Murderous Intent and the Common Law *

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This paper is an attempt to achieve two objectives at the same time:

(i) a description of the mental element of murder as that crime is understood in Hong Kong today, useful for the purpose of comparison with the new Macau Criminal Law;

(ii) an ilustration of the common law method at work in the field of the criminal law.

A. WHERE TO LOOK

Suppose a lawyer from Macau, "The Careful Researcher", wished to discover the law relating to homicide in Hong Kong, where should she look?

If she consulted a current list of Hong Kong Ordinances she would soon conclude:

(i) There is no criminal code in Hong Kong.
(ii) There are, however, a number of ordinances obviously dealing with criminal matters, which may deal with homicide:
- Crimes Ordinance;
- Offenses Against the Persons Ordinance;
- Homicide Ordinance.

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* **Nota:** Publica-se a presente comunicação em língua inglesa, língua em que foi apresentada pela Autora durante as Jornadas de Direito Penal.

Perhaps the Hong Kong law relating to homicide is in one of those.

In the *Crimes Ordinance* she would find that it is treason to kill Her Majesty the Queen, but no other mention of homicide and no mention at all of murder.

In the *Offences Against the Person Ordinance* she will find 19 sections dealing with some aspect of homicide including:

(i) *Section 1*: which provides that any person who is convicted of murder shall be imprisoned for life;

(ii) *Section 7*: which provides that any person who is convicted of manslaughter shall be liable to imprisonment for life and to pay such fine as the court may award;

(iii) *Section 9A*: which deals with the offence of genocide, which may involve killing;

(iv) *Sections 5, 8B and 9*: which deal with various extraterrotorial aspects of homicide;

(v) *Sections 10-14*: which deal with attemps to commit murder by various means;

(vi) *Section 6*: which provides that something previously called and punished as petit treason shall be murder only;

(vii) *Section 8*: which provides: "No punishment shall be incurred by any person who kills another by misfortune, or in his own defence, or lawfully in any other manner";

(viii) *Section 33B*: which provides for the offence of complicity in the suicide of another;

(ix) *Section 47B*: which creates the offense of child destruction where by the intentional killing of a child still within the mother's womb but capable of being born alive, not done in good faith for preserving the life of the mother, is to be punished as manslaughter;

(x) *Section 47C*: which creates the offense of infanticide whereby the killing of a child under one year of age by its mother is to be punished as manslaughter rather than as the murder it would otherwise be.

In the *Homicide Ordinance* she will find:

(i) in *Section 2*: 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 amount to murder* when not done in the course or furtherance of another offense.

(ii) in *Section 3*: that a person who kills, or is party to the killing of, another while suffering from "*...such abnormality of mind* (whether arising from a condition of arrested or retarded development of mind or any inherent causes or induced by disease or injury) *as substancially impaiyed his mental responsibility for his acts and omissions* in doing or being a party to the killing..." shall not be convicted of murder but shall be liable instead to be convicted of manslaughter (*diminished responsibility*).

(iii) in *Section 4*: "Where on a charge of murder there is evidence on which the jury can find that the person charged was provoked (whether by things done or by things said or by both together) to lose his self-control, the question *whether the provocation was enough to make a reasonable man do as he did* shall be left to be determined by the jury: and in determining that question the jury shall take into account everything both done and said according to the effect which, in their opinion, it would have on a reasonable man".

(iv) in *Section 5*: that killing pursuant to a *suicide pact* is manslaughter and not murder but that the onus of proving the existence of such a pact shall be on the defendant.

Having read these provisions carefully the diligent researcher would know:

(i) There are lawful and unlawful homicides.

(ii) Lawful homicides include but are probably not confined to:
- killing by "misfortune";
- killing in self defence.

(iii) Unlawful homicides are of two main kinds:
- *murder* for the commission of which the mandatory sentence in life imprisonment;
- *manslaughter* for the commission of which the *maximum* sentence is life imprisonment;

- Genocide which involves killing would also be punished with a mandatory sentence of life imprisonment, as would killing the Queen.

(iv) In some circumstances, homicides which would otherwise amount to murder will amount to and be punishable as manslaughter only, e.g. when at the time of the killing the defendant was suffering from diminished responsibility or post natal depression, or was party to a suicide pact.

(v) The fact or possibility that the defendant was provoked before the killing is relevant in some way;

(vi) The offence of murder requires proof of *"malice aforethought"*.

If the researcher was familiar with the significance of the historical notes appearing in brackets at the end of each section she would know that most of the provisions in the Offences Against the Person Ordinance were taken from an English statute of 1861, though subsequently amended, those in Homicide Ordinance from an English statute of 1957.

However, apart from the meagre information given in point (iii) and that murder requires something called "malice aforethought", the careful reader of statutes would still not know what the elements of the two forms of homicide are, how they are defined let alone how those definitions are applied in practice. She could search the Hong Kong - or the English - statutes for ever and never find a definition of either murder or manslaughter. Throughout the legislation, the definitions of those offences are assumed.

Why?

Because murder and manslaughter, in Hong Kong as in England, are judge made offences. They developed throughout English legal history from the earliest days, case by case, decision by decision, in the king's courts, and that is how they are still developing to this very day.

When Hong Kong received the common law it received the common law of murder and manslaughter along with the rest. As that law has envolved in England, mainly in the courts but with occasional interventions by statute, so it has envolved here, the Hong Kong judges following the English procedents to the best of their ability and understanding.

"Where will I find the common law?", asks our legal researcher.

"In the law reports - but I suggest you start with a criminal law textbook or treatise first. This will serve as a useful guide into the cases".

Smith & Hogan, *Criminal Law*, 7th, Chapter 12, *"Homicide: Murder"* opens with the following paragraph:

The classic definition of murder is that of Coke:

"Murder is when a man of sound memory, and of the age of discretion, unlawfully killeth within any country of the realm any reasonable creature *in rerum natura* under the king's peace, with malice aforethought, either expressed by the party or implied by law, so as the party wounded, or hurt, etc., die of the wound or hurt, etc., within a year and a day after the same".

The definition is from Coke's 3, Institute 47, 1628. Since our topic is "murderous intent" we are particularly interested in that part of the definition which relates to the killer's state of mind, that is, "with malice aforethought, either expressed by the party or implied by law".

Many pages later, the authors of Smith & Hogan explain:

"The *mens rea* for murder is traditionally called "malice aforethought". This is a technical term and it has a technical meaning quiet different from the ordinary popular meaning of the two words. Malice aforethought is a concept of the common law. It has a long story but, since *Moloney*, it is no longer necessary to explore this in order to expound the modern law. We can now state that it consists in:

(a) an intention to kill any person; or

(b) an intention to cause grievous bodily harm to any person.

Perhaps, although *Moloney* was only decided in 1985, 11 years ago, I have found my own research into the origins of the term "malice aforethought" useful in my attempts to understand the murderous intent of today. For this reason I have included two historical landmarks in the history of malice aforethought in an appendix to this paper:

- Coke's definition of malice aforethought, and
- Stephen, a very influencial 19th century judge and jurist.

That is mainly for you to puruse later. In our discussion to day we will only go back as far as 1935.

B. EARLY 20TH CENTURY MURDER

The method of the common law is cases, not codes nor even commentaries though these can be very important. So as an illustration of the common law method I propose to concentrate on the cases. For thirty minutes we are scholars

in a common law library, picking our way through the precedents, until eventually we arrive at an understanding of the state of the debate today. I have included substancial extracts from the judges'decisions so that you will be able to trace their language and their reasoning for yourselves if you so wish.

1. Matter of Proof

***D.P.P.* versus *Woolmington* [1935], A.C., 462**

The facts:

Woolmington's young wife had left him and returned to her mother's house. Woolmington equipped himself with a sawn off shot gun and went to vist her. He said he intended to use the gun to threaten suicide if she refused to come home with him. Somehow the gun went off and the young wife was killed. Woolmington said it was an accident. The prosecution alleged wilful murder.

There was really no doubt that the gun went off in Woolmington's hands. The judge told the jury:

"The Crown has got to satisfy you that this woman, Violet Woolmington, died at the prisoner's hands. They must satisfy you of that beyond all reasonable doubt. If they satisfy you of that, then he has to show that there were circumstsnces to be found in the evidence which has been given from the witness-box in this case which alleviate the crime so that it is only manslaughter or which excuse the homicide altogether by showing that it was a pure accident".

The House of Lords conceded there was "apparent authority" for this direction in past commentaries but were unanimous in their decision that, nevertheless, this was not the law of England.

"Throughtout the web of the English Criminal Law one golden thread is always to be seen, that it is the duty of the prosecution to prove the prisoner's guilt...[except where the defendant pleads insanity or a statutory provision says otherwise]. If, at the end of and on the whole of the case, there is a reasonable doubt, created by the evidence given by either the prosecution or the prisoner, as to whether the prisoner killed the deceased with a malicious intention, the prosecution has not made out the case and the prisoner is entitled to an acquital".

This was suspect as a historically accurate statement of English criminal law or practice but, as an authoritative statement from the highest court in the judicial system, it was henceforth the law. Only the proof of a man's thoughts is an uncertain business and the pressure to secure the conviction of "an obvious villain" considerable.

Woolmington should have made it impossible for any trial judge to direct a jury in a criminal trial that

(i) where stabbing, shooting or sudden quarrel fight is proved, malice aforethought *is presumed*, as it was in Coke's time, or even

(ii) a man *must* be taken to have foreseen what a reasonable person in the position of that man would have foreseen; or

(iii) a man *must* be taken to have intended the natural and probable consequences of his acts:

Woolmington should have meant that, whatever malice aforethought was, and that the House of Lords did not then decide, the prosecution had to *prove* that the defendant had it at the time of the killing in order to obtain a conviction.

But it took time, and some academic and even public outrage, for practice to change. As late as 1961 the House of Lords in *D.P.P.* versus *Smith* [1961], A.C., 290, apparently applied an objective standard in the law of homicide and held that a man *must* be taken to have intended the natural and probable consequences of his acts.

In England the legislature found it necessary to enact section 8 of the *Criminal Justice Act 1967*, in Hong Kong the *Criminal Procedure Ordinance*, section 65A, to get the message across.

S. 65A:

"(1) A court or jury, in determining whether a person has committed an offence,

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

2. Intention/Knowledge/Foresight of what?

Since Anglo-Saxon times the process of development for the law of murder has been a process of narrowing of liability, a slow inching towards a match, not yet reached, between the act of killing and a subjective decision to kill (or at least knowingly and deliberately put another at very high risk of death) without justification or excuse. By the beginning of the 20th century, apart from the imposition of the burden of proof just considered, two principal obstacles remained:

- the old common law doctrine of felony murder (constructive malice) whereby any killing done in the course of committing a felony or

resisting lawful arrest or custody was murder without proof of malice aforethought;

- the lack of any clear differentiation between intention, knowledge and foresight in the context of the mental element required for murder.

The former was settled first and for that reason will be dealt with first here.

I - *Constructive Malice*

The felony murder rule meant that any one who killed another intending to cause grievous bodily harm to that person was guilty of murder because intentional causing of grevious bodily harm was itself a felony and so the courts had no need to consider whether an intention to kill or at least wilfully endanger life ought to have been required. The evolution of the mens rea of murder was effectively halted at the beginning of the 18th century by which time the felony murder rule had solidified.

The rule had become unpopular by the 19th century. It seems that in practice, most cases prosecuted as felony murders in the later 19th century - early 20th century at least were cases in which the killer had intended to cause grievous bodily harm to the victim and so the practice developed of directing juries that the prosecution must prove either the intention to kill or the intention to cause grievous bodily harm, sometimes with, sometimes without further elaboration.

The doctrine of constructive malice was abolished in England by Section 1 of the Homicide Act 1957, which includes the words:

"Where a person kills another in the course or furtherance of some other offense, the killing shall not amount to murder unless 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 offense".

This section has a side note: "Abolition of constructive malice".

[*'Ah'*, says the careful researcher, *'the ancestor of section 2 of the Homicide Ordinance'*].

Very soon after the passage of the law, *Vickers* was decided.

II - *R.* versus *Vickers* [1957], 2, Q.B., 664.

The facts:

Vickers broke into an old lady's home in order to steal, at that time clearly the felony of burglary, and, when surprised by her, struck her many times causing

injuries from which she died. On the facts it was possible that Vickers had intended to cause grievously bodily harm but not to cause death.

The Argument:

Vickers counsel argued that section 1 of the Homicide Act not only repealed the doctrine of constructive malice, which was only one form of implied malice, but had restricted the definition of murder so that an intention to cause grievous bodily harm was insufficient.

"The section means that where a person is killed in the futherance of another offense, the malice necessary to make the killing constitute murder cannot be implied from the other offence; it must be shown that the killing itself was done with malice... it also applies when the other offence is grievous bodily harm..."

Counsel cited Coke's definition, quoted in the Appendix, as well as other authorities and concluded that the mens rea for the violent felony of causing grievous bodily harm was insufficient for proof of express malice aforethought. The judge should have said, "... that if the act of causing grievous bodily harm was dangerous to life and likely to cause death, then the jury should convict of murder." (p. 668).

A full court of five members of the Court of Criminal Appeal did not accept that was the effect of the section. Lord Goddard C. J., giving the unanimous judgment of all, maintained that "constructive malice" and "implied malice" are not the same thing.

"Murder is, of course, killing with malice aforethought, but 'malice aforethought' is a term of art. It has always been defined in English law as, either an express intention to kill, as could be inferred when a person, having uttered threats against another, produced a lethal weapon and used it on a victim, or implied, where, by a voluntary act, the accused intended to cause grievous bodily harm to the victim and the victimdies as the result. ... It will be observed that the section prserves implied malice as well as express malice, and the words "Where a person kills another in the course or furtherance of some other offence" cannot, in our opinion, be referred to the infliction of the grievous bodily harm... The "furtherance of some other offence" must refer to the offence he was committing or endeavouring to commit other than the killing, otherwise there would be no sense in it" (p. 670).

As to the meaning of implied malice in the statute, Coke's use of the term is best interpreted as referring not to do a different kind of malice but to a different way of proving the one form of malice then known [Perkins, *"A re-Examination of malice Aforethought"*, 43 (1933-34), Yale Law Journal, 537, 547]. Stephen regarded Coke's use of the term as unfortunate and an unnecessary complication

in Coke's explanation of malice which subsequently led to enormous confusion. Stephen (p. 83) himself used the term "implied malice" to refer to the extension of murder made by the felony murder rule. Other writers and some cases had used the term as the Court of Appeal suggested, i. e., to mean an intention to cause grievous bodily harm as distinct from an intention to kill. Unfortunately, the term "constructive malice" had similarly been used to describe both these things [See Kenny, p.155]. Therefore the defendant's argument was not without merit but it was not clearly addressed and the Court of Appeal largely ignored it.

III - *Hyam* versus *D.P.P.* [1975], A.C., 55.

The facts:

Hyam had been J.'s mistress. She believed J. was going to marry B. Hyam did not want that to happen. Having made sure that J. was in his house, Hyam went to B.'s house in the early hours of the morning while B. and her children were asleep. Taking care not to disturb anyone she poured petrol through the letterbox in the front door and then set fire to the petrol using newspaper and a lighted match. She left the house burning without raising the alarm and went home. Two of B.'s children died of asphyxia from fumes caused by the fire. Hyam was charged with the murder of the two dead children.

Hyam claimed that she had only intended to frighten B. into leaving town, that she had not intended to kill or cause grievous bodily harm to anyone.

[Of course, if she had intended to kill B. it would have made no difference that it was B.'s childrendied instead].

The trial judge directed the jury:

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

The Argument.

Hyam's counsel again raised the question of the effect of Section 1 of the Homicide Act, argued that the directionshould have been "intended to kill or knew it was highly probable that her act would death" and invited the House of Lords to overrule *Vickers*.

The question put to the House of Lords by the Court of Appeal:

Is malice aforethought in the crime of murder established by proof beyond all 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 harm?

Six Law Lords delivered separate judgments in the case.

On this issue, Lord Diplock agreed with Hyam's counsel. He wrote:

"I believe that all your Lordship are agreed that if the English law of homicide were based on concepts that are satisfactory, both intellectually and morally, the crime of murder ought to be distinguished from less heinous forms of homicide by restricting it to cases where *the consequence of his act, which the accused desired or foresaw as likely, was the death of a human being.* Where we differ is as to whether it is still open to this House to declare in its judicial capacity that this is now the law of England, or whwthwr to define the law of murder thus would involve so basic a change in the existing law that it could only properly be made by Act of Parliament. For my part I think that Parliament itself has, by the Homicide Act 1957, made it constitutionally permissible for this House so to declare, and I believe that this House ought to do so."

What followed is one of the most historically and intellectually satisfying judgments given in an English criminal case. Unfortunately, time does not permit us to do justice to it here.

Lord Kilbrandon agreed with Lord Diplock.

Lord Hailsham of Marylebone and Viscounty Dilhorne said that *Vickers* was authority for the proposition that proof of either an intention to kill or an intention to cause grievous bodily harm was a sufficient mens rea for murder.

Both accepted the definition of "grievous bodily harm", given by Lord Kilmour, *in DPP* versus *Smith*, [1961], A.C., 290:

"... I can find no warrant for giving the words 'grievous bodily harm' a meaning other than that which the words convey in their ordinary and natural meaning. 'Bodily harm' needs no explanation, and 'grevious" means no more and no lea than 'really serious'".

Lord Hailsham explained that whether particular injuries are "really serious" is usually a matter left to the jury added:

"Speaking for myself, I would consider it obvious that there are many injuries which a jury would call really serious which in the ordinary course would not be likely to endanger life... . *If it were desired to restrict the definition of murder by defining it as killing with intent to cause death or endanger life, I would think that an Act of Parliament would be necessary, and, before passing legislation, it would be desirable for Parliament to investigate policy*

considerations more widely than is desirable or possible in the course of a juducial investigation based on a single case".

Viscount Dilhorme agreed.

"Our task is to say what, in our opinion, the law is, not what it should be... To change the law to substitute 'bodily injury known to the offender to be likely to cause death'" for 'grievous bodily harm' is a task that should, in my opinion, be left to Parliament if it thinks such a change expedient'".

Lord Cross of Chelsea declared himself unprepared to decide the point without the fullest possible argument from counsel on both sides, which he felt he had not yet received. He unheld the conviction.

And so the matter of whether an intention to cause grievous bodily harm was a sufficient mens rea for murder undecided.

IV - *Cunningham* [1982], A.C., 566

The facts:

D. made an unprovoked attack on the victim, striking him repeatedly on the head with a wooden chair or part of a chair.

The judge directed the jury:

"At the time when the defendant inflicted injuries on Kim... did he intend to do him really serious harm? If the answer to that question is "yes", you find him guilty of murder".

The question certified by the Court of Appeal was:

"Whether a person is guilty of murder by reason of his unlawfully killing another intending to do grievous bodily harm".

The decision.

The main judgment was delivered by Lord Hailsham of St. Marylebone L. C., another of the most historically and intelectually satisfying judgments in English criminal law, this time concluding that VICKERS was correctly decided and the answer to the Court of Appeal's question was "yes". All the other Law Lords concurred and so it was finally decided that an intention to cause grievous bodily harm was a sufficient means rea for murder.

3. Intention/Knowledge/Foresight?

Michael Allen, *Textbook on Criminal Law* (2 ed.), pp. 45-46, identifies four possible states of mind which the common law *might* include within the word "intention":

(i) D shoots V in order to kill him. *Direct intention.*

(ii) D sees V standing behind a (glass) window and shoots at V in order to kill him, realising that to do so the bullet *must* first break the window. In this situation it may be said that D intends also to break the window, as this is a *necessary precondition* to killing V. *Oblique intention.*

(iii) D places a bomb under V's seat (in an aeroplane) timed to kill him in mid-flight as he co-pilots a plane over the Atlantic. In this situation D does not desire to kill the crew or passengers on the plane and their deaths are not a necessary pre-condition to killing V In the normal course of events, however, their deaths will ensue as the *inevitable by-product* of D's achievement of his primary purpose; they are an inseparable consequence of that end... morally certain if D achieved his primary purpose (and D knows this). *Oblique intention.*

(iv) D shoots at V while V is driving a bus, in order to kill him. D foresees that it is highly probable that the passengers on the bus will also be injured or killed... Their deaths are not inevitable although highly likely. *Does foresight that a consequence is highly probable amount to intention to bring that consequence about or does it only constitute recklessness?*

I - *Hyam* [1975], A.C., 55

You will recall that the Court of Appeal asked the House of Lords:

Is malice aforethought in the crime of murder established by proof beyond all 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 harm?

Note that this is a question about malice aforethought, not intention.

Lord Hailsham of St. Marilebone said "... the sooner the phrase [malice aforethought] is consigned to the limbo of legal history the better for precision and lucidity in the interpretation of our criminal law".

He expressly considered and rejected the possibility that foresight of propable consequences was a type of malice aforethought alternative to intention to bring about those consequences, i. e., death or grievous bodily harm.

He referred to the passage from Stephen's *Digest of Criminal Law* cited in the Appendix but found insufficient evidence of its having been regularly followed.

"... In my view, it is not foresight but intention which constitutes the mental element in murder".

As to the meaning of intention he said (emphasis added):

(i) An "intention" to my mind connotes a state of affairs which the party "intending"... 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 violition", adopting Asquith LJ in *Cuncliffe* versus *Goodman* [1950], 2, K.B., 237.

(ii) it includes "the *means* as well as the end and the *inseparable consequences* of the end as well as the means".

(iii) it is different from "desire"

(iv) the fact that a state of affairs is correctly foreseen as a highly probable consequence of what is done is [not] the same thing as the fact that the state of affairs is intended.

For Lord Hailsham, Allen's (i), (ii) and (iii) are clearly within "intention".

"But what are we to say of the state of mind of a defendant who knows that a proposed course of conduct exposes a third party to a serious risk of death or grievous bodily harm, wjthout actually intending those consequences but nevertheless and without law I excuse deliberately pursues that course of conduct regardless whether the consequences to his potential victim take place or not? In that case, if my analysis be correct, there not merely actual foresight of the propable consequences, but actual intention to expose his victim to the risk of those consequences whether they in fact occur or not".

"Once it is conceded that [*Hyam*] was actually and subjectively aware of the danger to the sleeping occupants of the house in what she did, and that was the point the judge brought to the jury's attention, it must surely follow naturally that she did what she did with the intention of exposing them to the danger of death or really serious injury regardless of whether such consequences actually ensued or not. Obviously in theory, a further logical step is involved after actual foresight of the probability of danger is established. But in practice and in the context of this case the step is not one which, given the facts, can be seriously debated. For this reason I do not think the summing up can be faulted..."

Is this Allen's (iv)?

How does this differ from deliberately doing an act with actual foresight/ knowledge of the probable danger?

Intending to take a risk of a consequence happening is a very differente thing from intending to bring that consequence about. Of course, we may regard each as equally morally blameworthy but that is another matter.

Viscount Dilhorme cited Stephen with approval:

"Whether or not it be that the doing of the act with the knowledge that certain consequences are highly probable is to be treated as establishing intent to bring about those consequences, I think it is clear that for at least 100 years such knowledge has been recognised as amounting to malice aforethought.

"A man may do an act with a number of intentions. If he does it deliberately and intentionally, knowing when he does it that it is highly probable that grievous bodily harm will result. I think most people would say and be justified in saying that whatever other intentions he may have had as well, he at least intended grievous bodily harm".

If the trial judge had asked the jury, "... was it proved that the accused had intended to kill or to do grevious bodily harm, no reasonable jury could on the facts of this case have come to any other conclusion than that she had intended to do grevious bodily harm, bearing in mind her knowledge and the fact that, before she set fire to the house, she took steps to make sure that Mr. Jones was not in it as she did not want to harm him. If the normal direction had been given, much litigation would have been avoided".

Lord Cross of Chelsea also specifically adopted Stephen's definition of malice aforethought as a correct statement of malice aforethought, whatever it might say about the meaning of "intention".

Lord Diplock did not refer to Stephen but said:

"...I agree with those of your lordships who take the uncomplicated view that in crimes of this class [where the defendant's mental attitude towards a consequence in material] 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. What is common to both these states of mind is willingness to produce the particular evil consequences: and this, in my view, is the mens rea needed to satisfy a requirement, whether imposed by statue or existing at common law, that in order to constitute the offence with which the accused is charged he must have acted with "intent" to produce a particular evil consequence or, in the ancient phrase which still survives in crimes of homicide, with "malice aforethought".

So three of the Law Lords accepted that proof of foresight of a (high) probability of death or grievous bodily harm is a sufficient to establish melice aforethought. Lord Hailsham's position is confused.

Lord Kilbrandon did not address the point since he would have allowed the appeal on other grounds. However he did say:

"My Lords, it is not so easy to feel satisfaction at the doubts and difficulties which seem to surround the crime of murder and the distinguishing from it of the crime of manslaughter. There is something wrong when crimes of such gravity, and I will say of such familiarity, call for the display of so formidible a degree of forensic and judicial learning as the present case has given rise to..."

II - *R.* versus *Moloney* [1985], A.C., 905

The facts:

Moloney (22) and his father stayed up late together drinking, long after the other members of a family party had gone to bed. At about 4.00am Moloney fired a double-barrelled shotgun, killing his father. It was not disputed that both had been drinking a great deal, that their relationship was generally excellent, they had been heard talking and laughing together by other members of their family.

Moloney claimed that both he and his father decided to have a competition to see who could load a shotgun the fastest, that he won easily and that is father dared him to pull the trigger, which he did without even aiming the gun.

The trial judge directed the jury

"The prosecution have to prove he intended either to kill his father or cause him some really serious bodily harm".

"When the law requires that something must be proved to have been done with a particular intent, it means this: a man intends the consequence of his voluntary act (a) when he dires it to happen, whether or not he foresees that it will probably happen and (b) when he foresees that it will probably happen, whether he deires it or not".

This direction was taken from the definition of intention given in one of the leading textbooks of the day. It represented a not uncommon intrepertation of the House of Lord's decision in HYAM. As to the cases other than *Hyam* cited in support of the proposition, Lord Bridge said:

"But looking at... [the facts of these cases of *Hyam* itself]... they suggest to me that the probability of the consequence taken to have been foreseen must be little short of overwhelming before it will suffice to establish the necessary intent. Thus I regard [this definition] ... of intent as unsatisfactory and potentially misleading and one which should no longer be used in directing juries".

The question put by the Court of Appeal:

Is malice aforethought in the crime of murder established by proof that when doing the act which causes the death of another the accused either: (a) intends to kill or do serious bodily harm; or (b) foeresees that death or serious bodily harm will reprobably occur, whether or not he desires either of those consequences?

The decision.

The judgment of the House of Lords was delivered by Lord Bridge of Harwich:

- The conviction was unsafe and unsatisfactory because Moloney's defense was not adequately put to the jury.
- Therefore, strictly speaking, the question put by the Court of Appeal did not arise and need not be answered. However, because the different opinions expressed by the House of Lords in *Hyam* had led to confusion in an area where clarity and simplicity area of paramount importance, the question would be answered and the House would lay down new guidelines for the future.

All the other Lords present, including Lord Hailsham of Marilebone, concurred.

The judgment clearly begins with the unspoken assumption, that the mens rea for murder is intention to kill or intention to cause grievous bodily harm and nothing else. But before this can be openly proclaimed something must be done about *Hyam*.

Lord Hailsham's judgment in *Hyam* is obviously the most promising since it too purports to define the mens rea of murder wholly in terms of intention.

The good points in Lord Hailsham's judgement in *Hyam*:

- there is no rule of substantive law that foresight by the accused of death or serious bodily harm as a probablenconsequence of his voluntary act, is equivalente or alternative to intention to cause death or grievous bodily harm;

- this is so even if probability is defined as exceeding a certain degree;

- foresight of consequences, as an element bearing upon the issue of intention in murder … belongs not to the substantive law but to the law of evidence.

The problem with Lord Hailsham's judgment in *Hyam*:

"The intention to expose a potencial victim … to a serious risk that … grievous bodily harm will ensue from his acts", said by Lord Hailsham to be a sufficient intent for murder, "comes dangerously near to causing confusion with at least one possible element in the crime of causing death by reckless driving … [or motor manslaughter] … where the driving was such as to create an obvios and serious risk of causing physical injury to some other person and the driver having recognised that there was some risk involved had nevertheless gone on to take it".

I. e., where was the boundary between recklessness and intention to expose a potential victim to a serious risk?

Clearly, that part of Lord Hailsham's answer had to be jetisoned.

And what of the other Law Lords? The House of Lords did not want to overrule HYAM since hyndreds of juries had been directed and men convicted in accordance with its terms in the intervening 10 years. They "overruled" the model direction based on it given in the next commonly relied upon by the trial judges and lawyers instead. *Hyam* itself was more gently treated. Lord Bridge noted it, took out the parts of Lord Hailsham's judgment he wanted, the restrictive definition of "intent", briefly acknowledged some of the other judgments and then left the case to rest lying silently on the table. Nobody was disceived or mislead however. *Hyam* was dead. Long live the new king, *Moloney*.

As to directing juries in murder trials, since *Hyam* had let to some confusion, new guidance was given:

- The golden rule should be that, when directing a jury on the mental element necessary in a crime of specific intent [such as an intention to kill and an intention to cause grievous bodily harm], the judge should avoid further elaboration about what is meant by intention and leave it to the jury's good sense to decide whether the defendant acted with the necessary intent unless the judge is convinced that, on the facts and having regard to the way the case has been presented to the jury in evidence and argument, some further explanation or elaboration is strictly necessary to avoid misunderstanding.

- In trials for murder, "I find it very difficult to visualise a case where any such explanation or elaboration could be required, if the offense consisted of a direct attack on the victim with a weapon, except possibly the case where the accused shot at A and killed B, which any first year law student could explain to the jury in the simplest terms" (p. 296)

- It may be necessary to explain to a jury that intention is quite disctint from motive or desire.

- "I think we should no longer speak of presumptions in this context but rather of inferences. In the old presumption that a man intends the natural and probable consequences of his acts the important word is 'natural'. This word conveys the idea that in the ordinary course of events a certain act will lead to a certain consequence unless something unexpected happens to prevent it. One might almost say that, if a consequence is natural, it is otose to speak of it as also being probable" (p. 909).

- "In the rare cases in which it is necessary to direct a jury by reference to foresight of consequences, I do not believe it is necessary for the judge to do more than invite the jury to consider two questions. First, was death or really serious injury ... a natural consequence of the defendant's voluntary act? Secondly, did the defendant foresee that consequence as being a natural consequence of his act? The jury should then be told that if they answer yes to both question it is a *proper inference* for them to draw that he intended that consequence".

Allen (pp. 52-53) points out:

(i) Though Lord Bridge does not say so in as many words, the rare and exceptional case must be one where the evidence suggests D's primary purpose or ultimate objective was something other than causing death or grievous bodily harm to V. Then the jury will need to consider whether D nevertheless appreciated or foresaw that causing death or grievous bodily harm to V was a virtually certain (natural) consequence of D's achieving her or his primary objective by the means chosen. If D so appreciate that would be oblique intent primary objective by the means chosen. If D did so appreciate that would be oblique intent.

A mere difficulty in deciding on the evidence whether D had a direct intent or was merely extremely reckless should never be regarded as an exceptional case. The jury may wish to consider the objective probability of death or grievous bodily harm as well as D's subjective appreciation of that probability in order to decide whether D had decided to bring V's death about but they would hardly need special instructions to do so. If they do, section 65A of the Criminal Procedure Ordinance points the way. Unfortunately, all the troublesome cases which have followed *Moloney* have been direct intention cases in which a trial judge gave an unnecessary and ill advised *Moloney* objection.

(ii) The use of the term "inferring" in the recommended direction was unfortunate. Earlier, Lord Bridge had said that, looking at the facts [rather than the language] of past cases, in the probability of the consequence taken to have been foreseen must be little short of overwhelming before it will suffice to establish the necessary intent, i. e., deliberately doing an act with foresight of a virtual certainty was doing that act intending that certainty. No process of inference was required.

"Inferring intention from foresight can create confusion. In a case where the prohibited consequence was not the accused's aim or purpose, nor desired by him as an end in itself or means to an end, the task of the prosecution would be to prove what he foresaw. In the absence of an admission by the accused the

jury would be left to infer this from the evidence. If they are satisfied that the foresaw death or grievous bodily harm as morally certain at the time he acted it would be correct to say he intended that result in the "oblique" sense of the word – no further *inferrin* should be required. Indeed, as it is not a case where bringing about the prohibited consequence is the accused's aim or purpose, and as intention is something distinct from motive or desire, there would not seem to be any ingredient left which might be inferred to convert foresight into intention" (p. 53).

Doubtless juries will use their common sense and equate foresight of a consequence as morally certain with intention but it would have been much more helpul if Lorde Bridge had said so clearly.

III – *R.* versus *Handcock & Shankland* [1986], 1, A.C., 455

The facts:

"H. and S. were miners. They and others were on strike. H. and S. strongly objected to any miners going to work while they were on strike. W. was a taxi driver who, at the mterial time, was driving another miner to work. In order to reach the mine W. had to pass under a bridge. Knowing this and knowing that some people might try to go to work H. and S. had put two lumps of concrete on the parapet of the bridge and waited there. As W. approached the lumps of concrete were pushed or thrown from the parapet. One struck the windscreen of the taxi. One feel on the road in the taxi's path causing the taxi to skid out of control. W. died from injuries he received in the wrecking of the taxi."

The defendants denied intending to kill or cause serious injury to anyone. Their intention had been to stop the miner from going to work, to frighten him off.

The trial judge directed the jury in terms of the *Moloney* guidelines and H. and S. were convicted.

The court of Appeal quashed the murder convictions, substituting convictions for manslaughter on the ground that the directions were misleading in that they contained no express mention of the importance of the *probability* of the consequences foreseen by the defendants.

Lord Bridge had himself said that the case law indicated "the probability of the consequence taken to have been foreseen must be little short of overwhelming before it will suffice to establish the necessary intent". The omission of any guidance on the relevance or wieght of the probability factor in determining whether they could or should infer from foresight of a consequence the intent to bring about that consequence.

The Director of Public Prosecutions appealed.

The question for the House of Lords:

"Do the questions to be considered by a jury set out in the speech of Lord Bridge of Harwich... [in Moloney] *as a model direction require amplification?"*

The decision.

Lord Scarman delivered the judgment, four other Law Lords concurring.

- *Moloney* made it absolutely clear that foresight of consequences is no more than evidence of the intent; it must be considered, and its weight assessed, together with all the evidence in the case. Foresight does not necessarily imply the existence of intention, though it may be a fact from which when considered with all the other evidence a jury may think it right to infer the necessary intent.

- *Moloney* also made it clear that the probability of a result of an act is an important matter for the jury to consider and can be critical in their determining whether the result was intended.

- The omission of "probability" from the guidelines was deliberate because Lord Bridge thought that if a consequence is natural it is really otiose to speak of it as also being probable but:

  "My Lords, I very much doubt whether a jury without further explanation would think that 'probable' added nothing to 'natural'. I agree with the Court of Appeal that the probability of a consequence is a factor of sufficient importance to be drawn specifically to the attention of the jury and to be explained. In a murder case where it is necessary to direct a jury on the issue of intent by reference to foresight of consequences the probability of death or serious injury resulting from the act done may be critically important... In my judgment, therefore, *the* MOLONEY *guidelines as they stand are unsafe and misleading. They also rewuire a reference to probability. They also require an explanation that the greater the probability of a consequence the more likely it is that the consequence was foreseen and that if that consequence was foreseen the greater probability is that consequence was also intended. But juries also require to be reminded that the decision is theirs to be reached upon a consideration of all the evidence"* (p. 473).

  (...)

  In a case where foresight of a consequence is part of the evidence supporting a prosecution submission that the accused intended the consequence, the judge if he thinks some general observations would help the jury, could well, having in mind (S. * of the Criminal Procedure Ordinance) emphasise that the probability, however high of a consequence is only a factor though it may in

some cases be a very significant factor, to be considered with all the other evidence in determining whether the accused intended to bring it about" (p. 474).

Comment:

So juries may infer intention from foresight of high probability and not merely foresight of a moral/virtual certainty?

If D fires a gun and kills V, the probability that the shot fired by someone in D's position with D's skills would have killed V, and D's foresight of that possibility, may be very relevant to the jury's consideration of D's claim that he didn't intended to cause grievous bodily harm to V.

But that is the kind of case in which the House of Lords had said the golden rule applies. A jury doesn't need any help about the meaning of intention in a case such as that.

The exceptional case where an explanation as to the meaning of intention is required must be a case where it is suggested that although killing or causing grievous bodily harm to the victim was not something D had set out to achieve for its own sake, nevertheless it was a consequence D had decided to bring about, perhaps as a means to a desired end, perhaps as an inevitable result of achieving a desired end.

Suppose the jury is satisfied that D foresaw that the death of V was highly probable though not certain consequence of D's decision to blow up a railway line. They know that such foresight of a high probability is not the same thing as a decision to bring about the death of V but they are told that such foresight is evidence from which they may infer that intent?

Is the jury being asked do decide whether this level of risk taking ought to be punished as murder?

As to the dangers in appellate courts giving guidelines of general application to judges as to how to direct juries:

"The laying down of guidelines for use in directing juries in cases of complexity is a function which can be usefully exercised by the Court of Appeal. But it should be done sparingly, and limited to cases of real difficulty. If it is done, the guidelines should avoid generalisation so far as is possible and encourage the jury to exercise their common sense in reaching what is their decision on the facts. Guidelines are not rules of law: judges should not think that they must use them. A judge's duty is to direct the jury in law and to help them upon the particular facts of the case". (p. 474).

IV - *R.* versus *Nedrick* [1986], 1, W.L.R., 1025

The facts:

Nedrick had a grudge against a woman, F. He went to her house in the early hours of the morning, poured paraffin through the letter box and onto the front door and set it alight. He gave no warning. The house was burnt down, killing one of F.'s children.

The prosecution adduced evidence of oral statements in which Nedrick admitted having started the fire but claimed he only wanted to wake B up, to frighten her. At trial he denied all responsibility for the fire.

The direction to the jury:

The judge directed the jury in terms of the textbook definition explicitly disapproved on in *Moloney*. That was before *Moloney* was decided.

The decision.

Since the judge's direction was clearly wrong in law, the conviction for murder could not stand and a conviction for manslaughter would be substituted with a sentence of 15 years imprisonment.

Further guidance:

"What then does a jury have to decide so far as the mental element in murder is concerned? It simoly has to decided whether the defendant intended to kill or do serious bodily harm... In the great majority of cases a direction to that effect will be enough... But in some cases, of which this is one, the defendant does an act, which is manifestly dangerous, and as a result someone dies. The primary desire or motive of the efendant may not have been to harm that person, or indeed anyone. In that situation what further directions should a jury be given as to the mental state, which they must find to exist in the defendant if murder is to be proved? We have endeavoured to crystallise the effect of their Lordships speeches [in *Moloney* and *Handcock*] in a way which we hope will be helpful to judges who have to handle this type of case".

- a man may intend to achieve a certain result whilst at the same time not desiring it to come about [Surely this point can be more easily expressed in terms of "means and ends" or primary and secondary purposes].

- "When determining whether the defendant had the necessary intent, it may therefore be helpful for a jury to ask themselves two questions: (1) How probable was the consequence which resulted from the defendant's voluntary act? (2) Did he foresee that consequence?

  If he did not appreciate that death or serious harm was likely to result from his act, he cannot have intended to bring it about. If he did [appreciate that death or serious harm etc.] but thought that the risk to

> which he was exposing the person killed was only slight, then it may be easy for the jury to conclude that he did not intend to bring about that result. On the other hand, if the jury are satisfied that at the material time the defendant recognised that death or serious harm would be virtually certain... to result from his voluntary act, then that is a fact from which they may find it easy to infer that he intended to kill or do serious bodily harm, even though he may not have had any desire to achieve that result".

"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.

"When a man realises that it is for all practical purposes inevitable that his actions will result in death or serious harm, the inference may be irresistible that he intended that result, however little he may have desired or wished it to happen. The decision is one for the jury to be reached upon a consideration of all the evidence".

Is this to back to only foresight of a virtual certainty amounts to oblique intention?

Lord Lane CJ subsequently told the Select Committee of the House of Lords on Murder and Life Imprisonment that was his intention. (Allen, p.57, note this). But his language was confusing, partly because he found it necessary to deal with Lord Scarman's probability language in *Hancock*,

[It is one thing for the House of Lords to ignore a troublesome House of Lords decision. It is much more difficult but not impossible for the Court of Appeal to do so, or at least, be seen to be doing so.]

partly because he implies a direction on probability may be necessary when the defendant's motive was not the death or grievous bodily harm of the victim. But "motive" is the reason why, not the decision to bring it about.

V - *Walker & Hayles* [1990], 90, Cr. App. R., 226

The facts:

The prosecution alleged that Walker and Hayles had deliberately thrown the victim off a third floor balcony in the course of a fight, intending to kill him. The defendants claimed he fell whilst running away from them. Miraculously, the victim survives.

The defendants were charged with attempted murder. Attempted murder requires proof of an intention to kill. An intention to cause grievous bodily harm is insufficient.

The judge directed the jury:

"...it is your firm view that if anyone is thrown over a balcony wall three floor up, is there an obvious high degree of probability that he would be so badly injuryed when he lands that he will die; a very high degree of risk?

If yes,

"are you sure that [this particular accused] joined in purposefully throwing John over that balcony wall and, if so, however fast and hectic the scene was, are you sure that he knew quite well that in doing that there was a high degree of probability that when John hit the ground he would probably die from it?

"If you are sure of that, the last question is this one: you are entitled to draw the inference that when he joined in chucking John over the balcony wall he was actually trying to kill him if he could knowing quite well there was a very high degree of possibility that he would be killed when he hit the ground..."

The decision.

This was not a case in which any further explanation of "intention" in terms of foresight was required.

But the fact that a direction was given is not a ground for appeal unless the direction given was wrong. The judge was not wrong.

The judge did not say that, if the jury was satisfied that the answers to the first question were, "yes" the jury *must* draw the inference that the defendant intended to kill J but only that the jury would be *entitled* to draw that inference.

In the rare cases where an expanded direction with regard to intention is required, "it is better that the judge should continue to use the term 'virtual certainty', which has the authority of this Court in *Nedrick*."

But use of the term, "a very high degree of probability" was not a misdirection.

"Once one departs from absolute certainty there is bound to be a question of degree. We do not regard the difference of degree, if there is one, between a very high degree of probability on the one hand and virtual certainty on the other as being sufficient to (amount to a misdirection)... We note that in Lord Bridge's

view no reasonable jury could have acquitted the defendant in *Hyam*... if they had be given the correct direction; yet we would venture to wonder whether serious injury in that case would have been regarded by the jury as more than very highly probable. *Whatever the direction, we suspect that in practice juries will continue to use their common sense".*

"Reading Lord Scarman's speech in *Hancock*, at p.276 and p.473, and the first of the two passages we have quoted from *Nedrick*, we are not persuaded that it is only when death is a virtual certainty that the jury can infer intention to kill. Providing the dividing line between intention and recklessness is never blurred, and provided it is made clear, as it was her, that it is a question for the jury to infer from the degree of probability in the particular case whether the defendant intended to kill, we would not regard the use of the words 'very high degree of probability' as a misdirection".

But this is the direct intention case! *Nedrick* had nothing to do with it. Of course, in deciding whether D had decided to bring about John's death the jury is not only entitled to do that if satisfied that D foresaw death as a virtual certainty given the method chosen. There was plenty of other evidence suggesting D was furiously angry with John and had decided to cause John at least grievous bodily harm. If the jury wasn't entirely sure that this had gone as far as a decision to kill him, even in the heat of the moment, they should acquit of attempted murder.

The danger of this confusion is that when a true oblique intention case comes along the jury will be directed that foresight of a high probability of death or grievous bodily harm is a form of intention, that a person intends not only those consequences they have decided to bring about [whether for their own sake, for some other purpose or as an inevitable by-product] but also those consequences they have foreseen as highly probable. That would be almost back to *Hyam* again.

The possible benefit is a clear distinction between intention and recklessness, between murder and manslaughter. Suppose a jury only has evidence sufficient to satisfy them that D saw a possibility of grievous bodily harm to V if he did a certain act and nevertheless decided to do the act. E.g., throwing stones into a river close to a group of swimmers. If directed that they may only infer an intention to cause grevious bodily harm if satisfied that V foresaw the that grevious bodily harm to one of the swimmers was a virtual certainty, a conscientious jury could only return a verdict of manslaughter since only recklessness would have been proved.

But would they really need a special direction to achieve that result?

VI - *R.* versus *Wong Tak-sing* [1989], 2, H.K.C., 94

The facts:

Wong had an argument with the deceased L. He pressed a knife against her neck. She moved her head and the knife cut her neck. Wong then pushed L. to the ground, held the knife against her neck and it again cut into her. She struggled. He held her down with the knife until the struggles stopped. Then he decapited her.

The direction:

"Did he intend to kill her or cause her grievous bodily harm, then this part of the case is proved against him. A drunken intent, members of the jury, is still an intent" (p. 100).

"Now members of the jury, in carrying out that act, [the second sequence] what do you believe his intention was? Was the probable consequence of his action one of causing her grevious bodily harm or even killing her? If it was, if that was his intent and you are satisfied of that, then the Crown has proved the necessary intent to have the defendant convicted of murder. (p. 100)

The decision.

- this was not a case which required a direction on foresight of consequences. It was unfortunate that the advice of Lord Bridge in MOLONEY not to elaborate unless strictly necessary had not been followed.

- *Moloney*, explained in [*Hancock* and *Nedrick*] ... was, as were the others, a case of an indirect act. Here, there was a direct attack with a weapon...

"What concerns me is that in the perfectly proper directions both earlier and later in the summing up, which emphasized the word I intent, that word may have become coloured in the minds of the jury by the passage I have just cited. If they believed that the applicant thought that the probable consequence of his action would be to cause the girl grievous bodily harm or even killing her, then they were told, in effect, that was his intent. This is wrong".

"While the expression 'natural consequences' was used in *Moloney*, this, it was made clear, meant that the consequences must be 'overwhelming'. In *Hancock and Shankland* the expression 'high probability' was used which became, in *Nedrick*, virtually certain - and this is now the correct phrase and emphasis if a direction on foresight is to be given at all. A jury should be told that a result is intended when it is the doer's purpose and they should be directed,

if necessary, that they may infer that a result as intended, though not desired, when the result is a virtually certain consequence of the act and the doer knows that it is a virtually certain consequence". Silke VP cites Smith & Hogan *Criminal Law* (6 ed.)

In Hong Kong as in England.

Appendix

Coke's definition of *"malice prepense"* from *3 Institutes*, written in 1628 but published rather later:

"Malice prepense" is when one compasseth [goes about, takes a step towards] to kill, wound or beat another, and doth it sedato animo. *That is said in law to be malice forethought prepensed - malitia praecognitata. It is implied in three cases: (1) If one kills another without any provocation on the part of him that is slain. (2) If a magistrate or known officer ... in doing or offering to do his office ... is slain that is murder by malice implied by law. (3) In respect of the person killing. If A assault B to rob him, and in resisting A kill B, this is murder by malice implied, ... Malice prepensed, that is voluntary and of set purpose, though it be done upon a sudden occasion, for if it be voluntary the law implyeth malice.*

Notice that the degree of bodily violence intended was apparently irrelevant, it was all murder.

Stephen, *Digest of the Criminal Law*, article 264, (1950 ed., text unchanged from the 1st ed., published in 1877):

"Murder is homicide not excused or justified by exceptions ... and with malice aforethought as herinafter defined.

Malice aforethought means any one or more of the following states of mind preceding or co-existing with the act or omission by which death is caused, and it may exist where that act is unpremeditated.

a) An intention to cause the death of, or grievous bodily harm to, any person, whether such person is the person actually killed or not;

b) Knowledge that the act which causes death will probably cause the death of, or grievous bodily harm to, some person, whether such person is the person actually killed or not, although such knowlege is accompanied by indifference whether death or grievous bodily harm is caused or not, or by a wish that it may not be caused;

c) An intent to commit any felony whatever;

d) An intent to oppose by force any officer of justice on his way to, in, or returning from the execution of the duty of arresting, keeping in custody, or imprisoning any person whom he is lawfully entitled to arrest, keep in custody, or imprison, or the duty of keeping the peace or dispersing an unlawful assembly, provided that the offender has notice that the person killed is such an officer so employed."

(c) and d) both dealt with the felony murder or constructive malice rule.

Questions:

1. Suppose D planted a bomb in a building but gave sufficient warning for the building to be evacuated, which it was. At the time he planted the bomb D knew that if the bomb was found, members of a bomb disposal squad would attempt to difuse the bomb. If anything went wrong, one or more of the members of the squad would almost certainly die.

The bomb was found, something goes wrong and a bomb disposal squad member was killed. Would we want to describe D as a murderer? Has D committed murder under the common law? Under the law of Macau?

2. D left a bomb, set to go off at 10:00 am, in a car parked on the side of a moderately busy road. There were people walking past the car about 70% of the time. The bomb exploded on time and, as it happened, a passer-by was killed. Is D a murderer? Has he committed murder under the common law? Under the law of Macau?