

Prima facie, the offences that the prosecution will allege, in relation to [ACCUSED] are murder, assault, etc... Each of thee offences will now be looked at in more detail to draw a conclusion.

Murder

Actus Reus

Death - The [VICTIM], a human being, is dead – a necessary element *R v Hatty*

“Death” is defined to mean the irreversible cessation of circulation of blood in the body, or the irreversible cessation of all function of the brain: *Human Tissue Act 1982 s41*

An unborn child is not classified as a “human being” for the purposes of murder and manslaughter. The child is born when he is fully delivered from the mother (umbilical cord = irrelevant): *R v Hatty*

While killing an unborn child will not be murder or manslaughter, it may be child destruction (*Crimes Act 1958 s10*).

Voluntary Act – The relevant act that the prosecution will argue caused [VICTIM]’s death is the [ACT THAT KILLED VICTIM]. This act must also be voluntary, here it was, in the sense that it was willed by [VICTIM]: *Ryan v R*. [ACCUSED] consciously chose to [ACT THAT KILLED VICTIM]: *He Kaw Teh v R*

Was it a separate act or willed by the defendant even though consequence not intended (argument: was it the rushing forward of deceased or the holding of the knife that killed deceased, the will bringing the knife – holding of the knife, in furtherance of a crime) – See notes, in doubt for jury.

Terms such as “accidental”, “unintentional”, “involuntary” and “unwilled” all possess a degree of ambiguity. They can be used to signify either that:

- The accused acts were not voluntary (addressing the VOLUNTARINESS); or
- That the accused lacked the requisite intention to commit the crime (addressing the MENS REA): *Ryan v R*

Causation – The prosecution must prove beyond reasonable doubt that the [ACT THAT KILLED VICTIM] contributed significantly to the death of [VICTIM], or have been a substantial and operating cause of [VICTIM]’s death: *Royall v R*. Here, [WAS IT OR WAS IT NOT?]

The acts must be such that an ordinary person would hold them, as a matter of common sense, to be a cause of the death – act must not be casually related to death: *Royall v R*

Accused’s acts do not need to be sole cause of death. A person can be criminally liable for a death that has multiple causes, even if he or she is not responsible for all of those causes: *Royall v R*

SEE CAUSATION NOTES – ACTS OF VICTIM/INTERVIENING ACTS.

Also, *R v Blaue* take your victim as you find victim, refusing medical treatment doesn’t break causation

Mens Rea

[ACCUSED] must have either intended to kill (or cause really serious injury to) [VICTIM] or have been reckless to that consequence. A person is reckless if they actually knew probably or actually averted to the probability that the act would result in death: *R v Crabbe*

Intention – If the prosecution can show [ACCUSED] wanted [VICTIM] dead, they will have proven intention. Here, it appears [UNLIKELY/LIKELY] [was it premeditated (yes) or was it in the heat of the moment (no)]

If the accused intended to kill B but accidentally killed V in course of trying to kill B, the accused will satisfy this element: *La Fontaine v R* – transferred malice

Recklessness – SEE RECKLESS NOTES – did he know: *Boughey* – it appears likely/unlikely that [ACCUSED] thought about the probability that his punch would cause [VICTIM]’s death.

1) In the context of murder, to commit an act “recklessly” is to commit that act knowing that someone will *probably* die or suffer really serious injury: *R v Crabbe*

- The word “probable” means “likely to happen”. It can be contrasted with something that is merely “possible/might occur”: *R v Crabbe*

DO NOT IMPUTE KNOWLEDGE – only impute if facts state accused averted

To have acted recklessly, the accused must *actually have known* that death or really serious injury would probably result from his acts. It is not sufficient for that danger to have been obvious to the reasonable person, or to the members of the jury: *R v Barrett*

The fact that a reasonable person would have appreciated the probability of death or really serious injury may infer that the accused had such an awareness – just one factor, not conclusive: *Pembury v The Queen*

2) “Probable” is not a mathematical term. The accused does not need to have mathematically weighed the probability of death or really serious injury occurring: *Boughey v The Queen*

It will generally be sufficient if:

- a) Consider whether the accused **knew** that death or really serious injury was the probable or likely consequence of his or her acts; and

Furthermore, [ACCUSED]’s circumstances are relevant to their determination of his or her state of mind: *Pembury v The Queen*. As such [ACCUSED]’s (age, educational and social background, emotional state, state of sobriety) will assist the prosecution to prove beyond reasonable doubt that [ACCUSED] acted recklessly

The meaning of “really serious injury” is a matter for the jury to determine: *R v Rhodes*. The phrase “*really serious*” is used to indicate the gravity of the required intent: *Wilson v R*

Temporal Coincidence

Assuming that intention or recklessness is proven, it must have existed at the time of the volitional act, that is, [THAT ACT THAT KILLED THE VICTIM]: *Fagan*. Temporal coincidence will be irrelevant if mens rea is not proven.

Defences to murder

Provocation (not a defence). Under this category
Anger – murder arising out of anger no defence

Self defence for murder section 9AC

Pursuant to section 9AC [ACCUSED] will be entitled to a complete defence if [ACCUSED] killed [VICTIM] "while believing the conduct to be necessary to defend himself or herself or another person from the infliction of death or really serious injury." The onus is on the prosecution to prove that [ACCUSED] did not hold such a belief: *Babic v R*

- Consider factors below – this is purely subjective

However, if there were no reasonable grounds to hold such a belief [ACCUSED] will be liable for defensive homicide: S 9AD

- This element does not require the jury to determine whether the accused acted unreasonably in the circumstances. It requires the jury to determine whether there were no reasonable grounds for the accused's belief that it was necessary to do what he or she did: *R v Hendy* – effectively apply below

Self Defence – applies to all offences - *Zecevic v Director of Public Prosecutions*

The question to be asked: is whether [ACCUSED] believed upon reasonable grounds that it was necessary in self-defence to [do what he did], this has a subjective and objective element: *Zecevic v Director of Public Prosecutions*

1) If the prosecution cannot disprove at least one of these elements beyond reasonable doubt the accused will be entitled to an acquittal

Subjective element: The issue is whether [ACCUSED] genuinely believed at the time that s/he committed [the relevant act] that what s/he was doing was necessary: *R v Mckay*. Here, the prosecution will argue that [ACCUSED] did not genuinely believe that it was necessary to... because taking into account: [was it proportional]

For this element to be satisfied, it **does not matter** if the accused's belief was mistaken, as long as it was genuinely held: *R v McKay*

If the accused was **intoxicated** at the time she committed act, this can be taken into account in determining whether she believed her actions were necessary: *R v Conlon*

Whether force used was necessary, consider the fact that a person who reacted instantly to imminent danger cannot be expected to weigh precisely the exact measure of self-defensive action which is required: *Zecevic v Director of Public Prosecutions*

The **proportionality** of the accused's response to the harm threatened is just one factor to take into account in determining whether the accused believed that his or her actions were necessary: *Zecevic v Director of Public Prosecutions*

If could have retreated – not necessary to act in self defence. There is no rule requiring the accused to retreat from an attack rather than defend himself or herself. However, a failure to retreat is a factor to be taken into account in determining whether the accused believed that what was done was necessary (as well as in determining whether that belief was based on reasonable grounds – see below): *Zecevic v Director of Public Prosecutions*

Objective element: That belief must have been based on reasonable grounds in all the circumstances: *Zecevic v Director of Public Prosecutions*.

That is, it must have been a belief which the accused might reasonably have held in all the circumstances: *Zecevic v Director of Public Prosecutions*

There must be reasonable grounds for the accused's belief that it was necessary to do what she did: *R v Hendy*
Not a reasonable person test: *Virov v R*

To determine whether the accused's belief was based on reasonable grounds, take into account the following matters:

- The surrounding circumstances: *R v Wills*
- All of the facts within the accused's knowledge: *R v Wills*
- The relationship between the parties involved: *R v Hector*
- The prior conduct of the victim: *R v Besim*
- The personal characteristics of the accused, such as:
 - Any excitement, affront or **distress** he or she was experiencing: *R v Wills*
 - The proportionality of the accused's response: *Zecevic*
 - The accused's failure to retreat: *Zecevic*

Other Relevant Considerations^{SEP}

Intoxication

Evidence of intoxication may be relevant to the subjective element of self-defence. If the accused was intoxicated at the time she committed the relevant acts, take this into account when determining whether he or she believed:

- That an occasion for the use of force had arisen; or
- That the use of force was necessary: *R v Conlon*

Section If any part of an element of a relevant offence, or of a defence to a relevant offence, relies on
1) reasonable belief
2) a person having reasonable grounds for a belief
3) reasonable response
in determining whether that (relevant 1, 2 or 3) existed/s, regard must be had to the **standard of a reasonable person who is not intoxicated.**
- Self induced did not come about see page 636: did not know drinking alcohol

Where the Accused Initiated the Aggression

People who originate an attack cannot then claim that they acted to defend themselves against a counter attack, unless their original aggression had ceased at the time of the counter attack: *Zecevic*

Although it is likely to be difficult to satisfy the jury that the accused's belief in the necessity of his or her actions was based on reasonable grounds: *Zecevic*

In such a case consider whether the accused declined further conflict, stopped using force, or attempted to retreat, when determining whether there were reasonable grounds for his or her belief: *Zecevic*

Defence Against Lawful Force

Common law self-defence is not limited to defending against unlawful attacks (cf. statutory self-defence). It is possible to raise the defence even if the accused was responding to the lawful use of force (such as a lawful arrest): *Zecevic*
However, consider whether the accused initiated the aggression.

Proportionality

Although in the past there was a separate requirement that the accused's actions be proportionate to the harm threatened, this is no longer the case. The proportionality of the accused's response to the harm threatened is simply one factor to take into account in determining whether the accused believed that his or her actions were necessary, and whether that belief was based on reasonable grounds: *Zecevic*

Use of pre-emptive force

People are not only entitled to rely on self-defence if they act whilst an attack is in progress or immediately threatened. They are entitled to take steps to forestall a threatened attack before it has begun: *Osland v R*

Self Defence for another

These principles apply equally to cases in which a person acts in defence of another: *R v Portelli*

Constructive murder section 3a of the crimes act: If [ACCUSED] caused the death of another human being, by an act of violence, committed during the course of or in furtherance of an offence involving violence, will be regarded as though he acted with the requisite *mens rea* for murder; even though *mens rea* is lacking it will be implied or constructed because of the circumstances.

Elements

- 1) Causation – Do all elements of Actus Reus above.
- 2) in course of furtherance of committing – Did the accuse commit the act in furtherance of an offence?
- 3) a serious offence (Robbery and armed robbery)

Resisting lawful arrest – constructive murder

It is murder if a defendant causes the death of another human being by an act of violence committed during the course of resisting lawful arrest or escaping from lawful custody: *R v Ryan & Walker*

Defensive homicide – abolished. It was effectively an offence of murder committed in self defence, where the accused had no reasonable grounds for believing it was necessary to kill in self defence

Manslaughter by unlawful and dangerous act

(Wilson v R – Deceased annoyed man, man punched deceased in head once, deceased fell on his head, evidence that the fall by deceased was likely cause of death)

Actus Reus – As above in murder – The prosecution must prove the actus reus as discussed above.

Note: Prosecution does not need to prove that the accused intended to cause death or really serious injury: *R v Haywood*

Unlawful Act: The prosecution must prove that [ACCUSED]’s act was a breach of criminal law: *Wilson v R*. Here, the breach of criminal law was an act of [ASSAULT/RAPE/CONDUCT ENDANGERING LIFE... WHAT WOULD THE ACT CONSTITUTE –OUTLINE BRIEFLY] – mention temporal coincidence.

Breach of civil law not sufficient, must be criminal law: *R v Lamb*

This element will not be satisfied if there was a relevant defence (Duress, consent, self defence):
Boughey v R

Consent not available as defence if took place in public space (group fight): *Aidid v R*
Consent may not be available where death occurs: *R v Stein*

Unlawful act does not need to be directed against the victim: *R v Mitchell*

Dangerous act: The prosecution must show that a reasonable person in the position of [ACCUSED] would have realised that s/he was exposing the [VICTIM] to an appreciable risk of serious injury: *Wilson v R*. Here, a reasonable person, in the position of [ACCUSED] would realise that [BY DOING WHAT... WOULD EXPOSE VICTIM TO AN APPRECIABLE RISK OF SERIOUS INJURY] [WHY WOULD THE JURY FIND AN APPRECIABLE risk of ‘serious injury?’]

Or Eg. Depending on [ACCUSED] and [VICTIM]’s size, the jury may well find that there was an appreciable risk of ‘serious injury’, particularly as the standard is not ‘really serious injury’: *Wilson*.

This is an objective test.

Serious injury does not need to be probable or certain. Just reasonable person would have realised exposing victim to serious injury: *Wilson v R* Use common sense: *Aidid v R*

Emotional disturbance is not sufficient to constitute serious injury: *R v Dawson*

The accused’s mental state is not relevant

The prosecution does not need to prove that the accused realised that his or her act was dangerous: *Nydam v R*

The jury must not consider matters such as the accused’s emotional state, whether he or she was under the influence of drugs or alcohol at the relevant time, or the accused’s subjective, mistaken belief that an action was safe: *R v Wills*

The test for dangerousness requires the jury to consider what risk the reasonable person in the position of the accused would have realised he or she was creating. Jury consider to be the same age as the accused, and to have any specialised knowledge and experience that the accused had: *R v Edwards*