when playing the game shot his friend dead. There were five chambers in his revolver, one of which was loaded, and the gun fired on the third pull of the trigger. There was thus a sixty per cent probability that the third pull would be lethal. That probability - or "risk" as it might also be called - was sufficient in the view of the court to justify a conviction of murder. But, as one commentator observed, if the gun had discharged on the first pull, the risk could be said to be only twenty per cent. Should that have meant that a manslaughter conviction only was warranted? In terms of moral culpability, what was the difference?

Then there is the House of Lords decision in *Hyam v. D.P.P.*[2] That was the case of the woman who set fire to the house where her rival for the affections of her lover was living with her three children: as a result two of the children died. She said that she only wanted to frighten the other woman and drive her away from the locality, but she knew that it was highly probable that serious injury, at the least, would be the result of her action.

Coming closer to home, there is the decision of Lowry L.C.J., sitting as a trial judge without a jury, in *R. v. McFeely*.[3] The accused was one of a gang responsible for planting a bomb in a public house near Limavaddy which caused the death of an RUC constable and for a robbery at the premises. He was the driver of the getaway car and the evidence was that the premises had been evacuated as a result of a warning having been given by the gang. The constable was killed when he arrived in response to a call from the

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[1] 354 Pa. 180.

[2] [1975] A.C. 55.

[3] [1977] N.I. 149.

manager after the robbers had left. Could the accused be found guilty of murder, as distinct from manslaughter, in those circumstances? Applying the law as laid down in *Hyam*,[4] the learned chief justice was not satisfied beyond a reasonable doubt that the accused knew that the probable result of his actions would be - at the least - serious personal injury. In the result, he found the accused not guilty of murder, but guilty of manslaughter.

The historical background against which the common law pursued its sometimes agonisingly tortuous path towards an acceptable definition of the essential ingredients of the crime of murder is dominated by two factors. The first is the abhorrence common to all civilised societies of the deliberate and premeditated killing of another human being. The second is the presence in all the common law jurisdictions until the second half of the last century of capital punishment. As early as the sixteenth century, English law recognised the distinction between the felonies of murder and manslaughter: it was only in the case of the former that the person accused of killing someone could not plead "benefit of clergy". (It will be recalled that an accused who was able to read a particular verse of the psalms - charmingly described as the "neck verse" - escaped the gallows.) And murder was defined in a phrase that came to haunt the criminal law as killing with "malice aforethought". (Sir James Stephen memorably said of it that it was a phrase which "is never used except to mislead or to be explained away.")

At one stage, the law went so far as to say that in the case of every killing, "the law presumeth the [killing] to have been founded in malice, unless the contrary appeareth."[5] That view was finally laid to rest in the famous speech of Viscount Sankey in *Woolmington v. D.P.P.*,[6] celebrating the "golden thread" of the onus of proof on the prosecution running

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[4] [1975] A.C. 55.

[5] Foster, *Crown Law*, p. 255.

[6] [1935] A.C. 462.

through the web of the English criminal law. But another aspect of "malice" was a hardier growth which for a long time defied attempts by both judges and legislators to uproot it: what came to be called the doctrine of "constructive malice."

This concept was not confined to the law of homicide: it was part of a developing tendency in the criminal law from the early nineteenth century onwards to attach criminal liability to acts committed with a "guilty mind" even where it could not be proved that the accused "intended" to commit the specific act which the law had criminalised. It would take us too far afield to consider how this tendency was reflected in the case law dealing with mens rea. In the case of homicide, it took the form of the principle that a person was deemed to have killed another with malice aforethought where the killing was committed by him with the intention of committing a felony or - in effect - resisting arrest by a police officer. Thus a person who committed the felony of causing grevious bodily harm but did not intend to kill his victim could be convicted of murder when his victim died.

In England, constructive malice appeared to have been banished from the law with the enactment of s. 1 of the Homicide Act, 1957 which provided that a person was not be guilty of murder unless the killing were:

> done with the same malice aforethought (express or implied) as is required for a killing to amount to murder when not done in the course or furtherance of another offence.

However, while that provision seemed to have - as the marginal note indicated - done away with constructive malice in England, it left the door open to what was now called "implied malice aforethought" as providing the necessary mental ingredient in the crime of murder. The consequences became clear with the decision of the Court of Criminal Appeal in *R. v. Vickers*[7] where Goddard L.C.J. defined

[7] [1957] 2 Q.B. 664.

murder as killing committed "with the intention either to kill or to do some grievous bodily harm." Since the expression "grievous bodily harm" had itself a somewhat storied history, the House of Lords in their highly controversial decision in *D.P.P. v. Smith*[8] took the opportunity to substitute for it the phrase "really serious harm" and when the Irish legislature addressed the question of the necessary mental ingredient in murder, they adopted the same approach. Section 4 of the Criminal Justice Act, 1964 (attached to which is the marginal note "malice") provides that

> (1) Where a person kills another unlawfully the killing shall not be murder unless the accused person intended to kill, or cause serious injury to, some person, whether the person actually killed or not.

English and Irish law alike had thus reached the stage where a person could be found guilty of murder although he had not intended to kill his victim: he could not be heard to say in his defence that "I admit I intended by striking X to cause him serious injury but I never meant to kill him." Whether that departure from what some would see as the fundamental principle of the criminal law that, in general terms at least, a person should not be convicted of a crime which he did not intend to commit, was desirable is a question to which I shall return. At this stage, however, I must complete my citation from s. 4 of the 1961 Act, *viz*.:

> (2) The accused person shall be presumed to have intended the natural and probable consequences of his conduct; but this presumption may be rebutted.

That brings me back to *D.P.P. v. Smith*.[9] That was the case in which a man driving a car with stolen property in the back was stopped by a policeman and drove off with the

[8] [1961] A.C. 290.

[9] [1961] A.C. 290.

policeman clinging to the side. He drove it deliberately in an erratic manner with the result that the policeman fell from the car and was killed. The man was convicted of capital murder and the House of Lords unanimously approved the direction of the trial judge to the jury that they should convict if they were satisfied that a reasonable man in the accused's position would have contemplated that driving the car in that manner would probably result in grievous bodily harm being caused to the policeman.

The decision provoked a storm of criticism throughout the common law world, since it seemed to lay down that a jury was entitled to convict a person of murder even in a case where it had not been proved that he actually intended to kill or cause grievous bodily harm. In England, the Criminal Justice Act, 1967 made it clear that juries were not bound to infer that a person intended or foresaw a particular result simply because it was the natural and probable consequence of his action: they were to decide whether he so intended or foresaw the result by reference to all the evidence. As we have seen, s. 4 of the Irish Act, although in different terms, also made it clear that the presumption as to intending the natural and probable consequences of one's acts could be rebutted in any case. Both legislatures thus rejected the objective test for determining whether the necessary intention existed which had been approved in *Smith*.[10]

But what precisely is meant by an intention to kill or cause serious injury continued to cause difficulties, as was illustrated by *Hyam*,[11] the case of the jealous woman who burnt down her rival's house. Even if her intention simply was to frighten her rival, she had committed an action which the jury were entitled to conclude she must have foreseen would be likely seriously to injure, if not to kill, the occupants of the house. If they concluded that she did indeed

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[10] [1961] A.C. 290.

[11] [1975] A.C. 55.

foresee that as the probable result of her action, were they entitled to convict, since her motive - as distinct from her intention - was not material? A majority of the law lords held that they were: Lord Diplock dissented, but for different reasons to which I shall return. The speeches of the majority gave rise to the difficulty that they suggested different degrees of probability as being required: one spoke of "highly probable" and another of "a serious risk."

In a further sequence of cases, the superior courts in England continued to grapple with these thorny problems. I shall content myself with briefly recalling their salient features, before summarising what appears to be the present position in that jurisdiction.

R. v. Moloney[12] was the case of the soldier who shot and killed his stepfather (with whom he was indisputably on affectionate terms) during the course of a drunken argument as to which of them was quicker on the draw. There Lord Bridge, this time with the unanimous agreement of his brethren, said that foresight of the probable consequences was not the equivalent of, or alternative to, the specific intention required for murder. He regarded the issue as really an evidential one rather than a question of substantive law. Juries should be told that if they were sure that the death or serious injury was the natural consequence of the act in question and that the accused foresaw that consequence as the natural conseqeunce of his act, they were entitled to infer that he intended to kill or cause serious injury. In that case the accused had claimed that he had not intended to aim the gun at his stepfather's head. Lord Bridge said that the jury should have been told that the inference that he intended to kill or cause serious injury should not be drawn unless they were satisfied that he had foreseen the consequence. He added that the probability of the consequence being foreseen would have to be "little short of overwhelming" if it was to be sufficient to establish the necessary intent.

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[12] [1985] A.C. 905.

That seemed to be not entirely on all fours with what was said in *Hyam*[13] and the uncertain state of the law was further demonstrated by *R. v. Hancock*,[14] which arose out of the bitter miners' strike in the early eighties. A taxi driver, who was carrying a miner to work, was killed when two lumps of concrete were dropped from a bridge on to his taxi by two miners who were on strike. They said that they had not intended to drop the lumps on the taxi and had simply intended to block the carriageway and frighten the miner.

A jury convicted the two men of murder, having been directed in accordance with the guidelines in *Moloney*.[15] The conviction was set aside by the Court of Criminal Appeal and that decision was upheld by the House of Lords. Lord Scarman, while he warmly endorsed the retreat from *Smith*[16] which had been completed in *Moloney*,[17] was unhappy with the guidelines because they omitted any reference to the probability of the consequence following from the act and simply referred to its being the "natural" consequence of the act. He also echoed the strong disapproval voiced by both Lord Hailsham and Lord Bridge of the elevation of what they regarded as a simple evidential maxim or even a matter of common sense - that people should normally be presumed to intend the natural and probable conseqences of their acts - to the status of a legal presumption: the factual context, he said, should always be taken into account. He did not dissent, however, from Lord Bridge's conclusion that the probability should be "little short of overwhelming" if the necessary intention was to be found.

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[13] [1975] A.C. 55.

[14] [1986] A.C. 455.

[15] [1985] A.C. 905.

[16] [1961] A.C. 290.

[17] [1985] A.C. 905.

In *R. v. Nedrick*[18] - another case of a house being set on fire and a child being killed as a result - the Court of Appeal on the basis of the previous House of Lords decisions formulated a model charge for juries in these terms:

> Where the charge is murder and in the rare cases where the simple direction is not enough, the jury should be directed that they are not entitled to infer the necessary intention unless they feel sure that death or serious bodily harm was a virtual certainty (barring some unforeseen intervention) as a result of the defendant's actions and that the defendant appreciated that such was the case.

That formulation was widely welcomed by academic commentators with one qualification: it was pointed out that it was not correct to speak of the jury "inferring" the necessary intention from foresight, since in at least some cases foresight could itself be regarded as a species of intention. That view was approved of by the House of Lords in the most recent decision on the topic, *R. v. Woollin*,[19] Lord Steyn indicating that the word "find" should be substituted for "infer".

It will be noted that, although in many if not all of these cases the conduct of the accused could, at the least, be regarded as reckless, that was not regarded as sufficient to bring the cases within the category of murder: cases where recklessness alone had been proved were within the manslaughter category. (See the remarks of Lord Bridge in *Moloney*[20] and Lord Steyn in *Woollin*.[21]) It is true that s. 4 of the Criminal Justice (Northern Ireland) Act, 1966 provides that, where it is necessary to determine the knowledge or

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[18] [1986] 3 All E.R. 1.

[19] [1999] A.C. 82.

[20] [1985] A.C. 905.

[21] [1999] A.C. 82.

state of mind of a person at the time of the commission of an offence, the court or jury may infer that the person

> (a) had knowledge of his conduct and of the natural and probable consequences of that conduct; and
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> (b) either intended those consequences, or, if he did not intend them, was reckless as to whether or not they would ensue from that conduct.

While murder is, of course, an offence requiring proof of a specific intent, this section seems to be of general application and Lowry L.C.J. sitting as a trial judge in *McFeely*[22] considered that he should direct himself in accordance with its provisions. His judgement, however, makes no further reference to the "reckless" provisions.

The possibility of recklessness providing the necessary mens rea in murder was adverted to in the decision of the Irish Court of Criminal Appeal in *The People v. Douglas*.[23] That was a case of shooting with intent to murder, but the observations of McWilliam J. are to some extent relevant to murder itself. Having referred to *Smith*[24] and *Hyam*,[25] he went on:

> ...evidence of the fact that a reasonable man would have foreseen that the natural and probable consequences of the acts of an accused was to cause death and evidence of the fact that the accused was reckless as to whether his acts would cause death or not is evidence from which an inference of intent to

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[22] [1977] N.I. 149.

[23] [1985] I.L.R.M. 25.

[24] [1961] A.C. 290.

[25] [1975] A.C. 55.

> cause death may or should be drawn, but the court must consider whether either. or both of these facts do establish beyond a reasonable doubt an actual intention to cause death.[26]

Before considering how the law has evolved in other common law jurisdictions, I should mention that there is some authority for the view that in deciding whether an accused can be said to have had the intention to kill or cause serious injury, a court should consider whether he can be said to have willed the result: he must in other words have done more than merely contemplate the result. That was what Asquith L.J. in *Cunliffe v. Goodman*[27] said was what was meant by "intention" and his definition was approved by Lord Hailsham in *Hyam*.[28] A similar view was expressed in the Irish Supreme Court by Walsh J. in *The People v. Murray*.[29]

In the United States, the Model Penal Code provides that criminal homicide constitutes murder where inter alia "it is committed recklessly under circumstances manifesting extreme indifference to the value of human life."[30] In Australia, recklessness is also capable at common law of supplying the necessary *mens rea*. The Indian penal code, which has traditionally commanded much respect since it was originally drafted by Sir James Stephen, does not seem to envisage recklessness as being sufficient:[31] indeed, it is of interest to note that the Indian Supreme Court have also referred to intention as "shaping...one's conduct so as to

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[26] [1985] I.L.R.M. 25 at 28.

[27] [1950] 2 K.B. 237.

[28] [1975] A.C. 55.

[29] [1977] I.R. 360.

[30] American Law Institute, *Model Penal Code and Commentaries (Official Draft and Revised Comments)* (1980), Part 1, §2.02.

[31] See Sections 299 and 300 of the Indian *Penal Code*.

bring about a certain event."[32] Finally, I should mention the distinctively Scottish contribution to the topic: under their law, a murder conviction may be established by "evidence of such wicked recklessness as to imply a disposition depraved enough to be regardless of the consequences."[33]

When the Irish Law Reform Commission came to consider the topic recently, they also referred in their Consultation Paper, *Homicide: the Mental Element in Murder*,[34] to the position in some of the European civil jurisdictions, such as Italy and Germany, and pointed out that under their law - and under South African law - persons could be convicted of murder where, having recognised the possibility that death may result, they nevertheless pursue a particular course of action. The Commission themselves have provisionally recommended that, in addition to clarifying the Irish law as to intention, the legislature should incorporate in the law the American concept of reckless indifference to the value of human life.

There has also been much discussion as to whether the law should continue to allow an intention to cause serious injury to provide the necessary mens rea for murder. In his dissenting speech in Hyam, Lord Diplock demonstrated with a wealth of erudition how this form of constructive malice came to be part of English law and argued that it should now be discarded in favour of an intent to cause injury likely to cause death. However, as the Irish consultation paper suggests, a person who deliberately causes serious injury to another must be taken to be aware that he is putting the person's life at risk, given the inherent frailty of the human body.

Their proposal, however, that in addition to clarifying the law as to intention, our law should also allow for the American concept of reckless indifference to the value of

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[32] *Jai Prakash v. State (Delhi Administration)* [1991] 2 S.C.C. 32, 42.

[33] *Cawthorne v. H.M. Advocate* [1968] J.C. 32, 193.

[34] Consultation Paper No. 17, March 2001.

human life is obviously more debatable. As long as our law retains the distinction between murder - the conscious and deliberate taking of another person's life - and manslaughter, there can hardly be room for a form of *mens rea* in murder cases which embraces conduct which, however morally culpable, falls decisively short of that form of homicide.

That, of course, inevitably raises the question as to whether the distinction should in fact be retained. Some would say that the time has come to recognise that unlawful killings may range all the way across the spectrum from the cold blooded act of terrorism which kills tens or even hundreds of men, women and children to the impetuous assault which results in a tragedy never intended by the assailant. Why should not the law provide for one crime of homicide and allow the courts then to impose the appropriate sentence taking into account all the circumstances which led to the death?

There are a number of reasons advanced by the Commission as to why the existing distinction between murder and manslaughter should be retained. Of these, the most powerful in my view is the extent to which the distinction is deeply rooted in our society and, I would think, throughout the common law world. Abolishing it would, in an age where violence is so unhappily on the increase, be understandably seen by many people as a further retreat from the principle that all human life is sacred. But if it is to be retained, as I think it should be, then the time is long overdue for abolishing the mandatory life sentence in cases of murder and recognising, as I think is abundantly demonstrated by the cases which I have been discussing, that the gradations of culpability in the crime of murder are almost as infinite as the variations in the human psyche itself.