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# Casenotes

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## THE DEVELOPING LAW OF INTENTIONAL MURDER IN MARYLAND

*Chisley v. State*<sup>1</sup>

By BARNARD T. WELSH\*

On the night of the murder the defendant had been drinking with cronies after work. His father, accompanied by a brother-in-law and the victim, met defendant by chance and drove him home in the car with them. During the drive home the accused sat in the back seat, apparently armed with a pistol which he purchased several months before, and appeared to sleep. The father drove to his home which he shared with the defendant, got out of the car, and in so doing dropped a pack of cigarettes. The brother-in-law called this to his attention. The defendant said the cigarettes belonged to him, but the victim said they did not, whereupon the defendant shot and killed him. A short time later, when both the father and brother-in-law were a "considerable" distance from the car, they heard a second and a possible third shot. Shortly thereafter the defendant threatened another man with death if he, the defendant, was not permitted to drive the car away, although the body of the victim was apparently still in the car. The defendant then drank more whiskey and was arrested several hours later. He disclaimed any knowledge of the victim's death, although he remembered having an argument with him.

On trial under indictment for murder the defendant pleaded not guilty and not guilty by reason of insanity at the time of the crime. The jury found him both guilty of first degree murder and sane, after the trial court had denied his motion for a directed verdict, in two parts, based on (1) the insufficiency of the evidence to show first degree murder, and (2) its insufficiency to show second degree murder. On appeal, the Court of Appeals affirmed.

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<sup>1</sup> 95 A. 2d 577 (1953).

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This note proposes to discuss the following questions of law which the language of the decision seem naturally to raise:

1. What is intentional murder in the first degree under Article 27, Section 494?<sup>2</sup>
2. What is murder in the second degree under Article 27, Section 498?<sup>3</sup>
3. How broad is the Maryland concept of malice aforethought in view of the language of the court in this case?
4. Does the presumption that all homicides are committed with malice aforethought conflict with the presumption that the defendant is innocent until proven guilty; and, if it does, which presumption should prevail?

1. Article 27, Section 494, provides:

"All murder which shall be perpetrated by means of poison, or lying in wait, or by any kind of wilful, deliberate and premeditated killing shall be murder in the first degree."

This section was copied from the Pennsylvania Statute. It seems to be unambiguous, but the Maryland Court of Appeals has, since *Davis v. State*,<sup>4</sup> held that the Legislature did not create a new crime when it divided murder into two degrees but left the common law crime of murder undisturbed. It would therefore seem that both first and second degree murder, before *Chisley v. State*, required at least the common law minimum of the unlawful killing of a reasonable creature in being with malice aforethought — express or implied. In any event, such interpretation of the first degree murder statute makes no full distinction between first and second degree murder. Apparently, in the instant case, the State, relying on the idea of the *Davis*<sup>5</sup> case, argued that because the only distinction between the degrees of murder lies in the relative atrocity thereof, the trial court could not direct a verdict on the insufficiency

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<sup>2</sup> Md. Code (1951). Under Article 27, other factors than intentional killing also make one guilty of first degree murder, but this note is primarily limited to intentional killings. Thus, Section 495, murder in the course of arson or attempted arson; Section 496, murder in the course of certain other burnings; Section 497, murder in the course of rape, sodomy, mayhem, robbery, burglary, or escape from certain penal institutions, are eliminated. See, as treating of all forms of homicide, but particularly the unintentional ones not discussed herein, Note, *Unintentional Homicide in Resistance to Unlawful Arrest*, 8 Md. L. Rev. 47 (1943).

<sup>3</sup> Md. Code (1951).

<sup>4</sup> 39 Md. 355 (1874).

<sup>5</sup> *Ibid.*

of the State's proof of the greater degree, so long as there was sufficient proof of the lesser degree.

While the Court found that there was sufficient proof of first degree murder to take the case to the jury, they rejected the State's contention in the abstract, and recognized the power of the trial court, in a proper case, to direct against first degree and to restrict the jury's consideration to second degree murder.<sup>6</sup>

Apparently the State's losing contention was that the *Davis*<sup>7</sup> case had made the distinction between first and second degree murder solely on the basis of the atrocity of the act of killing; that is to say that those murders which are too atrocious as defined in the first degree statutes shall be deemed first degree murder so that the perpetrator shall be permanently removed from society, while those which are *less* atrocious shall be deemed second degree murder in order that the perpetrator only be given a maximum of eighteen years.

A logical result of using "atrocity" as a line of demarcation between the two degrees of murder might result in a jury finding a defendant guilty of second degree murder for a killing which was really deliberate and premeditated but fortunately was not marked by great cruelty, viciousness, brutality, or atrociousness; or guilty of first degree murder for an atrocious unpremeditated or impulsive killing. A nice neat hole in the forehead of the victim, although quite effective and resulting from long design and planning, might result in a verdict of second degree murder, whereas the ghastly image of a disemboweled victim of impulsive and unpremeditated killing might result in the jury returning a verdict of first degree murder. "Atrocity" is a word of such vagueness that it seems rather primitive to use it as the dividing line between death and life in a civilized jurisdiction.

The results of restricting the meaning of Article 27, Section 494 to the thought that the legislature did not intend to create a new offense known as murder in the first

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<sup>6</sup> See the queries raised in Note, *Should Reversal of Criminal Conviction Because of Insufficient Evidence, Under the New Criminal Rules, be With or Without a New Trial?* 13 Md. L. Rev. 52, 62 (1953), and consider also that, since the time of the *Chisley* case, the Court of Appeals has amended (effective June 1, 1953) Rule 5A(a), Criminal Rules of Practice and Procedure, so as to provide that the accused may move for a directed verdict that the evidence is insufficient to sustain a conviction of any offense charged, whether by way of separate counts or as a matter of law under a single count.

<sup>7</sup> *Supra*, n. 4.

degree, with elements that are not present in second degree murder, have been unfortunate. These results are amplified by the fact that our Constitution still provides that the jury is the judge of the law as well as the fact, except that, as provided by constitutional amendment and Rule of Court, the Court may pass on the *sufficiency* of the evidence to sustain a conviction.<sup>7a</sup> It is not pleasant to assume the responsibility of defending a murder case under the best circumstances and with the aid of an enlightened bench, but it is intolerable for a competent and conscientious lawyer to address an unsophisticated jury and attempt to explain to it that, in spite of Article 27, Section 494, the whole question before them is whether or not they think that the act of killing was so atrocious that the defendant has forfeited his right to live in society.

Assuming that the Legislature did not intend to create a new offense, but only reserved first degree murder as an indefinable hell for atrocious killers, then why did it use the language which it did? It would seem reasonable to conclude that perhaps the Legislature meant deliberate when it said "deliberate" and also meant premeditated when it said "premeditated". At least that is a more reasonable assumption than to assume that it meant to create no new crime, or that it meant "atrocious" when it said "wilful, deliberate and premeditated killing".

Apparently the Court of Appeals shares the former view for, in the *Chisley* case, in determining the effect that intoxication had on the degree of murder, it said, "intoxication . . . must be considered by the jury as it bears on the questions of wilfulness, deliberation and premeditation on the part of the accused."<sup>8</sup> The Court continues in this language and cites two New York cases<sup>9</sup> and Hochheimer<sup>10</sup> in amplification of the meanings of wilfulness, deliberation and premeditation, and concludes with an interesting statement, which is as follows:

"It is generally established and certainly is necessarily the law of Maryland, where the jury is the judge of the law and the facts, that where there is evidence to go to the jury, whether or not there was malice,

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<sup>7a</sup> Md. Const., Art. 15, Sec. 5 (as amended 1949) and Rule 5A (a), Criminal Rules of Practice and Procedure (as amended June 1, 1953).

<sup>8</sup> *Supra*, n. 1, 585.

<sup>9</sup> *Leighton v. People*, 88 N. Y. 117, 120 (1882); *People v. Majone*, 91 N. Y. 211, 212 (1883).

<sup>10</sup> CRIMES AND CRIMINAL PROCEDURE (2d Ed., 1904), Sec. 347, p. 380.

wilfulness, deliberation and premeditation must be for the jury to determine."<sup>11</sup>

Although this is not a direct statement to the effect that wilfulness, deliberation and premeditation are the grand criteria of first degree murder, it, without that inference, does not make sense. Certainly where defendant's intoxication is put forth as a defense because it is claimed he cannot have the necessary intent to commit the crime charged and where he is charged with first degree murder and the Court uses the terms, "wilful, deliberate and premeditated" in defining the necessary element of intent, it is reasonable to infer that the language describes the intent element in first degree murder in cases other than where intoxication raises the question.

The effect of this case, in the writer's opinion, is to make first degree murder in Maryland, under Article 27, Section 494, exactly what that statute says it is. It is beyond the purpose of this comment to review what is meant by the words "deliberation" or "premeditation" except to say that, by quoting *People v. Majone*,<sup>12</sup> with approval, there must be some interval of time lapse between the formation of the intent to kill and the act of killing to satisfy the requirement of premeditation.

2. Article 27, Section 498 provides: "All other kinds of murder shall be deemed murder in the second degree." This statute provides therefore that those unlawful killings without legal justification or excuse and without legal provocation are second degree murder. Defined positively, second degree murder in Maryland under this statute is the equivalent to minimum common law murder as it is defined by Blackstone, namely, the unlawful killing of "any reasonable creature in being . . . with malice aforethought, either express or implied."<sup>13</sup>

The difference between intentional murder in the first degree and murder in the second degree therefore lies in this: First degree murder, under Article 27, Section 494, is that unlawful killing of a human being which is wilful, deliberate and premeditated; while second degree murder, under Article 27, Section 498, is other unlawful killing with malice aforethought. First degree murder therefore superimposes wilfulness, deliberation and premeditation upon the legal meaning of malice aforethought. This is

<sup>11</sup> *Supra*, n. 1, 586.

<sup>12</sup> *Supra*, n. 9.

<sup>13</sup> COMMENTARIES (Sharswood, 1864), Book 4, p. 194.

only so according to the analysis of *Chisley v. State*<sup>14</sup> as the author understands it, for as recently as *Webb v. State*,<sup>15</sup> the Court of Appeals said "Murder is still a common law crime in Maryland, although it is divided into two degrees carrying different penalties."

3. The definition of second degree murder is at least verbally clear. But the term "malice aforethought" has been distorted from its normal meaning until it is unrecognizable when compared with its "lay" meaning, or the meaning it had when Blackstone said that it was the grand criterion of murder. The following discussion of malice aforethought helps to define murder in the second degree and to answer the third question, namely: What is the scope of malice aforethought in Maryland under *Chisley v. State*? The Court said: "Malice has been defined, in this connection, as the intentional doing of a wrongful act to another without legal excuse or justification."<sup>16</sup> "This connection" refers to malice as being the essential distinction between murder (in the second degree) and manslaughter. In order to measure the scope of the thought within this statement it is necessary to compare it to some accepted definitions of malice aforethought.

a. Snyder on "Criminal Justice",<sup>17</sup> says,

"The slayer has malice aforethought in his mind, if (1) he kills with an actual intent to kill the person killed or another person; or if (2) he kills without intending to kill anybody in perpetrating or attempting to perpetrate a felony, the actual intent to commit the underlying felony being the malice aforethought in his mind; or (3) if he kills without intending to kill anybody but with intent to do great bodily harm to somebody or by a grossly reckless act."

b. Holmes, in his work "The Common Law",<sup>18</sup> cites Sir James Stephen, in his Digest of Criminal Law,<sup>19</sup> as follows:

"'Murder is . . . unlawful homicide with malice aforethought.' In his earlier work,<sup>20</sup> he explained that malice meant wickedness, and that the law had de-

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<sup>14</sup> 95 A. 2d 577 (1953).

<sup>15</sup> 93 A. 2d 80, 81 (Md., 1952).

<sup>16</sup> *Supra*, n. 14, 585.

<sup>17</sup> (1953), 601-602.

<sup>18</sup> 43rd printing (1949), 51.

<sup>19</sup> Art. 223.

<sup>20</sup> GENERAL VIEW OF THE CRIMINAL LAW OF ENGLAND, p. 116.

terminated what states of mind were wicked in the necessary degree. Without the same preliminary he continues in his Digest as follows: 'Malice aforethought means any one or more of the following states of mind . . . (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 knowledge 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; . . .'

c. Miller on "Criminal Law"<sup>21</sup> says,

"The difficulty of defining malice aforethought is further illustrated by the fact that it is so broad in scope that it exists in each of the following circumstances: (a) When there is an intention to cause the death of, or grievous bodily harm to, any person, whether such person is the person actually killed or not (except when death is inflicted in the heat of sudden passion or adequate provocation . . .); (b) When there is knowledge upon the part of the defendant that his act or omission will probably cause the death or grievous bodily harm to, any person, whether such person is the person actually killed or not, although such knowledge 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) When the homicide has been committed in the commission of or attempt to commit a felony; . . ."

d. Clark and Marshall on the "Law of Crimes"<sup>22</sup> defines malice aforethought as follows:

". . . is express malice — the homicide not being justifiable or excusable, and not being committed under extenuating circumstances reducing it to manslaughter — (1) When there is an actual intent to cause the death of the person killed. (2) When there is an actual intent to cause the death of any other person. Malice is

<sup>21</sup> (1934), 266.

<sup>22</sup> (5th Ed., 1952), Sec. 239.

implied, with the same exceptions — (1) When there is an actual intent to inflict great bodily harm. (2) When an act is wilfully done or a duty wilfully omitted, and the natural tendency of the act or the omission is to cause death or great bodily harm. (3) Subject, perhaps, to some limitations, when a homicide is committed, though unintentionally, in an attempt to commit, or the commission of, some other felony. —”

The four authorities above, Snyder, Stephen, Miller, and Clark and Marshall, all attach some qualification to the wrongful act which results in unintended death. Snyder says that if the wrongful act is intended it must be an act with an intent to commit great bodily harm, or if the wrongful act is unintended it must be at least a grossly reckless act. Stephen says that the perpetrator of the wrongful act must have knowledge that the act which causes death will probably cause the death of, or grievous bodily harm to someone. Miller says the same as Stephen and Clark and Marshall; that the wrongful act must be one the natural tendency of which is to cause death or great bodily harm. Maryland, in *Chisley v. State*, apparently says that the doing of any wrongful act which results in an unintended homicide creates a presumption of malice aforethought. This thinking seems to be a retrogression to that of Lord Coke<sup>23</sup> who felt that an unintended death resulting from a civil trespass or a criminal act that is only *malum prohibitum* is murder. It is regretted that the Court of Appeals used the language which it did for it broadened the scope of malice aforethought far beyond the accepted concepts of

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<sup>23</sup> INSTITUTE (1809), Part 3, 56:

“Homicide by misadventure, is when a man doth an act, that is not unlawfull, which without any evill intent tendeth to a man's death.

If the act be unlawfull it is murder. As if A. meaning to steale a deere in the park of B, shooteth at the deer, and by the glance of the arrow killeth a boy that is hidden in a bush: this is murder, for that the act was unlawfull, although A. had no intent to hurt the boy, nor knew not of him. But if B. the owner of the park had shot at his own deer, and without any ill intent had killed the boy by the glance of his arrow, this had been homicide by misadventure, and no felony.

So if one shoot at any wild fowle upon a tree, and the arrow killeth any reasonable creature afar off, without any evill intent in him, this is *per infortunium*: for it was not unlawfull to shoot at the wilde fowle: but if he had shot at a cock or hen, or any tame fowle of another mans, and the arrow by mischance had killed a man, this had been murder, for the act was unlawfull.

If a man knowing that many people come in the street from a sermon, throw a stone over a wall, intending only to feare them, or to give them a light hurt, and thereupon one is killed, this is murder; for he had an ill intent, though that intent extended not to death, and though he knew not the party slaine.”

the term and will place at the disposal of prosecuting attorneys a weapon to secure an unjustified conviction.

4. The Court of Appeals in *Chisley v. State* says, "The law presumes all homicides to be committed with malice aforethought and to constitute murder."<sup>24</sup> This seems to be a well settled proposition of law and it is frequently read by prosecuting attorneys to jurors in an effort to persuade them to return a verdict of second degree murder when the defense has attempted to show circumstances of alleviation, justification or excuse justifying a verdict of manslaughter or of not guilty. Certainly, it is an old proposition of law, having existed from the days of Lombard (1581) to Archbold (1934) but it is not sanctified merely because of its persistence. Several questions may properly be asked:

a. Is the rule an inference of fact? Generally speaking, an inference of fact properly can be said to exist when the probability of error is slight. Thus, assuming that the killing has been proved, is it generally true that the killing was murder in the first or second degree? In order for the presumption of malice aforethought to properly exist as an inference of fact it must be accepted that it is improbable that the accused was guilty only of (1) manslaughter, (2) or not guilty, (3) or not guilty by reason of insanity; or conversely, it must be accepted as true that it is probable that of five possible verdicts the verdict will be one of two, namely, first or second degree murder. Actually the chances are two out of five that the killing was committed under such circumstances as to have been with malice aforethought. Consequently, with the odds against such two verdicts it is difficult to see how the probability of error is slight.<sup>24a</sup>

b. If the rule is not an inference of fact is it a presumption of law? There is, among other doctrines in the criminal law, a presumption of innocence. A defendant in a criminal action is presumed to be innocent until proven to the contrary, and in case of a reasonable doubt, he is entitled to an acquittal. This is the logical rule and the one adopted by the great weight of authority. Thus it appears that the presumption that all killings are committed with malice aforethought comes into direct conflict with the presumption of innocence which attaches to the defendant and the rule that the burden of proof is upon the State to prove the defen-

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<sup>24</sup> *Supra*, n. 14, 585.

<sup>24a</sup> The author acknowledges his indebtedness to the material on pages 21-24, in the excellent book by MORELAND, *THE LAW OF HOMICIDE* (1952).

dant's guilt beyond a reasonable doubt. If one presumption must yield to the other, it is my opinion that it is better to keep the presumption of innocence unimpaired.

In 1935 the case of *Woolmington v. The Director of Public Prosecutions*<sup>25</sup> repudiated the rule that malice aforethought was presumed from proof of the mere fact of the killing. There the defendant was alone in a room with his wife from whom he had been separated, and she was killed as a result of a gun wound caused by a gun which belonged to the defendant and which he had brought with him to her room. Defendant said that the killing was accidental. There were no eyewitnesses nor was there any circumstantial evidence from which there could be a logical inference of intentional killing or arrogantly wanton action on the part of defendant. The jury returned a verdict of guilty of murder after having been instructed so to do unless they were satisfied that the defendant had shown circumstances entitling him to a verdict of manslaughter. The House of Lords quashed the conviction and said that in England by the common law the prosecution must prove the crime alleged and that "no attempt to whittle it down can be entertained."<sup>26</sup> This decision seems to reach the correct result as it subordinates the presumption of the existence of malice aforethought from proof of the mere fact of killing to the cardinal and fundamental principal of the common law of England, of which we are the heirs, that the defendant is presumed to be innocent until the State proves him beyond a reasonable doubt to be guilty.

The law that presumes all homicides to be committed with malice aforethought and to constitute murder conflicts with the law that holds that in order "to support a charge of assault with intent to murder it is generally recognized that there must be proof of both an assault and an intention to murder."<sup>27</sup>

A presumption of malice is not raised in a charge of assault with intent to murder from the mere fact of the use of a deadly weapon. Therefore, assuming the statements in the *Chisley* and the *Webb* cases are correct, if a defendant shoots the victim in a vital spot, but he lives, there is no presumption of malice aforethought either from the fact of the shooting, the use of the weapon, or where the bullet struck, in a charge of assault with intent to murder. But,

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<sup>25</sup> 30 COX'S CRIM. LAW CAS., 234 (1935).

<sup>26</sup> *Ibid.*, 244.

<sup>27</sup> *Webb v. State*, *supra*, n. 15, 82.

if the victim dies, and the charge is murder, it is said, except in the *Woolmington*<sup>28</sup> case, that the homicide is presumed to have been committed with malice aforethought. It would seem that the fact that the victim lives in one case, and dies in another, is not a proper factual difference upon which to base two different propositions of law. This is particularly true when it is realized that the death of the victim is not properly an element of culpable homicide as evidenced by the decisions on jurisdictional questions holding that the state in which the blow was struck, regardless of where the death occurred, has jurisdiction to try the defendant.

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<sup>28</sup> *Supra*, n. 25.