# LAWS 106
# CRIMINAL LAW

(Lectures with Dr. Amanda Alexander)
Textbook: Thalia Anthony, Penny Crofts, Thomas Crofts, Stephen Gray, Arlie Loughnan & Bronwyn Naylor, *Waller & Williams Criminal Law Text and Cases* (LexisNexis Butterworths, 12th ed, 2013)

D.B. Notes – Student's Lecture and Study Guide

**AUSTRALIAN CATHOLIC UNIVERSITY**
**THOMAS MORE SCHOOL OF LAW**
**NORTH SYDNEY CAMPUS**

# LAWS 106 – CRIMINAL LAW

(Lectures with Dr. Amanda Alexander)
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## Week 1
## THE CRIMINAL LAW
## INTRODUCTION:

Legal terminology:

1. Criminal law – The branch of public law that defines crimes, lays down rules of procedure for dealing with them, and establishes penalties for those convicted.
2. Civil Law – broadly, it is the law that defines relations between citizens. It is a body of law pertaining to noncriminal private disputes among individuals, corporations, and governments. It is that branch of private law dealing with the law of property, commercial law, administrative law, and the rules governing procedure in civil cases.
3. Trial - The hearing of a civil or criminal case before a court of competent jurisdiction. It is a judicial examination or hearing of the facts and passing of sentence in a civil or criminal case.
4. Criminal Burden of Proof – It is an evidentiary and procedural concept referring to the quantum of evidence necessary for a party to prevail on a claim or defense. In criminal cases, the burden rests on the Government or the prosecution to meet a very high standard of proof for the successful prosecution of those accused of a crime.
5. Criminal Standard of Proof - The degree of proof required for any fact in issue in litigation, which is established by assessing the evidence relevant to it. In criminal proceedings the standard of proof is "proof beyond reasonable doubt". In Civil proceedings the standard is "preponderance of evidence" or the balance of probabilities.
6. Prosecution – The Crown in general, as the prosecuting party. One who puts the case in court and advocates for the Crown. If referring to the process: it is the institution of criminal proceedings against a person in a court.
7. Defence – if referring to the party: it is the one accused of the crime and represented by counsel. In another sense, it may also be the answer to a criminal charge by which an accused claims to be entitled to an acquittal.
8. Hierarchy of Courts in Australia - structuring of courts into different levels, jurisdictions and areas of responsibility providing structure in the administration of justice. It provides a smooth and orderly appeals process from the lower courts all the way up to the High Court of AU.
9. Indictable Offence - one for which the accused is entitled to a trial by judge and jury, usually involves the more serious offences.
10. Summary Offence - An offence that can be tried summarily, i.e. before magistrates. Most minor offences (e.g. common assault and battery) are triable only summarily.
11. Indictable Offence Heard Summarily - some more serious offences are offences triable either way (i.e. they can be tried either summarily or on indictment in the Crown Court). With the consent of the defendant, some indictable crimes can be dealt with summarily by a magistrate sitting alone. Indictable offences which are not triable summarily must be heard in the higher courts
12. Committal Proceeding- is proceeding by way of committal. If the defendant does not call for the witnesses to attend and give evidence, the defendant is committed (or discharged) on the basis of the written material in the brief, which is tendered ('handed up') to the magistrate. Magistrate decides whether the prosecution has enough evidence for your case to be committed for trial, or sentence. If there is enough evidence and the case is serious enough, your case will be decided by a Judge and a jury in the District or Supreme Court.
13. Mention Proceeding - In the Magistrates' Court, all summary matters begin as a mention hearing. This is the first date on which the matter is listed before the court. If the accused pleads guilty the matter can be heard and determined at the mention hearing.
14. Stare Decisis - Latin: "to stand by things decided". A Latin maxim expressing the underlying basis of the doctrine of precedent, i.e. that it is necessary to abide by former precedents when the same points arise again in litigation.
15. Ratio decideni - Latin: "the reason for deciding". The principle of law on which the court reaches its decision.
16. Obiter Dicta - A judge's expression of opinion uttered in court or in a written judgement, but not essential to the decision and therefore not legally binding as a precedent.
17. Novus Actus Interveniens - Latin: a new intervening act (or cause). An act or event that breaks the causal connection between a wrong or crime committed by the defendant and subsequent happenings and therefore relieves the defendant from responsibility for these happenings. In tort the chain of causation may be broken by the claimant
18. De Novo - Starting from the beginning; anew
19. Inter alia - Among other things. The latin phrase is used to make it clear that a list is not exhaustive.
20. Prima facie – Latin: At first appearances or On its face. It means on first impression, accepted as correct until proved otherwise
21. Precedent - A judgment or decision of a court, normally recorded in a law report, used as an authority for reaching the same decision in subsequent cases.

**WHAT IS A CRIME?**

- is a legal wrong that can be followed by criminal proceedings which may result in punishment.

A "positivist" definition of criminal law focuses on the form – whether it was correctly made – rather than substance. This theory views the law to be valid so long as it is enacted validly by the one who has power to create them (Parliament), no matter how cruel or unjust a crime is.

Because legal wrongs may arise in civil law too, we may clearly define crimes through what is it not. – Something that is not a civil wrong, such as tort, and something that is punished. Punishment distinguishes a crime from civil wrongs.

**JUSTIFICATIONS OF CRIMINAL LAW**

1. 'the harm principle'
   - restrictions on liberty must be curtailed and are justifiable only in order to prevent harm to others. This balances the interest of the State while protecting the freedom and autonomy of the individual.
2. Public Interest
   - an act is to be labelled as a crime if it is thought to be more than an offence against one or more individuals. It must be injurious to the public in general.
3. Morality
   - for conduct to warrant classification as criminal, it must involve moral wrongdoing. The morality here assumes that this is a matter of prior state of affairs to which the law responds, and not that the law should regulate morality – for morality may be subjective.

**AIMS OF CRIMINAL LAW**

- To provide an organised means for controlling the passion of revenge.
- To prevent people injured by offences to take the matter into their own hands to the general detriment of the community

**THE AIMS OF PUNISHMENT**

1. Retribution
   - The retributive theory views a crime as a wrong, which by its very nature, justifies the infliction upon the criminal of a certain amount of punishment. This theory requires punishment be inflicted even though it would serve no useful purpose.
2. Deterrence
   - Because every human being has a twin objective of achieving pleasure and avoiding pain, it follows that we can deter a person from committing an act which will bring him or her a greater degree of pain if one commits the act.
3. Rehabilitation
   - The rehabilitative theory sees crimes as a social disease for which steps can and should be taken to cure. The punishment is inflicted for the purpose of reforming the criminal and inducing him to lead a non-criminal life in the future.

**SOURCES OF CRIMINAL LAW**

1. Common law (NSW and Victoria) and
2. Statute:
   *Crimes Act 1900* (NSW)
   *Crimes Act 1958* (Vic)
   Commonwealth Criminal Code – Commonwealth Crimes Act 1914

**INTRODUCTION TO THE CRIMINAL COURT SYSTEM**

*The difference between fact and law*

- It is said that the resolution of every case depends on ascertaining the facts and then applying them the appropriate rule of law. The judge decides the question of law and the jury decides the question of fact. In those cases where there is no jury, the Magistrate or judge decides both questions of law and fact. Only questions of law are appealed to a higher court as questions of fact are not, unless its appreciation in the lower court is clearly erroneous.

*The Burden of Proof*

- This is the onus in proving that the accused is guilty beyond reasonable doubt of the crime charged. The burden is on the Prosecution. However, a burden of proof may be on the accused if he puts forward a defence (e.g. self-defence – where he admits the act done and it was done deliberately however he was defending his life)

*The 'golden thread'*

- This is the standard for the burden of proof in criminal cases. This is the duty of the prosecution to prove the accused's guilt beyond reasonable doubt.

*The presumption of innocence*

- The legal presumption that every person charged with a criminal offence is innocent until proved guilty. It is in fact a fundamental principle underlying the criminal law

*'Beyond reasonable doubt'*

- There is no exact meaning. The view is maintained in Australia that it is for the jury to determine what is meant by reasonable doubt. And the judge should never attempt to define the term not elaborate its meaning.

*Double Jeopardy*

- A person must not be tried or punished more than once for an offence in respect of which he has already been finally convicted or acquitted in accordance with law.

  Special Plea:

  Autrefois acquit – previously acquitted

  Autrefois convict – previously convicted

  - These pleas operate as a bar to the further prosecution of an indictment for a criminal offence. The pleas differ from a plea to the general issue (guilty or not guilty), because here, the accused asserts that the court cannot proceed to try the charges laid.

*Appeals In Criminal Cases*

- At present, the Crown has no general right of appeal against a jury's verdict of acquittal. If, however, the accused is convicted by a jury and the conviction is reversed by an appellate court, then it is open to the Crown to seek an appeal against that decision to the High Court of Astralia. However, the decision then, although being a precedent for future cases, has no effect upon the accused's acquittal. Double jeopardy already sets in. For this reason, these appeals are sometimes referred to as 'academic appeals.

**ELEMENTS OF A CRIME**

1. *Actus Reus*
2. *Mens Rea*

   *"Actus non facit reum nisi mens sit rea"*

   - "an act does not make a person legally liable unless the mind is legally blameworthy".

**ACTUS REUS**

- Latin: a guilty act - The prohibited conduct or behaviour that the law seeks to prevent.
- It is the physical aspect or external element of a crime.
- It may differ in each situation. It may be an act or an omission
  - Act - (e.g. appropriation of property is the act of theft) accompanied by specified circumstances (eg that the property belongs to another)
  - Omissions – will only be considered unlawful if there is a legal duty imposed in doing something. (eg failure to prevent death may be the *actus reus*: R v Stone and Dobinson [1977] QB 354)
- It must be voluntary – If not, then the act cannot be considered criminal. (e.g. automatism)

**MENS REA**

- Latin: the guilty mind - subjective element for criminality, requires that a defendant have both a culpable state of mind (for instance, not be insane or coerced) and the particular mental state.
- The second element of a crime denoting criminal <u>intent</u> and <u>knowledge</u> of the wrongness of a criminal act. It may also be evidenced through one's <u>recklessness</u> or <u>gross negligence</u>.
- Whenever mens rea is required, the prosecution must prove that it existed at the same time as the actus reus of the crime (coincidence of actus reus and mens rea : *R v Le Brun* [ 1992 ] QB 61)

STRICT AND ABSOLUTE LIABILITY

- <u>Strict Liability Offences</u>
  - crimes that does not need Mens Rea. (e.g. using a motor vehicle on a road without insurance)
  - The prosecution just needs to prove the Act.
  - A defence of Mistake of Fact is available.
- <u>Absolute liability Offences</u>
  - crimes that need both actus reus and Mens Rea.
  - A defendant cannot plead ignorance of the law, nor is a good motive a defence.
  - He may, however, bring evidence to show that he had no mens rea for the crime he is charged with; alternatively, he may admit that he had mens rea, but raise a general defence (e.g. duress) or a particular defence allowed in relation to the crime.

**DEFENCES**

This is raised by the accused. A defendant should be acquitted when the magistrates or jury have a reasonable doubt as to whether he was entitled to a general defence. By contrast, special defences are confined to individual offences, are usually of statutory origin, and usually place an evidential burden on the defendant to show that he acted reasonably. E.g. Self-Defence, Duress, Necessity, Insanity. However, some defences are only partial. Partial Defences only mitigate and lowers the crime charge. E.g. The crime of murder may be lowered to Voluntary Manslaughter if a partial defence if raised – provation, excessive self defence, substantial impairment of the mind.

**Week 2**
**CAUSATION and MURDER**

Criminal Homicide
- Murder
- Voluntary Manslaughter
- Involuntary Manslaughter

**NSW CRIMES ACT 1900 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 with reckless indifference to human life, or with intent to kill or inflict grievous bodily harm upon some person, 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.

(1)(b) Every other punishable homicide shall be taken to be manslaughter.

(2)(a) No act or omission which was not malicious, or for which the accused had lawful cause or excuse, shall be within this section.
(b) No punishment or forfeiture shall be incurred by any person who kills another by misfortune only.

s 18 NSW Crimes Act 1900 simplified:

*MURDER* is committed where:
1. Accused does an act, or an omission
2. That causes death
3. with:
    a. reckless indifference to human life *or*
    b. an intention to kill *or*
    c. An intention to cause grievous bodily harm *or*
    d. with the necessary mental state for an offence which carries a maximum penalty of 25 years servitude

Murder is *NOT* committed where:
- The person has a full defence (self-defence) = NO CRIME
- Or a partial defence (provocation, substantial impairment by reason of abnormality of mind, surviving a suicide pact, excessive self-defence) = the murder charge will be reduced to MANSLAUGHTER.

**THE ACTUS REUS OF HOMICIDE**

ELEMENTS:
1. Was there an Act or Omission?
2. Was the act Voluntary?
3. Did the act *factually* cause the death of the victim? (Causation)
4. Was there an *intervening cause* of death that broke the chain of causation?

1. Was there an Act or Omission?

Act
- It is easy to find out which was the act that is to be material in a case because there is a positive manifestation which brought about the crime. However, there are instances where it becomes tricky – like in *Ryan v R (1967)* D pointed a loaded gun to the victim, but it went off and he contends he involuntarily pulled the trigger. What is the act that is material in this case? – the involuntary pulling of the trigger? – No. It was held that the unlawful act was the presentation of the loaded gun itself.

Omission
- *For an omission to count the following must be satisfied:*
    1. The accused must have been under a legal duty to act to forestall the causation of death
    2. The accused must have failed to fulfil this legal duty
    3. Omission caused death
    4. The accused must have concurrently possessed mens rea

*R v Conde*
D withheld food from child, and child died. His Omission is punishable.

*R v Taber* (2003)
D broke into someone's house to rob him. D tied up the victim and left him there. D called emergency but did not respond causing victim's dehydration and death. Held: the call was not enough. He still failed to fulfil a legal duty to someone who he put in danger.

*R v Russell* (1983)

Father watched his wife and child drown. It was held that he did NOT have a legal duty to save the wife, however, he had a legal duty to save the child. So he is liable for his omission.

*R v Stone & Dobinson* (1977)

Victim had a medical disability and lived with his relatives. They took him in and initially assumed duty of care and provided him food, and other needs but eventually stopped leading to the death of the victim. It was held that a relative helping another and taking him in and then withdrawing that care thus leading to the victim's death constitutes an omission.

*R v Hallet* [1969]

Hallet beat victim unconscious and left him in that condition on the beach. It was found that the victim died of drowning in shallow water. Hallet argues that he just hit the victim because of the homosexual advances to him while they were drinking and he did not drown the victim, thus he did not cause his death.

What is the act or omission that is material here? – is it the hitting? – No. the Court held that the relevant act was the leaving of the deceased on the beach and not the violence in the water reducing him to unconsciousness. Anyone who put someone in danger has a legal duty to act.

2. Was it voluntary?

Voluntariness - a *willed act* or omission on the part of the accused. The accused must have control over the act. Involuntary acts are those without the exercise of one's will like automatism – epileptic shock, hypoglycemic (deficiency in glucose cause shaking and other involuntary symptoms), sleepwalking.

*Ryan v R (1967)*

Ryan went to rob a service station, while he had his finger on the trigger of a loaded cocked gun pointed at the deceased's back. The deceased made a sudden move, Ryan stepped back and the gun discharged, killing the deceased. He contends that the pulling of the trigger was involuntary. It was held that the unlawful act was the presentation of the loaded gun itself.

*Ugle v R (2002)*

The victim died from a knife wound to the chest. D was holding a knife and was trying to fend off the victim and contends that it was the victim who impaired himself by running towards the knife. It was held that this was a factual question for the jury.

3. Causation – Did the act/omission cause the death?

- It is well established that there are two-steps to determine whether the act (or omission) of the accused caused the death of the victim:
  1. *Factual Causation* – the 'but for' test
  2. *Legal Causation* or Causal responsibility
     a. Substantial / Significant Cause
     b. Natural Consequence
     c. Reasonable Foreseeability
     d. Must take victim as you find them

1. Factual Causation
   - This is the causal connection established using the 'but for' test.

   The 'but for' test: (*Royall v R* (1991) per McHugh J)
   - This asks whether the victim would not be dead but for the behaviour of the accused.
   - If the victim would not be dead but for the act or omission of the accused then he or she is a factual cause of the death.
2. Legal or Causal Responsibility
   - This requires a judgment to be made about whether the 'but for' act or omission of the accused was 'causally responsible' for the death. Various tests have been developed though case law to help determine whether the accused is legally responsible for the death of the victim.

a) Substantial or significant cause

*R v Hallet* [1969]

Hallet beat Victim unconscious and left him in that condition on the beach. It was found that the victim died of drowning in shallow water. Hallet argues that he just hit the

victim because of the homosexual advances to him while they were drinking and he did not drown the victim, thus he did not cause his death.

It was enough on the question of causation that he was the substantial cause of the victim's death. The victim died as a result of some act or event which would not have occurred but for the infliction of the injury by the accused.

Foresight by the accused of the possibility or probability of death or grievous bodily harm from his act, though relevant to the question of malice afterthought, has nothing to do with question of causation. The death of the deceased is the material event. The question to be asked is whether an act or series of acts consciously performed by the accused is or are so connected with the event that it or they must be regarded as having a sufficiently substantial causal effect which subsisted up to the happening of the event, without being spent or without being in the eyes of the law sufficiently interrupted by some other act or event.

*Royall v R* (1991)

The deceased died when she fell from the bathroom window of the sixth floor flat in which she and accused lived. She was naked and her hair was wet. There was evidence of forcible entry into the bathroom and signs of struggle were found.

McHugh J citing R v Smith: It is not necessary that an act or omission be the sole or main cause of a wrong. It seems to the court if at the time of death, the original wound is still an operating cause and a substantial cause, then the death can properly be said to be the result of the wound, albeit some other cause of death is also operating… only if the second cause is so overwhelming as to make the original wound merely part of the history can it be said that the death does not flow from the wound.

b) Natural consequence test

*R v Hallet* [1969]

The victim being drowned was a natural consequence of the actions of the accused. That is, the consequence might be expected to occur in the normal course of events. It was the act of the accused in reducing the deceased to unconsciousness which originated the chain of events which led to drowning.

*Royall v R* (1991)

The natural consequence test had been explained as: a test which possess the question whether the victim's act was something that could reasonably have been foreseen as the consequence of what the accused was saying or doing.

Where the conduct of the accused induces in the victim a well-founded apprehension of physical harm such as to make it a natural consequence that the victim would seek to escape and the victim was injured in the course of the escape, then the injury is caused by the accused's conduct.

c) Reasonable foreseeability test

- This is usually applied to escaping victims

*Royall v R* (1991)

The key element in the chain of causation is that the accused's conduct creates in the mind of the victim a well-founded and reasonable apprehension of danger as a result of which the victim takes steps to escape leading to his or her death.

McHugh J: an accused should not be held to be guilty unless his or her conduct induced the victim to take action which resulted in harm to him or her and that harm was either intended by the accused or was a type which a reasonable person could have foreseen as a consequence of the accused's conduct.

d) Must take victims as you find them

*R v Blaue* [1975]

Victim, a Jehova's Witness, was stabbed. Victim refused blood transfusion causing death. It was held that this fact of refusal was not an intervening event which caused the death.

It has long been the policy of the law that those who use violence on other people must take their victims as they find them. The question for decision is what caused her death; the answer was the stab wound. The fact that the victim refused to stop this end coming about did not break the causal connection between the act and the death.

*4.* <u>*Novus actus interveniens* – Has there been an event that breaks the chain of causation?</u>

- It is also possible that a causal link could be established, but other events may occur which might break the chain of causation.
- The new intervening act could be an abnormal occurrence, unreasonable conduct of accused trying to escape, lack of care on the part of the accused, actions of third party, or unusual medical treatment.
    - NOTE: Natural events (such as normal high and low of tides) *Normal* medical care with (inherent risks or complications), *normal* acts of self-preservation, foreseeable events are NOT a *novus actus interveniens.*

a. abnormal occurrence, extraordinary events

*R v Hallett* [1969]

If after the act or omission, the victim was killed by a sudden earthquake, this is attributed as <u>an Act of God</u> and the law does not attribute the death to the assault, even if it may be certain that the deceased would not have been in that place had he been not rendered unconscious by the accused. There may be cases where the extraordinary as opposed to ordinary operation of natural forces might break the chain of causation, as in an earthquake, an extraordinary tidal wave.

But we cannot regard the ordinary operations of the tides at Tumby Bay being a supervening cause.

b. unreasonable conduct of accused trying to escape

- Generally, an act done by a person in the interest of self-preservation, in the face of violence or threat on the part of another, which results in the death of the first person, DOES NOT negative causal connection between the violence or threats of violence and death. The intervening act of the deceased does not break the chain. (Royall v R)
- Requisites to show that there is NO intervening event (R v Grimes and Lee (1894))
    1) Accused induced the victim to take a course of action resulting to injury
    2) Victim had both a well-founded AND reasonable fear for his or her safety
- Only when the victim acted 'unreasonably' would make such conduct an intervening event. So if an act is so unexpected that no reasonable person could be expected to foresee it, then it is a voluntary act on the part of the victim which breaks the chain of causation between the accused's conduct and the ultimate injury. (Royall v R)
- Reasonable means reasonable in the light of the accused's conduct and the apprehension of danger which is induced in the mind of the victim. (Royall v R)

*Royall v R* (1991)

McHugh J: "..an accused should not be held to be guilty unless his or her conduct induced the victim to take action which resulted in harm to him or her and that harm was either intended by the accused or was a type which a reasonable person could have foreseen as a consequence of the accused's conduct. In determining whether a reasonable person could have foreseen the harm suffered by the victim, any irrational or unreasonable conduct by the victim will be a variable factor to be weighed according to the circumstances of the case."

*R v Grimes and Lee* (1894)

The accused assaulted and robbed victim. The victim, thinking that his life was in danger, jumped out of the train, and was killed. Because a well-founded and reasonable fear of apprehension that if he stayed in the carriage he would be subjected to such further violence as would endanger his life.

It is not enough that the conduct of the accused had induced the victim to take a course of action which resulted in injury or was a substantial operating cause. The fear of the victim must be both well founded and reasonable.

*R v Beech* (1912)

Complainant jumped out of a window to escape his threatened attack and injured herself. Accused was convicted of inflicting grievous bodily harm. It was very likely for a woman to do as the result of the threats of the accused.

*R v Roberts* (1971)

A young woman was a passenger of accused's car, injured herself by jumping pout of it while the car was in motion. She alleged that she had jumped because of what the appellant had said he would do to her.

*R v Coung Quoc Lam* (2005)

D1 and D2 chased Victims. In order to escape, the victims jumped out of the Yarra river where they drowned. It was showed that the victims were able to flee to escape from the bus stop.

Held: In all of the reported self-defence cases, the victim, confronted and threatened by the accused generally in a confined space and faced with the risk of impending further violence, took immediate life-threatening action in an attempt to escape.

In this case, causal responsibility cannot be assigned to the accused. Their conduct did not extend beyond the area in the immediate vicinity of the bus stop. It would be the conduct of third parties and the acts of the victims that caused their deaths.

c. Actions of the Victim himself

- Voluntary Act of victim:

*R v Hallet* [1969]

Only <u>if he consciously entered the water</u> would it in our view be even arguable that the chain of causation had been broken.

*R v Bingapore* (1975)

The appellant was convicted of murder of a man in a brawl. There was evidence that he had punched him, knocked him down and kicked him. Soon after, the victim was taken to a hospital for treatment. A medical practitioner suspected internal head injuries and warned the patient of the danger of death if he left the hospital, <u>but the patient left.</u> Six hours later he was brought back to the hospital, operated on and died the next day.

There was NO BREAK in the chain of causation by reason of the fact that the deceased's wanton departure from hospital had deprived him of the opportunity for having the operation at a time when it might have saved him. The death from subdural haemorrhage was caused by the violence of the appellant

- On Drugs and Suicide:

*R v Dalby* [1982]

Accused supplied drugs to a person. That person subsequently died of an overdose. Was the supplying of the drugs a substantial cause of the victim's death? – no. the supply of drugs was not the act which caused the direct harm and would have caused harm, unless the deceased the deceased had subsequently used the drugs in a form and quantity which was dangerous. The <u>ingestion of the drugs</u> by the victim in an unreasonable amount causing overdose was seen as a novus actus interveniens.

*Stephens v State* (1932)

D raped V in extreme brutal circumstances. V managed to procure some mercury bichloride tablets and <u>took a large dose</u>. D refused to procure medical aid for V and kept her in a hotel for hours. V died a month later. D contends that it was an intervening act of V in taking poison. It was found that V had been distracted with the pain and shame inflicted on her by D at the time she took poison. Thus this was NOT AN INTERVENING ACT.

McHugh J in *Royall v R* citing *People v Lewis* (1899)

In some cases, the suicide of the victim should not be regarded as breaking causal chain of responsibility. If a person suicided to avoid further torture and eventual death, causal chain SHOULD NOT be taken as broken.

d. actions of third party

*R v Pagett* (1983)

A girl was held by the accused as a shield in from of him and was shot dead by police who were returning shots fired by the accused.

Although an act of the accused constitutes a causa sine qua non (necessary condition) of the death of the victim, nevertheless, the intervention of a 3rd person may be regarded as the sole cause of the victim's death. However, a reasonable act performed for the purpose of self-preservation in attempting to escape the violence of the accused does not destroy the causative connection with the accused's violence.

The act of the police DID NOT constitute a novus actus interveniens severing the chain of causation.

*R v Michael* (1840)

D determined to kill her baby son, V, by poisoning, gave the poison to the nurse whom she told was medicine. The nurse decided that her son did not need the medicine and put the bottle on a shelf. In the nurse's absence, her 5 year old son, T, took the bottle from the shelf and gave a large dose to V. V died. D is tried for murder.

Although the poison was administered by an unconscious agent, D's original intention was still continuing at the time. The act of the third party did NOT constitute as novus actus interveniens.

e. unusual medical treatment

- NOTE: the medical intervention must be so unusual, notoriously or grossly wrong, or one which would accelerate the death, to make that event an effective intervening act and break the chain of causal connection. Normal medical treatment, even if done sloppily, in themselves have risks that would not be an intervening act.

*R v Jordan* (1956)

D stabbed V in the abdomen in the course of a café brawl. V was admitted to the hospital. In treating him, it was found that he was allergic to an antibiotic that was administered to him. But even with this knowledge they subsequently resumed administering the antibiotic and because of this V died. This was held to be an effective intervening act because of the palpably wrong treatment given.

*Bush v Commonwealth* (1980)

D shot V, but medical evidence was given that the wound so inflicted was neither necessarily nor probably mortal and that death ensued from scarlet fever negligently communicated by V's doctor when he came to attend the wound. The conviction was reversed for the act of the doctor constituted a novus actus interveniens.

*R v Smith* [1959]

D stabbed V during a fight with a bayonet and pierced V's lung. In treating his wounds, he was dropped twice while being transported and unsuccessful attempt to give him saline transfusion. V died 2 and a half hours later. Medical evidence showed that if V was given blood transfusion, he would have a 75% chance of recovery. There was evidence that treatment he received was thoroughly bad. D was convicted of murder. This sloppy medical treatment was not held to break the chain of causal connection. The original wound is still the operating or substantial cause of the death.

*R v Evans and Gardiner (No 2)* [1976]

D1, D2 and V were all prisoners. D1 stabbed V in the stomach, while D2 was aiding and abetting. A bowel resection operation was performed successfully. Eleven months after stabbing, V began to suffer abdominal pains and vomiting until he died. They were convicted of murder.

It was held that a positive act of commission of an act of omission will serve to break the chain of causation only if it can be said that the act or omission accelerated the death, so that it can be said to have caused the death and thus to have prevented the felonious act which would have caused death from actually doing so.

*R v Blaue* [1975]

Victim, a Jehova's Witness, was stabbed. Victim refused blood transfusion causing death. It was held that this fact of refusal was not an intervening event which caused the death. The question for decision is what caused her death; the answer was the stab wound. The fact that the victim refused to stop this end coming about did not break the causal connection between the act and the death.

*R v Malcherek* [1981]*; R v Steel* [1981]

D stabbed his wife. Wife was brought to the hospital. She was recovering when she collapsed and surgery was done. Because of the complications, she was put on life support for she appeared to have suffered irreparable brain damage. After some tests, it was decided that the life support be disconnected. She was then declared dead. (decision below)

A attacked a girl causing her grave head injury. She was taken to the hospital and but on a life support machine. Two-days later, doctors concluded that her brain had ceased to function and machine was disconnected and was declared dead.

HELD: In both cases, the medical treatment given to the victims were normal and conventional. Where competent and careful medical treatment given to a victim for an injury inflicted by an assailant included putting the victim on a life-support machine, the decision by the medical practitioners concerned – to disconnect the machine because, by generally accepted medical criteria, the victim was dead – could not exonerate the assailant from responsibility for the death if, at the time of death, the original injury was a continuing or operating cause of the death; for then the disconnection of the machine did not break the chain of causation between the original injury and the death.

MENS REA

NSW CRIMES ACT 1900 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 with

- reckless indifference to human life, or
- with intent to kill
- or inflict grievous bodily harm upon some person,
- 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.

- This is the sole feature that distinguishes murder from manslaughter.

**THE MENS REA FOR MURDER** (s 18 of the Crimes Act)

- Presence of any of the following, together with the Actus Reus, constitutes Murder:
  1) An intent to kill (express malice)
  2) An intent to cause grievous bodily harm (express malice)
  3) Reckless indifference to human life (express malice)
  4) Committed in an attempt to commit or during or immediately after the commission of, a crime punishable by imprisonment for life or for 25 years. (implied/constructive malice)

1) <u>An intent to kill</u> (express malice)

- What test is used to determine intent / state of mind? – Subjective test.

Dixon CJ in Parker v R (1963) 111 CLR 610

It has long been recognized that intentions and other mental states are 'subjective' matters which must be ascertained 'subjectively'.

- To whom does the intent have to be directed? – The Doctrine of TRANSFERRED MALICE

*R v Saunders and Archer* (1577) 2 Plowd 473

Saunders with intent to kill his wife, by the advice of Archer, mixed poison in a roasted apple, and gave it to her to eat. She having eaten a small part of it gave the remainder to her child. Saunders made an attempt to save the child but eventually desisted, stood by and saw the infant eat the poison which it later died.

Although the intent was only to murder the wife, it was ruled that Saunders was guilty of the murder of the child based on the doctrine of transferred malice.

*Attorney-General's Reference (No3 of 1994)* [1988] AC 245

D stabbed the girlfriend V, who he knew was pregnant with their child W. V recovered well but prematurely gave birth to W, but four months later died. D was charged with the murder of W. D argues that it was V who he attacked not W, and W was not 'a person' so he cannot be held liable for homicide.

D could be held criminally responsible for the murder or manslaughter of W. If D intended to kill or cause grievously bodily harm to V when he stabbed her, then the doctrine of transferred malice operated to make him guilty of the murder of W, it being proved that he killed her. There was no legal requirement that the victim W had to be a person in being when the act which caused her death was perpetrated. She was of course in being when she died.

Note: Settled is the rule that a child in the womb is not in being, and legal personality only attaches until he or she is fully born in a living state. Once a baby is born alive, it is capable of being the victim of murder or manslaughter even if it is too weak to survive. If a child is injured while in the womb or during the course of birth, and is born alive but thereafter dies of the injuries received, homicide is committed. (R v West [1848], R v Iby [2005])

*R v King* [2003] NSWCCA 399

The complainant fell pregnant to the respondent after a single act of sexual intercourse. When the complainant refused to terminate the pregnancy, the respondent assaulted the complainant, kicking her in the stomach and stomping on her stomach several times. The foetus was delivered stillborn shortly thereafter.

There is no clear rule applicable in all situations as to whether the mother and foetus must be considered as one or separate. For the purposes of the offence of maliciously inflicting grievous bodily harm on a pregnant woman, a foetus should be regarded as part of the mother. That the foetus is intimately connected with the mother and cannot be regarded in isolation from the life of the pregnant woman is compelling for the law of assault. The aggravated form of the offence of assault does not depend on whether the foetus is 'born alive'.

2) An intent to cause grievous bodily harm (express malice)

s 4 of the NSW Crimes Act 1900 defines grievous bodily harm as:
"Grievous bodily harm" includes:
(a) the destruction (other than in the course of a medical procedure) of the foetus of a pregnant woman, whether or not the woman suffers any other harm, and
(b) any permanent or serious disfiguring of the person, and
(c) any grievous bodily disease (in which case a reference to the infliction of grievous bodily harm includes a reference to causing a person to contract a grievous bodily disease).

- It is settled in law that this means intention to cause bodily injury of a really serious kind. (Director of Public Prosecutions v Smith [1961] AC290)
- It is worthy to note that s 4 includes inflicting a grievous bodily disease.

3) Reckless indifference to human life (express malice)

- The Rule: The accused knew or foresaw that his actions would probably cause death or grievous bodily harm – and actual knowledge or foresight is necessary.

*R v Crabbe* (1985) 156 CLR 363

He got drunk and was kicked out of the bar. He got his vehicle and drove it through the wall and into the bar. As a result 5 persons died and many were injured. He did nothing to assist the injured but left the motel.

The court's view was that the mental state necessary to constitute murder in a case of this kind is knowledge by the accused that his acts will probably cause death or grievous bodily harm. The knowledge of possibility is not enough. A person who does an act knowing its probable consequences may be regarded as having intended those consequences to occur.

The word probable means 'likely to happen'. That state of mind is comparable with an intention to kill or to do grievous bodily harm. There is a difference between the case in which a person acts knowing that death or serious injury is only a possible consequence and where he knows that it is a likely result.

A person who does an act causing death knowing that it is probable that the act will cause death or grievous bodily harm is, guilty of murder, although such knowledge is accompanied by indifference whether death or grievous bodily harm is caused or not, or even by a wish that death or grievous bodily harm might not be caused.

That does not mean that reckless indifference is an element of the mental state necessary to constitute the crime of murder. It is not the offender's indifference to the consequences of his act but his knowledge that those consequences will probably occur that is the relevant element.

Of course, not every fatal act done with the knowledge that death or grievous bodily harm will probably result is murder. The act may be lawful, that is, justified or excused by law. A surgeon who competently performs a hazardous but necessary operation is not criminally liable if the patient dies, even if the surgeon foresaw that his death was probable.

- Is the test regarding whether the accused ought to have foreseen the consequences of the act contemplated *subjective* or *objective?* – SUBJECTIVE as to the accused's actual state of mind.

*R v TY (2006)* 12 VR 557

A 14 year old girl was a member of a group engaged in an altercation. She struck a member of the other group twice in the head with the steel tip of an umbrella. It penetrated the skull of the victim and he died.

The Court distinguished this mental state for murder and manslaughter by unlawful and dangerous act. Warren CJ stated tht the jury in the circumstances of reckless murder should be directed that they must be satisfied beyond reasonable doubt that:

1. The accused caused the death,
2. The accused ought to have foreseen the consequences of the act,
3. In assessing foresight, what a reasonable person might have foreseen is relevant but the accused's actual state of mind is critically important, and not treat what they think a reasonable person's reaction would be; and
4. In assessing the accused's state of mind, the accused's circumstances are relevant.

- What does "probable" mean? More than 50%? – No.

*R v Faure* [1999] 2 VR 537

D shot and killed V and was convicted of murder. D's defence was that he and V had played Russain Roulette after they had both been drinking. D claimed that the game had been played with

a six shot revolver containing one round of ammunition and that he and V, by agreement, twice pulled the trigger while pointing the gun at the other.

'Probable' as contrasted to 'possible but not likely' means a substantial or real and not remote, chance whether or not it is more that 50% and saying that accordingly in the case put a reasonable jury should regard the chance as substantial.

*R v Solomon*

The NSW Court of Criminal Appeal held that the effect of this provision to give recklessness a more limited operation in relation to murder than is the case in common law jurisdictions. Begg J stated: " I am of the opinion that there must be evidence which, on a practical basis, justified the jury being invited to consider murder based on 'reckless indifference to human life', not merely indifference to whether serious harm might be caused.

4) <u>"Committed in an attempt to commit or during or immediately after the commission of, a crime punishable by imprisonment for life or for 25 years." (implied/constructive malice)</u>

- "Statutory Murder" or Constructive malice in murder – in NSW, it does not apply to any of the categories of sexual assault – they are not covered as a crime punishable by imprisonment for life or for 25 years.

*R v Ryan and Walker* [1966] VR 553;

The prisoners seized a rifle and overpowered a warder. As they were making their way out, they were pursued by 3 warders. Ryan shot one of them. They were recaptured weeks later. Ryan contends that he did not fire a fatal shot.

It was held that the killing of a person by the intentional use of force, knowingly to prevent such person from making an arrest which he is authorized by common law to make, is murder even if the person using force did not intend to kill or do grievous bodily harm, and even if he did not foresee he was likely to do so.

The result is that in law the case was one of constructive-murder by Ryan, because that finding and those inferences mean that Ryan, knowing that Walker had committed the felony created by s 35 of the Gaols Act 1958 (resisting arrest) and knowing that the victim was attempting to arrest Walker therefore, intentionally used force, which resulted in his death, to prevent him from making arrest.

*R v Galas; R v Mikhael* (2007) 18 VR 205

They intended to steal cannabis from the area, entered the premises. One of the occupants was fatally shot by the first accused. Their defence was that the gun they were carrying accidentally discharged while he was tyring up the victim. Prosecution put its case on statutory murder on the basis that the act of violence was committed in the course of an attempted armed robbery.

The act of violence relied upon was the presentation of the loaded firearm. That even though it was done unintentionally, because of the armed robbery, the act of violence was done in the course of or in furtherance of a crime of the stated class, which carries the penalties stipulated.

*R v Maurangi and Rivett* (2000) 80 SASR 295

2 accused charged with murder when the deceased died from a single gunshot wound during an attempted robbery. The defence was that he did not intend to fire the gun and it discharged accidentally when he passed it to the other cohort, contending that the law requires an intentional act of violence for them to be held liable.

It was left to the jury to decide if the intentional pointing of a loaded gun in the course of the armed robbery constitutes an 'act of violence' as provided for in SA's state law. The jury found them not guilty of murder but guilty of manslaughter.

**CONCURRENCE / CONTEMPORANEITY TO CONSTITUTE MURDER**

- The actus reus causing the death of a person MUST COINCIDE with the mens rea for murder.

*Thabo Meli v R* [1954] 1 All ER 373

The four appellants were convicted of murder. They had planned to kill a man and then make it look like an accident. They took him to a hut and beat him over the head. Believing that he was dead, they then took his body to a cliff and threw it off. Medical evidence showed that the deceased died from exposure of being left at the bottom of the cliff and not from the blow to the head. They appealed against their convictions on the grounds that the actus reus and mens rea of

the crime did not coincide. That is to say when they formed the intention to kill, there was no actus reus as the man was still alive. When they threw him off the cliff, there was nomens rea as they can intend to kill someone they believed was already dead.

Held: Convictions upheld. The act of beating him and throwing him off the cliff was one continuing act. Lord Reid:

"It appears to their Lordships impossible to divide up what was really one transaction in this way. There is no doubt that the accused set out to do all these acts in order to achieve their plan and as parts of their plan; and it is much too refined a ground of judgment to say that, because they were under a misapprehension at one stage and thought that their guilty purpose and been achieved before in fact it was achieved, therefore they are to escape the penalties of the law."

*Royall v R* citing *Fowler v Padget* (1798)

s 18 of the Crimes Act gives effect to this common law principle requiring the act of an accused causing death be accompanied by one of the relevant states of mind.

It is trite law that the relevant state of mind and the harm-causing act must both concur to constitute the crime

This means that the state of mind of the accused does not have to coincide with the time of deceased's death. It is material only that the act and the state of mind coincide. It is irrelevant that at the time of death, accused no longer had the state of mind, or acquired it after the occurrence of his or her act or omission.

- The different acts done may constitute a single series of acts (also applicable to those done without mens rea thus constituting manslaughter)

*R v Church* [1966] 1 QB 59

D was charged with the murder of a woman whose badly injured body was found in the river. The cause of death was drowning. D's defence was that he had taken the woman in his van for sexual purposes but things got bad, knocked her unconscious. Thinking that she was dead, he panicked and threw her into the river.

He was convicted of manslaughter the actus reus (inflicting the initial injuries and later throwing the body into the river) constituted a single series of acts.

*R v Taber* (2002) 56 NSWLR 443

V was attacked in her home and left bound and gagged by the 3 accused. Shortly after abandoning her, one of the accused made a call to emergency services and supplied some information concerning the situation of V. The phone call was not acted upon by the emergency services. After that, no further attempt to have V rescued. V died of dehydration.

It is legitimate to describe what caused the death of the deceased as a single continuous act; commencing when she was attacked and ending when she died; or commencing when she was attacked and ending when she was abandoned, coupled with an omission commencing then and ending when she died. The jury are entitled to find any accused guilty of murder who had the relevant state of mind during the continuous act.

The proper formulation of murder for the jury should include a direction that any person who deliberately puts another in danger comes under a legal duty to take steps to remove that danger and that any failure to do so may constitute an omission causing death. If at any time during the period of omission that accused has the relevant state of mind, whatever it may have been at the commencement of the period of omission, the jury are entitled to find the accused guilty of murder.

In the present case, any breach of a duty to remove the deceased from danger into which she had been deliberately put is capable of leading to a verdict of guilty of murder if in the case of any accused the jury are satisfied that at any relevant time he acted with reckless indifference, and otherwise to a verdict of guilty of manslaughter by criminal negligence if the Crown proves the objective seriousness of the breach.