Criminal Law Assignment

The common law offence of Murder has witnessed a complicated development in its definition and application by the judiciary. The favoured definition of murder is that of Coke[1], which can be neatly summarised as 'the unlawful killing of a person in being under the Queen's peace, with malice aforethought'[2]. The actus reus of murder is relatively straight forward to clarify, in terms of who can commit the offence, where it can be committed and the need for a dead body. There are only a few minor areas of debate regarding causation and who can be a victim i.e. when does a child become independent of its mother? These issues, however, are recognised as settled at law[3], even though many people may have morally different views, especially regarding the latter.

The 'fuzzy edges', and requirement for clarity, Wilson is referring to[4], are the dynamic requirements in the mens rea (referred to as 'malice' here in) of murder; specifically how a jury can ascertain the intent of the defendant. This essay will examine the attempts in case law, and subsequent articles, to clarify the meaning of malice and how it can be ascertained. The evidence itself points to a string of unsatisfactory attempts to clarify malice; a situation that could be alleviated by either a classification of different levels of the offence or a reclassification in the sentencing of the offence. Whether this would improve the clarity of the doctrine behind the offence is debatable, in the sense that a sliding scale of sentencing already exists and whether the public would accept varying degrees of murder. The conclusion of the essay shows that the malice of the offence is likely to always need further clarification, and will produce an uncomfortable fit in difficult cases, meaning the status quo of having to incorporate the 'fuzzy edges' will continue.

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[1] Coke, 3 Inst 47.
[2] James, A (2003).
[3] Smith, J. C. *Smith & Hogan Criminal Law,* London, Butterworths, pp 354-355.
[4] Wilson, W. *Murder and the Structure of Homicide*

This essay will only examine the malice of murder post 1957[5], where the key to establishing malice is determining the intention of the defendant at the time of the actus reus, which can be done in two ways. Firstly, direct intention whereby a defendant purposely undertakes to kill, or cause GBH, to the victim; or secondly, oblique intention where a defendant's state of mind is such as to realise the virtually certain consequences of their actions[6].

Direct intention, in most circumstances, is straight forward to find, in th at there will be evidence, through behaviour or admittance e.g. coldly walking up to the victim and shooting them. It is in the absence of direct evidence where the difficulty lies in establishing intention[7], consequently creating the need for clarity because case law has struggled to incorporate different meanings and ways of finding oblique intention. The crux of the matter is that the only person who truly knows what the defendant intended is the defendant; making oblique intention a concept of evidential guess work to convince a jury[8]. Such a concept supports the view that creating clarity on the subject will be a tremendous, if not impossible undertaking.

Initially juries were directed along rather narrow lines in Vickers[9], put simply, if the jury were certain the defendant intended to kill, or cause GBH, they were to return a guilty verdict[10]. Whether the tomes of jurisprudence, and academic debate, have advanced such a direction is debatable and will be picked up later in the essay.

The common law nature of murder, leaves it open to contortion by successive judgements, with the first major alteration occurring in Smith[11]. The imposition of objective criteria to identify oblique intent could provide greater clarity of the necessary

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[5] Homicide Act 1957 s.1.
[6] Pedain, A. Intention and the Terrorist Example *Criminal LawRreview* (2003) Sept, 579, pp 579.
[7] Smith, J. C. *Smith & Hogan Criminal Law,* London, Butterworths, pp 70.
[8] Wilson, W. Doctrinal Rationality after Woolin, *Modern Law Review*, (1999) 62 (3) pp 450.
[9] R v Vickers [1957] 2 QB 664.
[10] Goff, R. The Mental Element in Murder, *The Law Quarterly Review,* (1988) 104, 30, pp 34.
[11] D.P.P. v Smith [1961] AC 290.

malice required for a murder charge. However, this notion never really had the chance to develop with the judgement subsequently regarded as bad law[12], and being overturned by statute[13].

Having identified the subjective nature in the malice of murder, we must now identify the major tension between the case law. The earlier view, emanating from the House of Lords in Hyam[14], was that malice was to be found if the defendant knew the outcome of their actions was highly probable even though they may have intended to create another outcome[15]. This is a very broad test, Mrs. Hyam was convicted of murder, in which it is perhaps too easy for the prosecution to prove malice to the jury. Malice was then narrowed through a subsequent line of cases, namely Moloney[16], Nedrick[17] and Woollin[18]. These cases affirm that the defendant must intend for an outcome to come about, even if it is not their main goal or desire to achieve such an outcome, stemming from Lord Bridges' plane to Manchester example[19]. The intention can be found by a jury if an outcome, even a secondary one is a virtually certain consequence of the defendant's actions, rather than an acceptance of high probability. As Lord Goff suggests, the line followed in Moloney was the linking of the evidential material inherent in the acceptance of the outcome probabilities of a defendant's actions, with the narrower certainty of intention[20], a view that still has similarities to the evidential guesswork concept mentioned earlier. Currently, this approach is seen in the judgement of Lord Steyn in the Woolin case that affirms and slightly alters Nedrick; where he states a jury cannot find intention if they are not satisfied, upon all the evidence, that the defendant knew the result of their actions was a virtual certainty, nothing less (i.e. mere probability) will

[12] Goff, R. The Mental Element in Murder, *The Law Quarterly Review,* (1988) 104, 30, pp 36.
[13] The Criminal Justice Act 1967 s.8.
[14] Hyam v D.P.P. [1975] AC 55.
[15] Smith, J. C. *Smith & Hogan Criminal Law,* London, Butterworths, pp71.
[16] R v Moloney [1985] 2 WLR 648.
[17] R v Nedrick [1986] 3 All ER 1.
[18] R v Woolin [1999] AC 82.
[19] R v Moloney [1985] 2 WLR 648.
[20] Goff, R. The Mental Element in Murder, *The Law Quarterly Review,* (1988) 104, 30, pp 40.

suffice[21]. Although Lord Steyn attempts to draw a definite distinction between the two schools of thought regarding, high probability and virtual certainty, as Norrie puts forward, any difference is highly ambigious, supporting the idea that in practical terms the two-stage test incorporates both elements[22].

The Nedrick-Woolin test, of identifying oblique intention, still lacks definitive clarity and is arguably the child of Judges making moral decisions, in the light of public opinion, with regard to the severity of murders[23]. Norrie, suggests the circumstances of the Woollin case, where the father is unlikely to have intended to kill his son, led to the narrow approach taken in the House of Lords viewing him as a man-slaughterer. Where as in Hyam, a case of lesser moral acceptance, Norrie suggests this prompted the wider approach of foresight of probability (Woollin if tried using the Hyam direction would have been likely to have been prosecuted for murder). This leads to the question of whether the single offence of murder, and the mandatory life sentence it carries, creates the difficulty judges face in having to incorporate all situations, of varying levels of intent, within one rigid framework.

Although classed, legally, as a single offence the public reaction to murders can be seen to vary depending on the circumstances of each incident, namely the combination of harm and personal culpability[24]. Mitchell's survey indicates the public have broad categorisations of murder, with child killings and killings involving torture held as the worst, and mercy killings being acceptable in the correct circumstances[25]. Therefore, in line with Desert Theory, the offence and sentence should match the proportional gravity

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[21] Wilson, W. Doctrinal Rationality after Woolin, *Modern Law Review*, (1999) 62 (3) pp 451 & 456.
[22] Norrie, A. After Woolin, *Criminal Law Review,* (1999), July, 532, pp 534.
[23] Norrie, A. After Woolin, *Criminal Law Review*, (1999), July, 532, pp 542-43.
[24] Mitchell, B. Further Evidence of The Relationship Between Legal and Public Opinion on the Law of Homicide, *Criminal LawRreview,* (2000), October, 814, pp 817.
[25] Mitchell, B. Further Evidence of The Relationship Between Legal and Public Opinion on the Law of Homicide, *Criminal LawRreview,* (2000), October, 814, pp 820-21.

of the wrong committed[26]. READ AMERICAN JOURNAL AND POTENTIALLY INCLUDE HERE! Applying this logic to the British system there could be a sliding scale of offence that attracted a relative punishment other than the mandatory life sentence that could be reserved for the most severe categories of murder. Each offence could then have its own malice requirement that would clarify the doctrine in relation to groupings of cases. Apart from the potential simplification this could provide there is likely to be more guilty pleas, especially in the lesser graded offences; in contrast to the position now where there is arguably little to be gained from a guilty plea[27]. Conversely, a whole new series of offences could create just as many problems in regard to malice, where eventually there will be difficulty in deciding which category a borderline offence should fall. The re-classification of the offence has been looked at but was denounced as unworkable[28].

If the offence is to remain the same cannot the dropping of the mandatory life sentence simplify the malice requirement? In this sense, the narrow Nedrick-Woolin test need only be satisfied for a life sentence to be imposed, where as the broad er foresight of high probability, from Hyam, could be used to impose a lesser sentence on a murder charge. The broader scope of malice (though not the sentencing), in the offence of murder, can be seen in the Scottish legal system, and is supported by Lord Goff. The concept of Wicked Recklessness allows malice to be found without the rigid constraints of the English system with regard to intent[29]. If this idea were to be followed by the English legal system, coupled with greater flexibility in sentencing, the malice behind the offence should increase in clarity.

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[26] Valier, C. Minimum Terms of Imprisonment in Murder, Just Deserts and the Sentencing Guidelines, *Criminal Law Review,* (2003), May, 326, pp327.
[27] Towler, A. Murder Most Foul, *Law Society Gazette*, (2002), 99, (20), pp 21.
[28] Valier, C. Minimum Terms of Imprisonment in Murder, Just Deserts and the Sentencing Guidelines, *Criminal Law Review,* (2003), May, 326, pp 333.
[29] Goff, R. The Mental Element in Murder, *The Law Quarterly Review,* (1988) 104, 30, pp 53-55.

Sentencing does vary within the mandatory life sentence, in terms of the tariff system that is operative and to be further codified by the Criminal Justice Bill[30]. However, even if a convicted murderer is released following a minimum term sentence, this is only on licence, and the minimum term has no bearing on the malice requirement of the offence.

This essay has shown the tension within case law as to identify the malice within the offence of murder and how it has been narrowed down to the current Nedrick-Woollin test for oblique intention; after previously being thought too wide as a test of high probability in Hyam. The difficulty that faces judges is that the test for oblique intention is one of evidential guesswork, despite the semantically guised duals in jurisprudence. This is borne in the moral nature of the tests attempting to fit the circumstances of the murders, to hand down equitable judgements. Each murder, where the prosecution must identify oblique intent, will vary widely in their circumstances and to find a one size fits all test of great clarity appears to be a gargantuan, if not impossible task. This can be seen in the often debated terrorist example; whether a terrorist intends to kill members of a bomb disposal team[31]? If such a scenario occurred in the future it is likely the Nedrick-Woollin may be altered slightly, to incorporate any fuzzy edges, so that an intention to kill, or cause GBH, intention will be found. As Lord Goff suggests, under the current law (altered slightly after his article but not enough to affect the view), a terrorist may not have even intended to kill anyone, but intended to promote their cause; ergo how can they be guilty of murder[32]?

This leads to a conclusion, that if the executive is unwilling to reclassify the offence or its mandatory sentence, to reflect different moral culpabilities, incorporating both the narrow and broad view of malice to prosecute different levels of murder the law will continue along its present course. That is a course in the flux of unclear, entangled

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[30] Criminal Justice Bill 2002.
[31] Pedain, A. Intention and the Terrorist Example *Criminal LawRreview* (2003) Sept, 579, pp 580.
[32] Goff, R. The Mental Element in Murder, *The Law Quarterly Review,* (1988) 104, 30, pp 57.

jurisprudence attempting to fit a legally equitable judgement to the particular moral circumstances of the offence. Whilst all the semantic phrasing of the malice, in the current state of the law, is required so that justice can be seen as to be done it is highly debatable how much of a direction a jury actually understands when reaching their verdict[33]! Although, it is mere speculation, one cannot help think that for all the changing of the law in this area that a jury is still likely to reach their verdict on the basis of the original direction in Vickers, which appears to give intent its common meaning, and is more of a gut reaction in terms of judgement. Given the executive's lack of action in the last 46 years to alter the offence, and its sentence, the status quo, in the uncertainty of malice, looks set to continue; waiting for a combination of circumstances that renders the current test of malice unsuitable. This is not particularly desirable because of the uncertainty, and potential for misdirections; and in the author's opinion a strong executive is required to enact the necessary changes outlined in this essay that will broaden the offence itself.

[33] Goff, R. The Mental Element in Murder, *The Law Quarterly Review,* (1988) 104, 30, pp 46.