LAWS1016: Criminal Law

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OFFENCES
THE ELEMENTS OF CRIMINAL OFFENCES

(i) Generally

ACTUS NON FACIT REUM NISI MENS SIT REA

Actus reus is:
- Conduct (act, or omission with duty of care or state of affairs); OR
- Conduct in specified circumstances; OR
- Results, consequences of conduct

Mens rea is NOT a general condition, or a guilty mind; it is a specific STATE of mind

(ii) Woolmington and Evidential Burdens

Woolmington v DPP: the golden thread through the criminal law is that it is the prosecution’s duty to prove the accused’s guilt
- Exception: where the defence of insanity is raised, and subject to any statutory exception

An evidential burden: governs what a judge does, in leaving a question to the jury, the passing the judge duty
- The duty to produce sufficient evidence for a tribunal to call upon the other party to answer

A legal burden: governs what a judge says, in directing the jury how to reach their verdict
Braysich v R: where the accused has the legal burden, they also have the evidential burden

- TWO types of defence
  1. P has legal burden; A has evidential burden: the test is whether the jury has a reasonable doubt that each element is met
  2. A has both burdens: the test is whether the jury doubts on the balance of probabilities

- The beyond a reasonable doubt test applies only to the elements, not the evidence as a whole

(iii) He Kaw Teh: and the presumption in favour of a subjective mental element where an offence-creating provision is silent as to mens rea

He Kaw Teh: Where legislation is silent as to mens rea, then

- There is a presumption that mens rea is an essential element and that the mental element is subjective
- This can be rebutted, and displaced by strict or absolute liability
- Rebutting it:
  o Consider the words of the statute
  o Consider the subject matter of the statute
    o Balance “grave social evil” (inclines towards absolute liability) and “truly criminal” (inclines towards presumption)

Lim Chin Aik: Also important is whether putting the defendant under strict liability assists the enforcement of the regulations

THREE TYPES of OFFENCE

1. Mens rea must be proved by prosecution
2. Strict Liability: mens rea is presumed, unless the defence advances material proving an “honest and reasonable belief” that the conduct is not criminal
   - The prosecution then has the burden of negativing this belief, beyond reasonable doubt (CTM v R)
3. Absolute Liability: mens rea plays no part, and guilt is established by proof of the objective ingredients

NB for an offence to be absolute liability, the Parliament must “make its intention plain by express language or necessary implication” (CTM v R)
(iv) Strict Liability and the honest and reasonable mistake of fact ‘defence’

**Proudman v Dayman**: ‘genesis of defence’ in Australia
- an **honest and reasonable** belief in a state of **facts** which would have made the defendant’s act **innocent** affords an excuse

**SRA v Hunter District Water Board**: this excuse is only available to those who have **thought about the issue**, and so have a **positive belief** of facts or **positive state of mind**
- Mere ignorance or inadvertence is insufficient
- Necessary **even if** it was reasonable to not turn your mind to the facts

NB The defence will really only apply to the **circumstance** of a crime (e.g. consent, age, status)

**Mayer v Marchant**: the mistaken belief must have, if true, made the act **innocent**

**Ostrowski v Palmer**: it must be a mistake of **fact**, not **law**

(v) Have the courts taken the presumption seriously?

In **CTM v R** the Court ignores the presumption, and goes straight to a decision whether it is strict or absolute
- Heydon J expressly challenges the fundamental nature of the presumption
- Hayne J accepts the presumption, but thinks that it doesn’t require a subjective mens rea, just an absence of reasonable mistake of fact
- It may have been because counsel didn’t raise the argument

See further S. Hodson article: the preferred approach is to apply Brennan J’s formulation in **He Kow Teh** (which is still good law!)

**Thomas v R**: the presumption is “the most fundamental element in a rational and humane criminal code”
HOMICIDE

MURDER

(i) Generally

**Crimes Act 1990 (NSW)**

s 18(1)(a) Murder shall be taken to have been committed where:
- the act of the accused, or thing by him or her omitted to be done,
- causing the death charged,
- was done or omitted:
  1. with reckless indifference to human life,
  2. or with intent to kill or inflict grievous bodily harm upon some person,
  3. or done in an attempt to commit, or during or immediately after the commission, by
     the accused, or some accomplice with him or her, of a crime punishable by
     imprisonment for life or for 25 years [CONSTRUCTIVE MURDER]

(ii) Conduct element: act or omission causing death

**SW and BW** murder by omission IS possible where there is
- a duty of care (here a parent/child);
- the probability of death is realised;
- and a deliberate choice is exercised not to intervene

(iii) Conduct element: identifying the precise act

**Arulthilakan v R**: the choice of the act causing death is essentially a matter for the JURY (cf. **Ryan**)

(iv) Conduct element: act or omission causing death

(a) Where the alleged intervening conduct is the act of a third party

**Smith**: if the original wound is still an operating and substantial cause at the time of death, then
causation is established
- Only if the second cause is so overwhelming as to make the original wound merely PART of
  the HISTORY
- Here, the failure to administer later medical treatment DID NOT suffice this test
- Affirmed in **Evans & Gardiner**
- **Cheshire**: does the later treatment render D’s acts INSIGNIFICANT?
(b) Where the alleged intervening conduct is an act of nature

**Hallett**: If D’s acts are so connected with the event that they must be regarded as have a sufficient *SUBSTANTIAL* causal effect subsisting up to the even, without being spent or sufficiently interrupted, causation is made out
- Distinguish between:
  1. Act of nature/natural force
  2. Act of god (which may break the causal link) (like an earthquake)
- OVERALL, this statement of causation is MOST accepted

(c) Where the alleged intervening conduct is the act of the deceased

(1) Refusing medical treatment/rejecting medical advice

**Blaue**: the assailant must take their victim as they find them
- Their religious beliefs (here, a Jehovah’s witness) can’t be called unreasonable if they inhibit certain treatment
- This is still subject to the operating and substantial cause test

*Cf. Singapore*: refusing medical treatment and so dying is equivalent to not going to the hospital: it is still murder, and you treat the treatment as never having occurred

BUT *Cf. Burns*: a drug user voluntarily takes drugs, and dies; is the dealer responsible?
- NO: the independent actions of a sane adult cannot be taken to be caused by another
- So **QUERY** the conflict: maybe intervening in an injury caused by another is distinct from starting the causational chain oneself?

(2) Fright or self-preservation cases

**Royall**: Where the conduct of D induces in the victim a well-founded apprehension of physical harm such as to make it a **natural consequence** or **reasonable** that the victim would seek to escape
- Injury caused by escape is taken as **caused**
- Where the means of escape is **irrational or unexpected**, there may be a difficulty that the action was the victim’s voluntary act; an **over-reaction** could break the chain
- No requirement of **REASONABLE FORESEEABILITY**: confusion between objective element of this, and the subjective state of D’s mind

*Cf. McAuliffe*: A decision that the victim’s response was reasonable or proportionate = a decision that D’s conduct was a **SUBSTANTIAL** cause (This is a question for the jury (cf. *RIK*)

(v) Conduct element: act or omission causing **death**

Alive: **s 20 Crimes Act 1900 (NSW)**: children are taken to be alive at the first breath, regardless of circulation
- Cf. *Iby*: any sign of life after delivery sufficient (e.g. heartbeat)

Dead: **s 33 Human Tissue Act 1983 (NSW)**: death occurs at either:
  (a) **Irreversible cessation of brain function**; or (b) **Irreversible cessation of circulation**
(vi) Mental element: ‘intent to kill’, intent to inflict GBH’

**Zaburoni**: death or GBH is the object at the time of engaging in the conduct

**Stokes and Difford**: it is allowable for juries to judge the SUBJECTIVE mens rea on the basis of the reasonable person and extrapolate it to the actual experience of the accused

**Pemble**: affirmed this, and noted that in this extrapolation, take into account the individual factors—e.g., age, background, emotional state, sobriety.

(vii) Mental element: ‘reckless indifference to human life’

**Crabbe**: there must be the subjective knowledge (foresight) that death was a PROBABLE consequence
- Possibility of death not sufficient
- **Boughey**: probable = likely

**Solomon**: recklessness as to GBH INSUFFICIENT in NSW; such a person is only guilty of manslaughter
- Followed in **Royall**

**Zaburoni**: foresight of risk of harm DISTINCT from intention to produce that harm (cf. **Campbell**)
- That is, foreseeing the probability that an act will produce the relevant consequence is distinct from intent

(viii) The temporal coincidence rule

**Meyers**: Act and intent MUST coincide
- If the prosecution can’t show given elements of the offence had the relevant mental state, no conviction can be returned

**Thabo Melli**: the man dies from exposure after a failed plot to kill him
- Judged that it is impossible to divide up the series of acts
- The fact that the accused had a plan set out to achieve the goal
- Concealing commission of an offence...

**Le Brun**: man helping up his wife who he had assaulted drops her, and she dies
- The appreciable interval of time doesn’t exonerate him
- Again, concealing commission of an original unlawful assault
- UNLIKELY to be stretched to attempts to rescue a victim, rather than conceal the attack

**Fagan**: rolling car on policeman; the argument was run that act preceded intent
- Determined that the act was CONTINUOUS