OFFENCE OF MURDER: A CRITICAL APPRAISAL

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OFFENCE OF MURDER: A CRITICAL APPRAISAL

By

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Abstract
'I'his paper examines the law and principles relating to the offence of murder. 'I'his was done by focusing on definition, the one year and a day rule under seetion 314 of the Criminal Code, brain dead patients (under a persistent vegetative state) and an overview of the mental elements of murder.

Introduction

Murder is the most heinous offence against the person. The offence both

from the viewpoint of consequences vis-a-vis sanction is disastrous. It is disastrous in view of the fact that to kill a person means a complete annihilation of his existence and that of the murderer, if the latter's act is adjudged to be unlawful or unjustified. Life itself is a divine gift: for God has commanded that "you must not murder."* [1]

It is in view of this, that the termination of life is universally acknowledged to be the function of the Creator who gave it.[2] This perhaps, explains why life is considered to be sacred and, the reason behind the contention whether human authorities have the competence to terminate it. The school of thought which supports the contention that human authority can terminate life in appropriate circumstances; have argued that there is

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1. Iixodus 30:13: New World Translation of the Holy Scripture^ p.93.
2. In Islamic brotherhood, life is absolutely sacred. In *sura Nissa* verse 92 it is prohibited lor a Believer to kill a Believer. But if it is unintentional or by mistake, the family of the deceased are entitled to a compensation and, it is also ordained that the Believer who kills should free a believing slave. See Holy Qur'an, translated by A. Yusuf Ali. P.209.

no crime of homicide.[3] [4] By this, it is meant that homicide is only unlawful, where it is not justified or authorized by law. This is the purport of section 306 of the Criminal Code which provides that "It is unlawful to kill any person unless such killing is authorized or justified or excused by law."

This means that the sacrosanct of life, may be breached by sovereign authorities - if to do so would make things even i.e. (for example) that he who kills, must also be killed. The above assertion is enshrined in section 33 of the 1999 Constitution of the Federal Republic of Nigeria, wherein the right to life is protected, but may be derogated in the interests of private defence of any person or to protect any person from unlawful violence, or for the defence of property, or killing in order to effect a lawful arrest, or killing done for the purpose of suppressing riot, insurrection or mutiny/[1]

In English Law, the urge to exert the maximum punishment in murder cases, in consonance with the principles of retribution (retributive justice, or deserts) have been abolished. Under that law, death sentence is now regarded as archaic. Thus, in English law, since the abolition of the death penalty by the Murder (Abolition of Death Penalty) Act 1965, a judge has no discretion on sentencing.[5] The judge is compelled to impose a sentence of life imprisonment on conviction for murder.[6]

The crucial issue in the offence of murder borders on intention. What is the requisite *mens rea* for murder under English law is still riddled with controversies. In *Moloney*,[7] Lord Bridge commenting on *mens rea* for murder, said:

> Eirst, was death or really serious injury... natural consequences of the defendant's voluntary act? Secondly, did the defendant foresee that consequence as being a

3. Owoade, M.A.: *Law of Homicide in Nigeria* (Obalemi Awolowo University Press Limited: Ile-Ile; Nigeria, (1990), p.16.
4. Section 33 (2) [a], [b] and [c] of 1999 Constitution.
5. Heaton, *Russell: Criminal Law* (Blackstone Press Limited: London 1996), p.98.
6. *Ibid.*
7. (1985) I ALL.H.R. 1025.

> natural consequence of his act? The jury should then be told that if they answer yes to both questions it is proper inference lor them to draw that he intended that consequences.

In *Ilyam*[8] the majority of the judges felt that foresight by the accused that death or grievous bodily harm (g.b.h.) was highly probable was sufficient mens rea for murder. The House of Lords in Cunningham[9] removed the uncertainties caused by the disparate reasoning used by the individual law Lords in the case *Ilyam* v. *D.P.P* and confirmed that an intention to cause g.b.h. was sufficient *mens rea* for murder.

This paper intends to do a critical re-examination of the definition of murder, as propounded by Coke. The one year and a day rule will also be re-examined, in order to buttress the argument that the rule is out-moded in view of the fact, that current medical diagnosis can assist pathologists to trace with precision, the cause of death, irrespective of the time lag. The cases of people in persistent vegetative state will be examined. The persistent vegetative state (p.v.s.) is a system whereby medical machinery can be used to keep people alive for long periods. The aim of examining this type of medical system is to determine whether a conviction for murder or manslaughter should hang on the chance factor of when medical aid is withdrawn.

For all practical purposes, murder is the gravest offence in the criminal law and, in English law; mandatory life imprisonment is now the most severe sentence. In Nigeria, the sentence for murder is death. In English law, since the report of the Criminal Law Revision Committee in 1980[10], which was not implemented, there have been significant changes in the definition of murder. This can be seen from the re-affirmation of the

8. (1974) 2 ALL.Ii.R. 41.
9. (1981)2 A.II.Ii.R. 863.
10. 14th Report, Offences against the Person, Cmnd. 7844 (1980).

"g.b.h rule" in *Cunningham*[11] to the question over the meaning of intention in *Moloney* and *Hancock* and *Shankland*.[12]

Definition

Section 316 of the Criminal Code defines murder as follows:

> "Except as hereinafter set forth, a person who unlawfully kills another under any of the following circumstances that is to say:
>
> (a) If the offender intends to cause the death of the person killed, or that of some other person;
>
> (b) If the offender intends to do the person killed or to some other person some grievous harm;
>
> (c) If death is caused by means of an act done in the prosecution of an unlawful purpose, which act is of such a nature as to be likely to endanger life;
>
> (d) If the offender intends to do grievous harm to some person for the purposes of facilitating the commission of an offence which is such that the offender may be arrested without warrant, or for the purpose of facilitating the commission of an offence which is such that the offender may be arrested without warrant, or for the purpose of facilitating the flight of an offender who has committed or attempted to commit any such offence;
>
> (e) If death is caused by administering any stupefying or overpowering things for either of the purpose last aforesaid;
>
> (1) If death is caused by willfully stopping the breath of any person for either of such purpose, is guilty of murder.

11. (1982) A.C. 566.

12. *Moloney* (1985) A.C. 905: *Hancock* and *Shank land* (1986) A.C. 455.

The offence of culpable homicide is defined generally under section 220 of the Penal Code, thus:
"whoever causes death:-

(a) by doing an act with the intention of causing death or such bodily injury as is likely to cause death; or
(b) by doing an act with the knowledge that he is likely by such act to cause death; or
(c) by doing a rash or negligent act to commit the offence of culpable homicide."

But lor the offence to amount to murder (i.e. culpable homicide punishable with death) such a homicide must come under section 221 of the Penal Code, which provides as follows:
Except in the circumstances mentioned in section 222, culpable homicide shall be punished with death-

(a) if the act by which the death is caused is done with the intention of causing death; or
(b) if the doer of the act knew or had reason to know that death would be the probable and not only a likely consequence of the act or of any bodily injury which the act was intended to cause.

In English law, the offence of murder is yet to be defined statutorily, although the Committee on Law Reform Commission (CLRC) had attempted a definition, in its proposal for reform of the law of murder. Their recommendation for a statutory definition of the offence was incorporated in the Commission's draft code as follows: "A person is guilty of murder if he causes the death of another or he intends to cause serious personal harm and being aware that he may cause death."

Since the offence is yet to be codified, it means the definition of murder in English law, is still governed by common law as propounded by 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 afore thought, 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.

Capacity to Commit Murder

The above definition means that a person who can commit murder must be responsible, of sound memory and must have attained the age of discretion. This simply means that the person must be sane in accordance with the principles enunciated in the M'Naghten Rules. Such a person must be above 7 years and, if he is under twelve, he is liable if it is shown that he has a mischievous discretion,[13] and in English law, he does not suffer from diminished responsibility.[14]

Eurihcr, Coke's definition of murder tended to limit where the offence of murder can be committed "within any country of the realm". Now under English law such limitation is no longer necessary. English courts now have jurisdiction over offences committed aboard. By virtue of section 9 of the Offences against the Person Act 1861 and section 3 of the British Nationality Act 1948, a murder or manslaughter committed by a British citizen on land anywhere out of the United Kingdom may be tried in any country or place in England as if it had been committed there. Similarly,

13. Smith J.C. and Ilogan, Brian: Criminal Law (Seventh Edition) (Butterworth & Co. Publishers: London, 1992), p.327. See also s,50 (a) and (b) of the Penal Code, under which a child under seven years, is not criminally responsible, but if he is above seven years but under twelve, he is responsible, if it is shown that he has attained sufficient maturity of understanding to judge the nature and consequences of such act.

Id. Section 3 of the Homicide Act, 1957.

homicides on a British ship[15] [16] or aircraft[10] arc also triable in England, whether committed by a British subject or not; but not those on a foreign ship, outside territorial waters.[17]

The Victim of Murder

The consideration as to who can be the victim of murder is traditionally discussed in relation to homicide, albeit, Smith and Hogan[18] have argued, that in principle, the same rules must apply to assaults and offences against the person generally. In this regard, it is argued that Coke's reasonable creature in *rerum natura* is simply a person who can be a victim of an offence in the modern law of offences against the person i.e. any humanbeing.[19]

It is clear, that the aim of determining the "reasonable creature in *rerum natura*"[20], i.e. in-being, is to distinguish a living person, and a corpse on the one hand and, on the other hand, to ascertain at what point during the process of birth, a foetus becomes a person. This is because; it is not murder to kill a child in the womb or in the process of leaving the womb. At common law killing a child in the womb was as "great misprisons"[21] (misdemeanor).[22]

It is now an offence under s.58 of the Offences against the Person Act 1861[23] or, where the child is capable of being born alive, under the Infant

15. Anderson (1868) L.R.I CCR 161, it'was held that the rules apply not only when the ship is sailing on the high seas, but also when the rivers of a foreign territory at a place below bridges, where the tide ebbs and Hows and where great ships go.
16. Jurisdiction over offences within territorial waters is given by the territorial waters Jurisdiction Act 1878, Section 2: see also Oil and Gas (Enterprise) Act 1982 - Section 22.
17. Smith and Hogan, op.cit. p.328.
18. *Ibid,* p.329.
19. *Ibid.*
20. *Ibid.*
21. *Ibid.*
22. According to Hale, I.P.C. 433, it is "a great Crime". Wills J. said in 1866 (BPP 21, p.274) that the crime was absolute.
23. In English Law, the act is now governed by the offence against the Person Act 1861, Section 58. which makes it an offence for a woman to intent to procure her own abortion. See also section 232 of the Penal Code on causing miscarriage.

Life (Preservation) Act 1929.[24] In the eyes of the law, a child yet unborn has no independent existence from the mother. Thus, to kill a child before it acquires such independent existence is not murder, but child destruction under the Infant Life (Preservation Act) 1929. Once a child has been born alive, it is irrelevant that the cord and after-birth have not been expelled from the mother nor severed from the mother. This proposition is in accord with s.5 (2) of the Penal Code:" A child becomes a person when it has been born alive whether it has breathed or not, and whether the umbilical cord is severed or not." Also under section 307 of the Criminal Code, a child becomes a person capable of being killed when it has completely proceeded in a living state from the body of its mother, whether it has breathed or not, and whether it has an independent circulation or not, and whether the navel string is severed or not.

Although the courts have accepted the tests of independent existence as a yardstick to determine whether the killing of a child is murder, the tests that the child must have breathed poses some difficulties. In Brain[25], Park J. said: "...it is not essential that it should have breathed at the time it was killed, as many children are born alive and yet do not breathe for sometime after their birth."

According to *At-Kinson* "there is no known means of determining at what instant the foetal and parental circulations are so dissociated as to allow the child to live without the help of the parental circulation; and this dissociation may precede birth."[26] There is thus uncertainty about the exact moment a child comes under the protection of the law of murder. There is also a paucity of authority on this point, but the last reported case the

24. Section 58 of the Offences against the Person Act 1861 which is subject to Abortion Act 1967. attempts to procure miscarriage from any time alter the conception of the child until its birth, and Section 1 of the Infant Life (Preservation Act) 1929 prohibits the killing of any child which is capable of being born alive. The two offences thus over-lap.

25. (1834) 6C&P 349 at 35.
26. 20 LOR at 145.

CLRC could trace was in 1874.[27] The Committee recommends that the test should be that the victim should have been born and have an existence independent of its mother.[28]

Glanville Williams[29] has suggested an example. He said, if a foetus is injured in the womb and is subsequently born alive but dies as a result of the parental injury, this is murder or manslaughter according to the mental elements.[30] The culpability of the accused depends upon whether a doctor is able to remove the foetus from the womb while it is alive, even though it is so premature that it is doomed to die almost immediatey.[31] In *West,* Maule J[32] directed the jury:

> ...if a person intending to procure abortion does an act which causes a child to be born so much earlier than the natural time that it is born in a state much less capable of living and afterwards dies as a consequence of its exposure to the external world, the person who by her misconduct so brings a child into the world and puts it merely into a situation in which it cannot live is guilty of murder.

This direction certainly represented the law under the felony or unlawful act doctrine. This is so, because the accused would have had the *mens rea* sufficient for murder, at that time, since abortion is unlawful and, there was intention to commit a felony. But applying the "reasonable

27. Handley (1874) 13 COX CC 79, followed by Wright J: In Prichard (1901) 17 TLR 10, Cmnd.7844, para 35.
28. Smith and Hogan, *op. cit.* p.329.
29. Williams, Glanville: *Textbook of Criminal Law* (London: Stevens & Sons, 1978), (Section Ed) p.249.
30. Glanville Williams argues that: "the rule depends" on old authorities dating from Coke, and was 784, 175 E.R. 329. "It was held in Hong Kong that if D Stabs V, a pregnant woman, whose child is born alive and then dies as a result of injury received from the weapon, D is guilty of murder or manslaughter of the child.
31. Williams, Glanville, *ibid.*
32. (1848) 2 Cox C.C. 500. See also Kwok Chak Mind (Hong Kong, 1963) discussed in (1963). (Crim. L.R. 748 and Temkin, "Ore-Injury, Homicide and the Draft Criminal Code", (1986).

creature" doctrine and, the *rerum natura* rules a person who intends to kill or cause serious injury to an unborn child does not intend to kill or cause g.b.h to a person in-being. The above observation goes to show that the prosecution would have had a Herculean task in establishing a case of murder against the accused who is accused of causing the death of an unborn child. In English law, the Infant Life (Preservation Act) 1929 and, the Abortion Act, 1967, have thus, ameliorated the difficulties which the prosecution would have faced in such circumstances. Under these laws the accused would be charged of infant destruction, which mental element differs from that of murder.

It is also necessary to ascertain at what point the human being dies since it is not possible to kill someone who is already dead. In determining this point several questions have been raised i.e. is a person incapable of being murdered "if his heart stopped beating but a surgeon confidently expects it to start again, by an injection or mechanical means."[33] Another question has been asked "is a person dead if he is in a 'hopeless' condition and 'kept alive' only by an apparatus of some kind."[34] A legal definition of these questions is yet to be evolved and, in English law, the CLRC has declined to propose one,[35] due to the fluid state of medical science and the repercussions that such a definition might have on other branches of the law.[36] The medical view on the point is that "the test is one of brain death and that this can be diagnosed with certainty."[37]

In *R.* v. *Matcherek and Steel*,[38] the court was of the opinion that it is possible that a person whose brain had ceased to function would be legally dead, even though their heart and lungs were kept working by a ventilator. Lord Lane C.J. said that:

33. Williams, Sanctity of Life and Criminal Law, 15.
34. Elliot (1964) Med.Sci.L.77: I.M. Kennedy, "Alive or Dead"? (1969) 22 CLP 102: Switching Off Life Support Machines", (1977) Crim. L.R. 443; Hogan "A Note on Death" (1972) Crim. L.R. 80.
35. Smith and Hogan, *op. cit.* 330.
36. CLRC/OAP/R. para.37.
37. British Medical Journal and the Lancet, 31, February, 1979.
38. (1981) 1 WLR 690 C.A.

> ...There is, it seems, a body of opinion in the medical profession that there is only one true test to death and that is the irreversible death of the brain stem, which controls the basic function of the body such as breathing.
> When that occurs it is said the body has died even though by mechanical means the lungs are being caused to operate and some circulation of blood is taking place.

By this authority, it means that brain dead person could not be killed, if the medical machine that had kept him alive was later removed. In that case, the court did not advert to this point, which means a legal authority to authenticate this as the position is yet to be evolved.[39] In *Airedale NHS Trust* v. *Bland*,[40] the patient was seriously injured. His lungs were crushed and punctured and the supply of oxygen to the brain was interrupted. The result of this was catastrophic and the consequence was that an irreparable damage was done to the higher centres of the brain, which had left him since April, 1989 in a condition known as a persistent vegetative state (p.v.s.). In the medical parlance, there was unanimity of opinion, based on the diagnosis and prognosis, that there was no hope of improvement in his condition or recovery. With the concurrence of his family and the consultant in charge of his case and the support of independent physicians, the authority responsible for the hospital where he was being treated as plaintiffs in the action, sought declarations that they might (i) lawfully discontinue all life-sustaining and medical support measure designed to keep the patient alive in his persistent vegetative state including the termination of ventilation, nutrition and hydration by artificial means; and (ii) lawfully, discontinue and thereafter need not furnish medical treatment to the patient except for the sole purpose of enabling the patient end his life and die peacefully with the greatest dignity and the least pain, suffering and distress. Sir Stephen Brown P. granted the declaration sought. On

39. Heaton, Russel: Blackstone's LLB Learning Tests-Criminal Law (Blackstone Press Limited: London 1996), p.97.
40. (1993) 2 W.L.R. 316, HL.

appeal by the Official Solicitor the Court of Appeal upheld the President's order. On appeal by the Official Solicitors it was held dismissing the appeal, that:

> The object of medical treatment and care was to benefit the patient, but since a large body of informed and responsible medical opinion was of the view that existence in the persistent vegetative state, was not a benefit to the patient, the principle of the sanctity of life, which was not absolute, was not violated by ceasing to give medical treatment and care involving invasive manipulation of the patient's body, to which he has not consented and which conferred no benefit upon him to a p.v.s. patient who had been in that state for over three years; that the doctors responsible for the patient's treatment were neither under a duty, nor (per Lord Browne - Wilkinson) entitled, to continue such medical care; that since the time had come when the patient had not further interest in being kept alive, the necessity to do so, created by his inability to make a choice, and the justification for the invasive care and treatment had gone; and that, accordingly, the omission to perform what had previously been a duty would no longer be unlawful.

Under the King's Peace

There is no doubt that Coke's expositions on the definition of murder were postulated in classical words. This seems to create some impression in certain words used. For instance the meaning of the phrase "under the King's peace," appears to suggest that the victim of murder must be living within England's colony. This reasoning was canvassed in the case of *Page*[41] where an argument that an Egyptian national who had been

41. (1954) 1 Q.B. 170: (1953) 2 All Ii.R. 1355 (C-MAC).

murdered in an Egyptian village by a British soldier was not within the Queen's peace, was rejected.'[12]

A person may be held to be living under the King's peace, if the country of his domicile is a political state with all apparatuses capable of affording such a state with the powers to protect its citizenry and aliens alike. Thus, in the present day constitutional government, where the right to life is given a superlative pre-eminence, it is the duty of the sovereign, the synonym of the king, to protect the lives of its citizens and, similarly, that of all aliens whose stay in the country, is with due process. This should not be construed to mean that .illegal aliens are not entitled to protection, but the concerned govermnent might absolve itself from liability to protect such aliens, as their stay in the country was contrary to due process. But it would hardly be a defence on the part of the accused, that the killing of an illegal alien is not murder. This is because the fact of legal stay is a question of immigration laws.

It has been postulated, that persons appear to live "under the Queen's peace" for this purpose, even an alien enemy "unless it be in the heat of war, and in the actual exercise thereof."[42] [43] It means that the killing of an alien enemy far away from the theatre of war is murder.

Causation

The principles of causation can be deduced from Coke's definition of murder in which the condition for murder included the fact that the person wounded or hurt etc died of the wound or hurt etc, within a year and a day after same. This rule has been codified under Section 314 of the Criminal Code in which it is provided that a person is not deemed to have killed another, if the death of that other person does not take place within a year and a day of the cause of death. Such period is reckoned inclusive of the

42. Smith and Hogan argued that "the real issue in that case was whether the court martial assembled in the Canal - Zone had jurisdiction to try the case. It was admitted that if D has been brought to this country and tried here, no question could have arisen as to the nationality of the victim: The court martial was held to have jurisdiction under the Army Act." Smith and Hogan op.cit. p.330.

43. Hale, I.P.C. 433.

day on which the last unlawful act contributing to the cause of death was done. When the cause of death is an omission to observe or perform a duty, the period is reckoned inclusive of the day on which the omission ceased. When the cause of death is in part unlawful act, and in part an omission to observe or perform a duty the period is reckoned inclusive of the day of which the last unlawful act was done or the day on which the omission ceased, whichever is the latter.

But the fact remains that a fatal injury inflicted on a victim could last for more than the limitation period above. The argument here, is that the role traceable to Coke's exposition on the definition of murder, would have been most efficacious in classical times, when medical sciences had not attained the height of sophistication, as is the case in modern times. It was problematic in those days to connect a person's act to a victim, due to the injuries inflicted a considerable time before. However, in spite of the sophistication of current diagnostic techniques, the rule has been retained. The time lag between the infliction of injury and the death, underlined Coke's formulation of the rule: "... for if he dies after that time, it cannot be discerned, as the law presumes, whether he died of the stroke or poison etc or a natural death."[1'1]

Owoade [44 45] does not see the rationale for the retention of the rule in view of the progress made by medical sciences relating to diagnosis and prognosis. The learned author argues that:

> The retention of the rule in modern times can however not be justified on those grounds. Certainly, medical science has improved since the time of Coke and the cause of death can now be traced with greater precision by pathologists.
> This rule can now only stay on the basis that the suspect should not remain indefinitely at the risk of prosecution for murder. This conceded however, it is still felt that the rule if

44. Owoade, M.A.: *Law of Homicide in Nigeria* (Obalemi Awolowo University Press Limited lie lie Nigeria 1990, p.21.
45. Heaton, Russel, *op.cit.* p.97.

to be retained at all should only exist as part of procedural law and should not be part of the ingredients of the offences of murder as it is now; as it has an overall danger of barring justifiable prosecution of murder suspects.

One leg of the argument in support of the rule is that the rule is reasonable because the accused should not be left with a sword of Damocles hanging over him for an indefinite period. The English Law Commission has recently recommended the abolition of the rule for all offences subject to certain safeguards.'[16] In English law, the position now, is that the Attorney General's consent would be required in a homicide offence where the death occurred more than three years after the accused's last act causing the death,[*47] or where the accused has already been (a) convicted of a non-fatal offence in respect of the acts eventually causing death and (b) sentenced to at least two years imprisonment for it.[48]

It should, however, be noted, that although the accused may not be guilty of murder or manslaughter, he would generally be guilty of a non- fatal offence against the person in respect of the deceased initial injuries. Under the Penal Code, if the accused intended to cause hurt only, he would be convicted under section 225 and, in English law, if the accused intended serious injury he would be convicted under section 18 of the Offences against the Persons Act 1861. Also, if he intended to kill, he would be prosecuted for attempted murder under section 229(1) of the Penal Code and section 320 of the Criminal Code. The same is the position under English Law.[49] Under the two Nigerian codes, the punishment would be life sentence, but in English law, the law Commission points out that it would generally lead to a lower sentence being imposed.[50] A graphic illustration of this principle is provided by *Clark*,[51] In that case, following

46 Ilenton, Russel, *op.cit.* p.97.
47. *Ibid.*
•18. Law Comm. No. 230 (1995), *ibid.*
49. Heaton, Russell, *op. cit,* p.97.
50. *Ibid.*
51. (Unreported) reported in (The Observer, 11 June, 1995).

accused's assault, accused's victim died after being in a coma for 16 months. The accused had earlier been convicted under section 18 and sentenced to two months imprisonment. He was released nine weeks after his victim's death.[52]

The case of *Dyson,*[53] illustrates how the rule works. The accused was charged with the manslaughter of his child in March 1908. The accused inflicted injuries on him in separate incidents in November 1906 and November 1907. The judge directed the jury that they could find the accused guilty if they considered death to have been caused by the injuries inflicted in November 1906. The Court of Criminal Appeal held that the accused could only be convicted of manslaughter if it was established that the injuries inflicted in December 1907 were a substantial cause of the child's death.[54] The court set aside the conviction: "it is still undoubtedly the law of the land that no person can be convicted of manslaughter where the death docs not occur within a year and a day after the injury was inflicted, for in that event it must be attributed to some other cause."

In the United States, it seems that the rule is not treated as that of substantive law, which must be strictly adhered to. In that jurisdiction, the year and a day rule, is treated as a rule of procedure, which may be disregarded, if the act is sufficiently connected to the death, although the death occurred after the one year and a day limitation. The Supreme Court of Pennsylvania in the case of *Common Wealth* v *Ladd*[55] held that the year and a day rule was not more than a rule of evidence or procedure only and might therefore be displaced by adequate proof of causation.[56]

Against the background of the much flouted claim of the developments in modern medical sciences in which the difficulty in proving a causal connection between old injuries and a subsequent death, is said to have been simplified, the above decision may be taken as stating what ought to

52. In view of such cases, the Law Reform (year and a Day Rule) Act 1996 was passed to implement the Law Commission's Recommendations.
53. (1908) 2 K.B. 454.
54. Heaton, Russell, *op. cit.*
55. 402 Pa. 164, 116 A 2d 501 (1960).
56. Owoade, M.A., *op. cit.* p.21.

be the correct position. This is because if it is now unanimously agreed that modern medical science can easily diagnose such connection irrespective of the time lag since the said act occurred, it may therefore, be argued that the period of limitation of a year and a day, should be confined to the relics.

This argument is further buttressed by the fact that legal doctrine does not accord with medical doctrine.[57] This has the effect of resulting to conflicts, which may occasion a miscarriage of justice. For instance, a victim of a fatal hurt or wound may have died after the expiration of a year and a day rule period, but medical opinion may connect his death to the old injuries inflicted. Conversely, the victim may die within the year and a day rule and, a medical opinion, would not link his death to the injuries inflicted. In the first example, the accused should be released, although his unlawful act has been directly connected to the death by medical proof and, in the second example, applying the ratio in *Ladd* (supra), the accused may be convicted, irrespective of the medical opinion absolving him from the death of the victim of fatal hurt, even though, there is adequate proof of the causation.

One would, therefore, agree with Owoade, that the rule has the danger of barring the justifiable prosecution of murder suspects.

Contributory Causes

In *R v Dyson (Supra)* the child suffered from meningitis and would have died shortly anyway. The act of the accused merely accelerated what was an imminent event in that case, which was clearly an inevitable event. The problem here lay on the question whether acceleration of death from

57. See Seelion 57 (1) of the Evidence Act, CAP E14, Laws of the Eederation 2004 - which provides inter alia, that upon a point of science or art, the opinion of persons specially skilled in science or art are relevant facts: See also *Oke v Trenco Ltd* (1963) 2 ALL N.L.R. 187 as per De Lestang, C.J., (High Court of Lagos) which laid down the principle that a court is not bound by the opinions of experts. In that case, the opinions of two medical doctors were rejected by a Magistrate, and the High Court on appeal confirmed the judgment.

benign motives should be regarded as murder.[58] A death is said to have been accelerated in certain instances, two of which are (1) where pain relieving drugs are given to a patient who is near death and (2) where persistent vegetative state patients, are unlawfully deprived of all life support measures. In these instances the motive may be to relieve the victim from the untold sufferings of a prolonged injury or illness, which from the opinions of medically qualified persons, there is no hope of survival, but in law, generally speaking, motive of an accused is.irrelevant, in situation like this, the law is concerned with *mens rea* and *actus reus.*

An Overview of Mental Element of Murder

In criminal law, two elements are essential for criminal liability: *actus reus* and *mens rea.* These are essential elements which the crown had to establish before criminal liability could be imposed. The maxim at common law was *actus non facit reum nisi mens sit rea* (an act is not wrongful unless there is a wrongful state of mind. *Mens rea* is a generic term which refers to the mental element of a crime.[59] The accused's liability or otherwise depends on the inference reached by the court as to his culpability, evidenced for his act. Mental element is the determining factor as to whether the accused in a murder case, will receive a life sentence, a term of years in prison short of life, sentenced to death or no legal sanction whatsoever.

In persistent vegetative state cases, the motive, no matter how innocuous is irrelevant; the mens rea is present, which is to take the life of a person. In the case of *Robert Porter*,[60] a hospital consultant was convicted at Winchester Crown Court of attempting to murder a patient dying of rheumatoid arthritis. He was found guilty of administering a lethal injection of potassium chloride to the patient, whose agony had become so

58. Janet, Diane *et at. Cases and Materials on Criminal Law* (Blackstone Press: London, 1993), p.394.
59. Janet, Dine, *et.al, op. cit,* p.89.
60. Sunday Telegraph, 20 September, 1992.

appalling that not even near lethal doses of heroin could keep the pain at bay.

In another case of Dr. Henry Palmer 'Dr. Adams' trial for murder.[67] Devlin J., summing-up the jury said:

> Murder was an act or series of acts, done by the prisoner, which were intended to kill, and did in fact kill. *It did not matter whether Mrs. Morrell's death was inevitable and that her days were numbered. If her life were cut short by weeks or months it was just as much murder as if it was cut short by years*...If the first purpose of medicine which is the restoration of health - could no longer be achieved, there was still much for the Doctor to do, and *he was entitled to do all that was proper and necessary to relieve pain and suffering even if the measures he took might incidentally shorten life by hours or perhaps even longer. The doctor who decided whether or not to administer drug could not do his job if he were thinking in terms of hours or months of life.*

These authorities go to show that in causation the motive of the accused is irrelevant. What is paramount is the acceleration of death by the accused. However, contributory cause need not be the act of the accused only. It might include the acts of others including the acts of the deceased himself.[61] [62] At common law, the negligence of the plaintiff constituted an absolute defence in a civil action of negligence. In *Swindall and Osorn,*[63] one of the accused ran over and killed an old man, Pollock C.B., directed the jury that it was immaterial that the man was deaf or drunk or negligent and contributed to his own death.

61. (1957) Crim. L.R. 365.
62. Smith and Ilogan, *op.cit,* p.333.
63. (1846) 2 Car and Kir. 230, p. 132.

A Substantial Cause

The offensive act which resulted to the death of the victim must be shown to have substantially contributed to his death. This means that where the acts of the accused are shown to be insignificant or minute, the death of the deceased may not be attributed to his act. In such instance, the contribution may be ignored under the *"de minimis*" principle.[64] However, it has been postulated, that it would be misleading to direct a jury that the accused is not liable unless his conduct was a "substantial cause".[65] Since every one must die, killing is merely an acceleration of death and factors which are inconsequential to the acceleration will be ignored. In the case of *Adams*[66] Devlin J. directed the jury that there is no special defence justifying a doctor in giving drugs which would shorten life in the case of severe pain: "if life were cut short by weeks or months it was just as much murder as if it were cut short by years".

Thus, if a doctor administers drugs knowing them to be likely to shorten life, then he intends to kill.[67] Secondly, if the act of the doctor was "necessary and proper" in order to "relieve pain and suffering, "he has a defence, even if the steps he took may incidentally shorten life.[68] In the later case, the act may be justified on the basis that it could be a case in which motive affords an excuse. This proposition simply means that the doctor has no *mens rea* since the *actus reus,* i.e. the death was not contemplated when such drugs were administered.

Intervening Acts or Events

One of the principles with regard to causation in homicide cases is that an accused is guilty of causing death of a victim, if the victim died as a result of the injury he inflicted on the deceased. This means that where some

64. Smith and Hogan, *op.cit.* p.334.
65. Cato (1976) 1 All E.R. 260 at 265 -*266"*... it need hardly be added that (the cause) need not be substantial to render the accused guilty: *"Malcherak* (1981) 2 ALL E.R. 422 at 428.
66. (1957) Crim. L.R. 365: (1957) Times, 9 April, Sybille Bedford, "The best we can do", at 192: Devlin, "Easing the passing" (1985).
67. Smith and Hogan, *op.cit,* p.332.
68. Begnon, "Doctors as Murders" (1982) Crim. LR.17.

other act or event intervenes before death, some problems arise as to whether it was the earlier injury or the subsequent one that caused the death of the deceased. The new intervening act (novus actus interveniensj, where it is done without any pressure, intimidation or mistake, "will normally operate to relieve the defendant of liability for a further consequence".[69]

' According to Professor Chukkol,[70] in a situation like this, the chain of causation is considered broken, any resultant death is attributed to the new cause. But the subsequent act or event should be capable of independently causing the death of the deceased irrespective of the earlier injury inflicted on the deceased by the accused. Where the subsequent act is not mortal, it would be tantamount to an extreme view of criminal responsibility for a man to be responsible for harm that is directly caused by others. Glanville Williams[71] contend that this does not represent criminal law.

It should be pointed out that not every act or omission of a casual nature will relieve the accused from liability for the subsequent death. Three grounds on which he might still be held to have caused the death are as follows:

(i) Where the earlier injury inflicted by the accused is held to be "an operating cause" and a "substantial cause."[72] The intervening act may not obliterate an earlier injury inflicted by another person, where the earlier injury inflicted is adjudged not mortal, but may cause death in combination of the subsequent injury inflicted by the accused. The accused and that other person are both guilty of homicide.
Also, the deceased's injury is treated negligently by a doctor or the deceased himself, and the deceased dies of the ill treated or non-treated wound, the accused is liable.

69. Williams, Glanville, *op. cit.* p.388.
70. Prof. Chukkol, Kharisu Sufiyan: The Law of Crimes in Nigeria (Ahmadu Bello University Press, Zaria, 1988), p.28.
71. Williams, Glanville, *op.cit* p.337.
72. *Smith* (1959) 2 QB 42-43, per Parker C.K.

In *People v. Lewe*,[73] the deceased having received a mortal gunshot wound from which he would have died within the hour, cut his throat and died within five minutes. The accused was held liable for manslaughter on the ground that the original wound was an operating manslaughter and operating cause. The court further held that when the throat was cut, (the deceased) was not merely languishing from a mortal wound, he was actually dying, and after the throat was cut he was actually dying; and after the throat was cut he continued to languish from both wounds. Drop by drop the life current went out from both wounds, and at the very instant of death the gunshot wound was contributing to the event.

(ii) A victim may die due to some acts which would not have occurred but an act done by the accused which act is an actual consequence of the accused's act.[74] The accused is liable if it is shown that his act is foreseeable as likely to occur in the normal courses of events. Here the injury inflicted by the accused is not an "operating cause," the accused is still liable to have caused the death. But it must be shown that the act or event was the natural consequence of the accused's act. Failure of which, the accused is not liable.

(iii) In this third place, the rule is that the accused must take his victim the way he finds him. *The locus classicus* on this point is the case of Blaue.[75] The accused stabbed the

73. Cal: 551 (1899) 5 cut of California.
74. Smith and Hogan, *op. cit,* p.336.
75. (1975) 3 ALL E.R. 446: (1976) Crim. I.R. 648 and commentary: *Smithers* (1976) 34 C.C.C. (2nd) 427 (Sup.et. of Canada) is to the same effect, see also *Effang* v. *State* (1969) 1 ALL N.I.R. 339: I.N.M.I.R. 186 - which decided that if the victim's death is traceable to the injury inflicted by the accused, it would be of no moment for him to argue that the deceased

> deceased a young girl, and pierced her lung. She was told that she would die if she did not have a blood transfusion. Being a Jehovah's Witness she refused on religious grounds. She died from the bleeding caused by the wound.
> The accused was convicted of manslaughter and argued that the deceased's refusal to have a blood transfusion being unreasonable had broken the chain of causation. It was held that the judge had rightly instructed the jury that the wound was a cause of death. Lawton L.J. said:[76]
>
> "It has long been the policy of the law that those who cause violence on other people must take their victims as they find them. This in our judgment means the whole man, and just the physical man. It does not lie in the mouth of the assailant to say that his victim's religious beliefs, which inhibited him from accepting certain kinds of treatment, were unreasonable. The question for decision is what caused the death. The answer is the stab wound".

The implication of this decision to the medical profession is obvious. It means that if the victim of a homicidal assault died as a result of the medical treatment instituted to save his life, the assailant would not be guilty of murder, if the treatment could be shown to be "not normal."[77] Another analogous situation is where the death of a victim is due to the negligence of the injured person himself. In such circumstances the

might have avoided the injury by proper precaution or that his death from the injury might have been prevented by proper care or treatment.

76. *Ibid* p.450.

77. In Nigeria, under section 303 of the Criminal Code, it is the duty of every person who, except in case of necessity, undertakes to administer surgical or medical treatment to any person, to have reasonable skills and to use reasonable care in doing such act. Death resulting from failure to exercise due care is manslaughter: Section 317 of the Code: *R* v *Akerele* (1941) 7 WACA 56.

question is whether the act of the victim himself should exempt the accused from liability lor his ultimate death. In *Wall's* case[78] where the former Governor Goree was convicted[79] of the murder of a man by the illegal infliction on him of a flogging of 800 lashes, there was evidence that the deceased had aggravated his condition by drinking spirits. MacDonald L.C.B., told[80] the jury:

> ...there is no apology for a man if he puts another in so dangerous and hazardous a situation by his treatment of him, that some degree of unskilfulness and mistaken treatment of himself may possibly accelerate the fatal catastrophe. One man is not at liberty to put another into such perilous circumstances as these, and to make it depend upon his own prudence, knowledge, skill or experience what may hurry or complete that catastrophe, or on the other hand may render him service.

According to Smith and Ilogan,[81] the following propositions at present represent the law:

(i) Medical evidence is admissible to show that the medical treatment of a wound was the cause of death and that the wound itself was not.[82] This is so whether or not the wound is mortal.

78. (1802) State Tr. 54.
79. Twenty years after the event.
80. *Wall's case {supra).*
81. Smith and Ilogan, *ibid,* p.342.
82. It has been argued that *'Jordan* must be an authority for this at least. Moreover at the trial in Smith Dr. Campus gave evidence, that, with proper treatment, P's chances of recovery were high as 75 percent:' Smith and Ilogan, *ibid.*

(ii) If a wound was an operating and substantial cause of death, the accused is guilty of homicide, however badly the wound was treated.[83]

(iii) If a wound was not an operating and substantial cause of death (i.e., it was effectively healed) but the deceased was killed, e.g. the inadvertent administration of deadly poison by a nurse, the wrongful administration of terremycin, or the ill-treatment of a tracheotomy, the accused may or may not be guilty of homicide. The test we must now apply is the *Cheshire* independence/potency test. A better test, it is submitted, would be whether the treatment, or the manner of administering it was so extra-ordinary as to be unforeseeable - which may be much the same thing as asking whether it was gross negligence.

It is apparent from Coke's definition of murder that the killing of the reasonable creature in *rerum-natura,* must be with malice afore-thought, either expressed by the party or implied by law. If the expression 'malice- afore-thought' is to hold sway, it then means that a killing is murder, if and only if, it was the product of premeditation accompanied with a malicious intention. English authors seem to have an aversion to the expression 'malice-afore-thought.' Commenting on mental element for murder, Smith and Hogan,[84] said:

> The *mens rea* of murder is traditionally called 'malice afore-thought'. This is a technical term and it has a technical meaning quite different from the ordinary popular meaning of the two words. The phrase, it has been truly said: is a mere arbitrary symbol .....for the

83. But Hart and Honor, 361 discussing *Blaue,* 'suppose that P had called for a blood transfusion and had been caused by the doctor's callousness, not the original wound.' Surely it would have been caused by both. The wound would certainly have been an operating and substantial cause - Smith and Hogan, *Ibid,* p.342.

84. Smith and Hogan, *op.cit,* p.346.

> 'malice' may have in it nothing really malicious; and need never be really 'afore-thought. '

According to Heaton:[85]

> The term 'malice afore-thought' is a term of art with a particular technical legal meaning. There need be neither 'malice' nor 'afore-thought.' The 'Killer' need not be motivated by 'malice' or ill will so that a deliberate 'mercy' killing to alleviate the unbearing suffering of a terminally ill loved one is with 'malice afore-thought' and therefore murder. Equally there is no need to prove that the intentional killing was done with any premeditation or 'afore-thought', A spur of the moment decision to kill suffices.

Cross and Jones, in explaining the meaning of the term malice afore-thought, stated three stages in homicide cases, in which malice-aforethought can be present. They argued that:

> ...It is also necessary to recollect that malice aforethought does not always imply an intention to kill....
> Before the Act of 1957 came into force, there were three kinds of malice afore-thought. It might have been 'express,' 'implied,' or 'constructive'. Constructive malice afore-thought may still be express or implied. It is said to be 'express' in cases in which there is an intention to kill, and 'implied' when there was an intention to do grievous bodily harm, or to do an act likely to cause death or grievous bodily harm...[86]

85. Heaton, Russell, *op. cit,* pp. 98 - 99.
86. Cross, Rupert and Jones, Philip Asterley: *An Introduction to Criminal Law* (London: Butter Worths, (1964) (Filth Edition) pp. 133 - 134.

The term 'malice afore-thought,' clearly, is now an outmoded principle and the House of Lords was opportuned to make it irrelevant in the definition of murder in *Moloney.*[81] In that case the House of Lords described 'malice afore-thought' as an 'anachronistic' and now wholly inappropriate phrase "which still lingers on in the definition of murder to denote the necessary mental element."[87] [88] The question then, is what is the necessary mental element for murder? From authorities, it may be argued, that it means either:

a. an intention to kill; or
b. an intention to cause grievous bodily harm.

The next question here, is what is intention? This refers to a state of mind of a person at the time the actus-rcus of a crime was committed. Being a subjective issue, it is extra-ordinarily difficult to positively prove what the condition of the mind of the accused was at the material time or that his mind was inflicted with malice or premeditation when the unlawful act was committed. This explains why intention to do g.b.h. is accepted as sufficient or alternative *mens rea* for murder. The House of Lords in Cunningham[89] removed the confused state of the law in this regard, arising from the dissenting reasoning used by the individual law Lords in the case *Ilyam* v. *D.P.P*[90] by confirming that intention to do g.b.h. was sufficient mens rea for murder.

What Does Grievous Bodily Harm Mean?

The phrase 'grievous bodily harm' means no more than 'serious harm' according to Saunders.[91] But in *D.P.P.* v *Smith,*[92] the House of Lords preferred 'really serious harm.' Whether g.b.h. means 'serious' harm or

87. (1985) 1 ALL Ii.R. 1025.
88. Heaton, Russell, *op.tit,* p.99.
89. (1981) 2 ALL E.R. 863.
90. (1974) 2 ALL Ii.R. 41.
91. (1985) Grim. L.R. 230, C.A.
92. (1960) 5 ALL Ii.R. 161.

'really serious harm,' but the terms differ considerably from intention to cause a life-threatening injury. Lords Diplock and Kilbrandon in *Iiyam* v *D.P.P* were of the view that it should be an intention to cause injury likely to endanger life, but their view was only an *obiter,* as the majority disagreed.

A person who intends to do g.b.h to another may not really intend to kill. But the law would impute intention to kill, where intention to do g.b.h resulted to the death of the victim. Antagonists of this rule have argued that:

> *"if the accused aims to break someone's leg, he intends to cause grievous bodily harm. It seems wrong that he should be convicted of murder if the victim dies due to unforeseen medical complications. "*[93]

In English law if the recommendation of the English Draft Criminal Code in Clause 54(1) is accepted, intention to do g.b.h. to be sufficient *mens rea* for murder, the accused must act intending to cause serious personal harm and being aware that he may cause death.[94] This proposal introduces element of foresight. But the fact is that foresight, no matter how probable, is not alternative to the necessary intention. But whether the accused intended to kill or not, is a question for the jury, but the golden rule is that the judge should avoid an elaborate formulation of what is meant by intent and leave to the jury's good sense to decide whether the accused acted with necessary intent.

However, there are circumstances when the judge's elaborate formulation on the meaning of intention becomes necessary. Lord Lane C.J. in *Hancock*[95] said:

> One of the occasions on which some further explanations (of the meaning of intention) may be required is where the

93. Ileaton, Russell, *op.cit,* p.100.
94. *Ibid.*
95. (1986) 1 ALL E.R. 641, C.A.

> defendant's motive or purpose is not primarily to kill or injure but the methods adopted to achieve the purpose are so dangerous that the jury may come to the conclusion that death or injury to some third party is highly likely.
>
> According to Lord Bridge, who acted as the mouth piece for all the judges in *Moloney,* the judge should direct the jury as follows; 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 questions it is proper inference for them to draw that he intended that consequence.

Heaton[96] has criticized this direction on the ground that it failed to state that foresight of death, as a natural consequence is intention to kill. This observation is well taken, because the formulation appears to depend on the jury's whims. Further, the formulation is contradictory and to some extent ambiguous. For instance, it is not clear what he meant by "natural consequence." This is because an act may be the natural consequence of the accused - the accused may not be sure of its certainty. Based on the ratio in *Moloney,* Heaton[97] argues as follows:

(a) An intention to kill or cause g.b.h. was essential for murder.
(b) Intention did not include foresight of (even high) probability (contrary to the view of some judges in (Hyam) .
, (c) Lord Bridge sought to include foresight by the accused that death or g.b.h. was a practical certainty in establishing intention but he did not define the substantive law on intention in this way.

96. Iicaton, Russell, *Ibid,* p.101.
97. *Ibid,* pp. 101 - 102.

(d) In the end, it is at the discretion of the jury to regard someone who docs not aim to kill but who foresees death from his infliction of g.b.h as virtually certain as having the necessary intention.

Conclusion

Edward Coke's (ex-CJ of England) exposition on the meaning of murder under common law is thoroughly examined because it is believed that principles distilled therefrom are still relevant in construing statutory definition of murder. Erom the medical point of view where the brain stopped .functioning death has occurred. But legal opinion on the point has not been given. The House of Lords premise for declining opinion on the issue is because of the consequences such opinion would have on other branches of law, although no case has specifically sought for such a declaration. The year and a day rule was found to be outmoded due to the level of sophistication of medical sciences. Making the rule part of a constituent of an offence may provide an escape route for persons who should be liable for murder. It is therefore recommended that the American model where the rule forms part of procedural law should be introduced into our law on murder.

The paper did not focus on specific examination of mental element of murder statutorily. It is however believed that the treatment of the principle in this paper will assist in ascertaining what constitutes the *mens rea* of murder in particular cases.