

CHAPTER 2

HOMICIDE AND ACTUS REUS

INTRODUCTION

'Homicide is broadly defined as

- a **volitional act** [or omission]
- that **causes the death** (how is cause defined?) (how is death defined?(life support))
- of **another human being** (what is a human being? (foetus?))
- **sooner than it would otherwise have occurred.**' BP 40.

Not all homicides are unlawful via secondary defences that if successful excuse the offence.

Homicide can be divided into many categories as below:

Homicide Statistics BP 41.

HOMICIDE AT COMMON LAW

At common law **homicide is divided into murder and manslaughter**, and **murder is said to require 'malice aforethought'**. However, malice aforethought does at common law does not always mean that there must have been malice and prior planning on the part of the offender.

MURDER & MR

At common law and is described for penalty only.

CRIMES ACT 1958 - SECT 3

Punishment for murder

Notwithstanding any rule of law to the contrary, a person convicted of murder is liable to:—

- (a) level 1 imprisonment (life); or
- (b) imprisonment for such other term as is fixed by the court as the court determines

INTENTIONAL MURDER BP.42

- Victim was a **human being**

- Whose death was caused by the accused person ("**the causation element**");
- in a **conscious, voluntary and deliberate manner**;
- with the **intent to kill or cause grievous bodily harm (GBH)** ; and
- The defenses and **mitigating circumstances are NOT applicable.**

MEANING OF INTENTION

No comprehensive definition, but in Aus courts = *ordinary usage meaning*.

In *R v Wilmott (No 2) (1985) 2 Qd R 413* per Connolly J:

"The ordinary and natural meaning of the word 'intends' is to mean, to have in mind. Relevant definitions in The Shorter Oxford English Dictionary ... the directing of the mind, having purpose or design".

He Kaw Teh v R (1985) 157 CLR 523 per Brennan J

'Intent in one form, connotes a decision to bring about a situation so far as is possible to do so- to bring about an act of a particular kind or a particular result. Such a decision implies a desire or wish to do such an act or to bring about such a result'

R v Wilmott (No 2) (1985) 2 Qd R 413

"an intention to do something exists where D 'meant to do it"

SUBJECTIVE TEST

- **Accused acted with Intent** – aim, purpose, object, want, meant to do it, bring about result.
- **Accused acted with knowledge** – awareness, foresight result substantially /practically certain to follow as a result of the act or omission. (probable result) *Solomon v The Queen [1980] 1 NSWLR 321* at 327. *Peterkin V The Queen (1982) 6 A Crim R 351* at 354.

DEFINITION OF GBH

OBJECTIVE TEST & A QUESTION OF FACT

- It's for the jury to decide according to the ordinary current meaning

Case law commonly defines GBH as '**really serious bodily harm**' (see *R v Miller [1951] VLR*)

An **injury of a very serious nature** and is such as **to seriously 'interfere with comfort or health'** of person per *R v Ashman (1858)*

Use of any or a particular weapon not necessary, **fists alone will suffice: R v Heaton (1899) 5 ALR 61.**

Cutting off someone's air supply by placing a pillow over their head to stop them screaming can amount to grievous bodily harm *R v Rhodes (1984) 14 A Crim R 124.*

S 15 Crimes Act 1958 (Vic)

Defines 'injury' to mean:

- (a) physical injury; or
- (b) harm to mental health—

'Serious injury' is defined in s.15 to mean:

- (a) **an injury** (including the cumulative effect of more than one injury)that-
 - (i) **endangers life**; or
 - (ii) is **substantial and protracted**; or
- (b) 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; (woman means a female person of any age).

RECKLESS MURDER

- Victim was a **human being**
- Whose **death was caused by the accused person**;

- in a **conscious and voluntary manner**;
- **while acting with recklessness as to killing or causing serious bodily harm.** BP 42; and
- The defenses and mitigating **circumstances** are not applicable.

MR ELEMENTS OF RECKLESS MURDER –SUBJECTIVE

TEST:

NEGLIGENCE NOT SUFFICIENT.

R v Pemble (1961) 124 CLR 107 (HCA)

Menzies J: described the difference with reference to a rock dropped out a window to a rock falling off a window ledge and hitting a person. BP 100.

R v Pemble (1961) 124 CLR 107 (HCA)

In reckless murder the MR must involve:

- **Foresight of or advertence to the probability or possibility* of death or grievous bodily harm** resulting; and
- **A willingness to run the risk** of those consequences maturing into actuality.

Per Barwick CJ *“An awareness of the consequences of the contemplated act is essential”*.

DISTINCTION BETWEEN PROBABLE AND POSSIBLE

R v Crabbe [1985] 58 ALR 417 (HCA)

D must foresee the probability of death or gbh resulting from his conduct.

Must think its

*‘probable that death or [gbh] will result ... It is **not enough** that he does the act knowing that it is **possible but not likely**’* (156 CLR 464 at 469-470).

Doesn’t matter what he wishes to happen “but his knowledge that those consequences will probably occur that is the relevant element”

DELIBERATE ABSTENTION FROM INQUIRY

“imputed knowledge is not enough. Deliberate abstention from inquiry might, of course, be evidence of the actual

knowledge of the accused.” Accused must still believe the result is probable in these circumstances.

Social utility of conduct was considered i.e. surgeon who operated with only a 50% chance of success may not be guilty of murder.

CHANCE -50%

Boughey v The Queen (1986) 161 CLR 10,

“an accused ... will not have ... calculate[d], the ... mathematical probability” the risk must be ‘substantial’ – a ‘real and not remote’ chance regardless of whether it is less or more than 50%.

Awareness conduct is wrong is not required *R v Morrison* [2007] SASC 168.

STATUTORY CONSTRUCTIVE MURDER

The accused does not possess the *mens rea* for murder but it is implied in the circumstances.

At common law referred to as the felony-murder rule

- **‘causing the death**
- **of another human being**
- **by an act of violence**
- **which occurs in the course of the commission of – or in furtherance of the purpose of – a felony involving violence’** e.g. *R v Ryan & Walker* [1966] VR 553. BP 43.

Crimes Act 1958 (Vic) s 3A - UNINTENTIONAL KILLING IN THE COURSE OR FURTHERANCE OF A CRIME OF VIOLENCE

- (1) A person who unintentionally
 - **causes the death**
 - **of another person**
 - **by an act of violence**
 - **done in the course or furtherance of a crime**
 - **the necessary elements of which include violence for which a person upon first conviction may ... be sentenced to level 1 imprisonment (life) or to imprisonment for a term of 10 years or more**

shall be liable to be convicted of murder as though he had killed that person intentionally.

(2) The rule of law known as the felony-murder rule ... is hereby abrogated.

Crimes Act 1958 (Vic) s 197A – Is also used in Victoria where the offence is arson.

COMMON LAW CONSTRUCTIVE MURDER

‘Where a person causes the death of another by an act of violence committed during the course of preventing, resisting, or escaping from *lawful* custody.’ (only exists in Vic and SA). BP 43.

Does not require *mens rea* as it is constructed in the circumstances. BP 43.

MANSLAUGHTER

VOLUNTARY MANSLAUGHTER

HAS THE SAME REQUIREMENTS AS RECKLESS OR INTENTIONAL MURDER except there are mitigating circumstances capable of reducing the charge to manslaughter. BP 43.

In Victoria they include where the defendant:

- IS THE SURVIVOR OF A SUICIDE PACT *Crimes Act 1958 (Vic) s 6B*;

Survivor of suicide pact who kills deceased party is guilty of manslaughter

- (1) Where upon the trial of a person for the murder of another person
 - the jury are satisfied that the **accused caused or was a party to causing the death**
 - **of that other person**
 - **by a wilful act or omission**
 - **but are satisfied on the balance of probabilities that the act was done or the omission made in pursuance of a suicide pact**

then the jury shall, notwithstanding that the circumstances were such that but for the provisions of this section they might have returned a verdict of murder, return a verdict of manslaughter in lieu thereof.

(1A) Despite [section 5](#), a person convicted of manslaughter under subsection (1) is only liable to level 5 imprisonment (10 years maximum).

(2) Any person who—

(a) [incites](#) any other person to commit suicide and that other person commits or attempts to commit suicide in consequence thereof; or

(b) aids or abets any other person in the commission of suicide or in an attempt to commit suicide— shall be guilty of an indictable [offence](#) and liable to level 6 imprisonment (5 years maximum);

but if the jury are satisfied on the balance of probabilities that the acts constituting the [offence](#) were done pursuant to a [suicide pact](#) the jury shall return a verdict of guilty of the indictable [offence](#) of being a party to a [suicide pact](#) and the convicted person shall be liable to level 6 imprisonment (5 years maximum).

(3) The fact that by virtue of this section any person who in pursuance of a [suicide pact](#) has killed another person has not been or is not liable to be convicted of murder shall not affect the question of whether the homicide amounted to murder in the case of a third person who is a party to the homicide and is not a party to the [suicide pact](#).

(4) For the purposes of this section "suicide pact" means an agreement between two or more persons having for its object the death of all of them whether or not each is to take his own life; but nothing done by a person who enters into a [suicide pact](#) shall be treated as done by him in pursuance of the pact unless it is done while he has the settled intention of dying in pursuance of the pact.

USED EXCESSIVE FORCE DESPITE THEIR BELIEF THAT THE FORCE WAS NECESSARY TO DEFEND THEM from the 'unjustified application of force or the threat thereof' (referred to in Vic as defensive homicide).

CRIMES ACT 1958 - SECT 322K

Self-defence

(1) A person is not guilty of an offence if the person carries out the conduct constituting the offence in self-defence.

(2) A person carries out conduct in self-defence if—

(a) the person believes that the conduct is necessary in self-defence; and

(b) the conduct is a reasonable response in the circumstances as the person perceives them.

(3) This section only applies in the case of murder **if the person believes that the conduct is necessary to defend the person or another person from the infliction of death or really serious injury.**

INVOLUNTARY MANSLAUGHTER

At common law this is where the accused caused the death of another without lawful excuse under circumstances that do not amount to murder or voluntary manslaughter. Lesser *mens rea* than would be required for murder or no *mens rea*. **BP 44.**

Manslaughter = **Objective test**

Wilson v The Queen (1992) 107 ALR 257 (HCA)

"At common law... manslaughter is not generally an offence requiring a particular intention: in that respect it is sharply distinguishable from the offence or murder."

INVOLUNTARY MANSLAUGHTER BY UNLAWFUL AND DANGEROUS ACT

R v Larkin [1943] 1 All ER 217 per Humphreys :

'Where the act ... is unlawful, ... [and] dangerous ... [or] likely to injure another person, and quite inadvertently the doer ... causes the death ... then he is guilty of manslaughter'

- That the accused committed **an act that causes the death of**
- **another person;**
- That the relevant act was committed **consciously, voluntarily and deliberately;**
- That the relevant act was **"unlawful"**; and
- That the relevant act was **objectively "dangerous"**.

➤ **UNLAWFUL ACTS**

ONLY UNLAWFUL CRIMINAL ACTS (not civil crimes)

R v Franklin (1883) 15 Cox CC 163

Act must have involved a breach of the criminal law

Wilson v R (1992) 174 CLR 313; Pemble v R (1971) 124 CLR 107.

UNLAWFUL ACT MUST BE A DANGEROUS ACT

R v Larkin [1943] 1 All ER 217 (and 'likely to injure another person').

NOT ALL CRIMINAL ACTS "UNLAWFUL" FOR PURPOSES OF THIS ELEMENT.

Boughey v R (1986) 161 CLR 10 per Brennan J :

"where an act is unlawful ... by reason of the negligence with which the act is done, the doer of the act is not guilty of manslaughter if death results from the act unless negligence amounts to criminal negligence."

Boughey v R (1986) 161 CLR 10; R v Lamb [1967] 2 QB 981- An act will **not be "unlawful" if the accused had a defence** to the relevant offence.

BREACH OF A STATUTORY OR REGULATORY PROHIBITION ALONE IS NOT SUFFICIENT

R v Pullman (1991) 25 NSWLR 89, Hunt CJ (Campbell and Newman JJ concurring) the act must be unlawful for some reason other than the breach.

All elements of Unlawful act must be present. AR (plus MR and TC if MR offence)

R v Lamb [1967] 2 QB 981 Do only Offences requiring proof of *mens rea* fall within that category?

(R v Nguyen (Ruling No 2) [2010] VSC 442).

Do offences that are dependent on negligence or gross negligence therefore not qualify as "unlawful". (negligent manslaughter more appropriate?).

➤ **MUST BE "OBJECTIVELY DANGEROUS"**

Wilson v R (1992) 174 CLR 313; R v Holzer [1968] VR 481

Irrelevant whether the accused thought his or act was dangerous or not

Wilson v R (rejected test of foreseeability)

Jury must find that a **reasonable person** in the position of the accused, performing that act, **would have realised** that he or she **was exposing the deceased to an 'appreciable' risk of serious injury**. (rather than 'really' as in *Holzer*). **BP 241**.

"SERIOUS INJURY" – for jury to determine

➤ **REASONABLE PERSON**

R v Edwards [2008] SASC 303 BP249.

Layton J took the view that the reasonable man is to be imputed with:

- the age of the accused,
- the experience and knowledge of the accused and
- the normal fortitude & strength of mind.

OBJECTIVE TEST: *In the circumstances and on the facts as they are known to the accused – would a sober and reasonable person have realised that the unlawful conduct would have subjected another to 'an appreciable risk of serious injury'?*

The reasonable person **would know** of any peculiarities or weaknesses of the victim that the accused possessed at the time of committing the unlawful act (but no more than what accused knew)

R v Dawson (1985) 81 Cr App R 150; *R v Watson* [1989] 1 WLR 684.

Reasonable person **will not** be vested with the accused's mental state, idiosyncrasies or factors affecting the accused's reasoning or judgment. Anything that clouded the mind of the accused *R v Wills* [1983] 2 VR 201; *R v Lavender* (2005) 222 CLR 67).

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 **will not** be invested. *R v Wills* [1983] 2 VR 201; *R v Ball* [1989] Crim LR 730).

INVOLUNTARY MANSLAUGHTER BY CRIMINAL NEGLIGENCE

Caused the death of another by an act or omission in circumstances involving a high degree of negligence. **BP 251**.

- **Voluntary act** (or in some circumstances omission)
- **Causing death of**
- **another (human being)**
- **Absence of intent to cause death or GBH**
- **Duty and standard of care**

- Accused **owed a "duty of care" to Victim;**
- Level of "Standard of care" owed to victim:+
 - Accused's act, in the circumstances, amounted to a gross departure from the standard of care and
 - involved such a high risk that death or GBH would follow that the doing of the act merits criminal punishment.

Nydam v R [1977] VR 430

"criminal negligence... does not involve a consciousness ...of the likelihood of ...causing death or [gbh]....The requisite mens rea is rather an intent to do the act which... caused the death ...but to do that act ... where the doing of it involves a great falling short of the standard of care required of a reasonable man in the circumstances and a high degree of risk or likelihood of the occurrence of death or serious bodily harm if that standard of care was not observed... such a falling short'.

"DUTY" OF CARE

Must establish accused owed duty of care to V.

Acts:

- Principles for general tortious duty not to cause harm to another applicable

OMISSION:

Criminal liability will only arise if accused under a recognised duty to act to avoid causing injury or death and he makes a conscious decision to refrain from acting.

A failure to act must be voluntary:

- **the accused is aware the victim is in danger and**
- **the situation is such that the accused can ward off the danger without significantly suffering harm him or herself.**

GENERAL RULE (at cl)

R v Coney (1882) 8 QBD 534

"it is no criminal offence to stand by, a mere passive spectator of a crime, even of murder ." **Exceptions**-Law may import a duty to act in certain situations:

- **Contractual obligations** (eg hired body guard).
 - **Statutory duty to act** (eg police officer)
 - **Voluntary assumption of responsibility** to assist a person may create a duty to take steps to help preserve that person's life (especially where they are isolated from receiving care from others). *R v Stone: R v Dobinson* [1977] QB 354
- R v Taktak* (1988) 14 NSWLR 226, NSW Crim Ct of Appeal – jury could not have found BRD that the accused's omitting to seek medical treatment had caused the death, or that the accused's conduct fell short of the standard of care owed to the requisite degree. (uncertain of the facts, time of death etc). **BP 263-64**.
- **Special relationship** (eg parent and child or husband and wife) and the victim is relying on accused for protection, reliance is reasonable in circumstances and the defendant knows or has reason to know of victim's reliance.

"STANDARD OF CARE"

In evaluating if someone's conduct falls below the standard of care courts weigh up BP 552:

- Social utility of conduct
- Magnitude of risk involved in conduct
- Likelihood that the risk will materialise
- The burden in taking the appropriate measures to minimise or eliminate the risk

Varying "degrees" of negligence may be found:

- “Least” culpable form (just falls below standard) = “ordinary” negligence = compensation in tort law **BP 252.**
- “Gross” or “criminal” negligence
- Most” culpable forms = **Reckless or “aggravated” negligence** (See reckless murder for definition of recklessness).

STANDARD OF CARE- OBJECTIVE:

What is **expected of a reasonable person** in the same situation as the accused.

- Accused’s act, in the circumstances, amounted to a **gross departure from the standard of care** and
- involved **such a high risk that death or GBH** would follow that the doing of the act merits criminal punishment.

Cittadini v The Queen [2009] NSWCCA 302

“the degree of negligence must extend beyond a mere matter of compensation between citizens [and] show such disregard for the life and safety of others as to amount to a crime against the state”

Non MR offence (objective test)

Nydam:

No MR “mens rea does not involve a consciousness ... of the likelihood of his acts causing death or... [gbh] **the accused man did not in fact advert (although a reasonable man would have adverted) to the probability that death or ...[gbh] would ensue.....if the accused ...[knew] ... and consciously accept[ed] the risk, it is murder.** ”.

HIGH DEGREE OF RISK

Nydam

“indicating to a jury the high degree of negligence necessary ...is to relate it to the risk or likelihood of substantial personal injury resulting from it, rather than ... ‘negligence’.”

*“... in circumstances where the doing of it involves a great falling short of the standard of care required of a reasonable man in the circumstances and a **high degree of risk or likelihood of the occurrence of death or serious bodily harm** if*

INVOLUNTARY MANSLAUGHTER BY UNLAWFUL AND DANGEROUS ACT

– The accused performs an act that is ‘both unlawful and dangerous in the relevant senses’ that causes the death of another.

THERE ARE OTHER FATAL OFFENCES CLASSIFIED SEPARATE FROM MURDER & MANSLAUGHTER

INFANTICIDE is a distinct offence but is similar to voluntary manslaughter in that it would constitute murder if not for the mitigating circumstances (psychological effects of giving birth) **Crimes Act 1958 (Vic) s 6.**

CULPABLE DRIVING CAUSING DEATH - Crimes Act 1958 (Vic) s 318.

CHILD HOMICIDE - Crimes Act 1958 (Vic) s 5A. BP 44.

DEFINING HOMICIDE

MEANING OF LIFE AND DEATH

This issue has not arisen frequently, and where it has arisen it has arisen in the area’s of the legal status of a foetus and the liability of doctors in cases of euthanasia and withdrawal of life support. **BP 45.**

FOETUS AND CHILD

A foetus in its mother’s womb is not considered ‘in being’ and therefore does not fit within the definition of homicide. **BP 45. R v Hutty [1953] VLR 338 (SCV) BP 46.**

19 YO girl accused of murder of an infant, she gave birth and baby either fell to ground and was killed (girl claimed) or was kicked to death as per signed hospital confession.

The child was considered to be ‘in being’ as it had been completely delivered from its mother and has a ‘separate and independent existence in the sense that it does not derive its power of living from its mother’ (umbilical cord irrelevant) child is living ‘by virtue of the functioning of its own organs.’ **Barry J.**

R v West (1848) 2 Cox CC 500 BP 47.

Doctrine of ‘transferred intent’ or ‘transferred malice’. Injuries sustained while in the womb where they cause death after being born alive can amount to killing a human being.

MEANING OF DEATH

This definition is important in defining if and when a homicide has occurred especially in cases where life support machines are a factor. **BP 47.**

HUMAN TISSUE ACT 1982 (VIC) S 41.

Definition of death

For the purposes of the law of Victoria, a person has died when there has occurred—

- irreversible cessation of circulation of blood in the body of the person; or
- irreversible cessation of all function of the brain of the person.

Only provides ‘guidance’ irreversible cessation of brain function is said to mean **brain stem death** not total cessation of all brain activity.

The **definition of irreversible blood circulation** has not been addressed in Australian law but has been addressed in England in **Airdale NHS Trust v Bland [1993] 1 All ER 821.**

TWO CENTRAL ELEMENTS OF ACTUS REUS- UNLAWFUL HOMICIDE

- **Voluntariness;** (rare, rebuttal presumption)
- **Causation**

VOLUNTARINESS

(only mental component of actus reus)- For an act to be voluntary it must consist of **‘some willed muscular movement.’**

In **Ryan v R 121 CLR 205**, Barwick CJ said (at CLR 216), ‘...the authorities establish, and it is consonant with principle, that an accused is not guilty of a crime if the deed which would constitute it was not done in exercise of his will to act’.

Generally presumed that, the accused did in fact act voluntarily. Where sufficient evidence to the contrary is raised, the prosecution is required to prove beyond reasonable doubt. **Ryan v R (1967) 121 CLR 205** at 213 per Barwick CJ states that in the absence of evidence to the contrary there is a rebuttable presumption that the defendant’s act or omission was voluntary in the relevant sense.

Where sufficient evidence to the contrary is raised, the prosecution is required to prove beyond reasonable doubt.

The test for whether a genuine issue of voluntariness has been raised in **Ryan v R (1967) 121 CLR 205** at [217] Barwick CJ stated that ‘whether upon that material a jury would be entitled to entertain a reasonable doubt as to the voluntary quality of the act attributed to the accused.’

Accused’s act or omission must be result of an exercise of free will of the accused (**Woolmington v D.P.P. [1935] AC 462; R v Falconer (1990) 171 CLR 30.**

A muscular movement or omission is deemed wilful if it results from a conscious decision to move or refrain from moving a portion of one's body.' **BP 26.**

In the High Court decision in *R v Falconer (1990) 171 CLR 30* at [40] per Mason CJ, Brennan and McHugh JJ held that :

'The requirement of a willed act imports no intention or desire to effect a result by the doing of the act, but merely a choice, consciously made, to do an act of the kind done' **SLEEP WALKING** for example is not conscious, and involuntary reflexes are not the result of conscious action. **BP 26.**

REFLEX ACTION NOT VOLUNTARY

Ryan v R (1967) 121 CLR 205.

Killing during armed robbery – Reflex action causing weapon to discharge – Voluntary act – Accident – “Act” of accused – Relevant state of mind – Wounding – No intent to wound – Crimes Act 1900 (N.S.W.), ss. 18 (1), 98.

R v Butcher [1986] VR 43

Where the holding out of a knife was found to be sufficiently voluntary and found to be the cause of the fatal injuries of the deceased despite no forward action or movement of the accused. **BP 49.**

DEFENCES: Duress or compulsion.

CAUSATION

Causal connection between the accused's voluntary act (or omission) and the non MR component of the offence. Where this act will be an operating and substantial or significant contribution to the happening of the event if not sufficiently interrupted.

Steps:

- (1) **Identify** accused act(s) or omission(s) that may be cause of death giving rise to liability.
- (2) Consider if death is **causally related** to accused act / omission using two fold test.
 - **"But for" the act or omission** the death would not have occurred when and how it did.
 - **A supervening or superseding event** has broken the chain of causation from the act or omission of the accused to the death of the victim. (something else is regarded as the cause of death).

TO FIND LEGAL CAUSATION IDENTIFY CATEGORY OF CASE:

- Flight and self-preservation case?(*Royall*),
- Eggshell skull case (*Blaue*)
- Medical treatment case (*R v Smith, R v Evans & Gardener*)

P must prove beyond a reasonable doubt that **"but for"** the accused's voluntary act or omission the death of the victim would not have occurred.

Where two or more separate events (by different people) concurred to bring about death– Courts would likely relax this requirement to avoid an unjust outcome *March v Stramare Pty Ltd (1991) 171CLR 506* at 516 per Mason CJ (civil?).

SUPERVENING OR SUPERSEDING EVENT - May consist of human acts or omissions, 'acts of god', and even acts of animals.

Legal causation determined by a fact finder.

Never just one 'but for' cause must be established which is relevant. There is no one single legal test of causation in Australian criminal law, instead there are a number that may be used.

1ST TEST: OPERATING AND SUBSTANTIAL CAUSE TEST

- **Accused's conduct must substantially or significantly contribute to the victim's death:** *Royall v R (1991) 172 CLR 378.*
- The test is an **OBJECTIVE TEST** not a subjective test. This means that what the accused intends **(ACCUSED'S STATE OF MIND) IS NOT RELEVANT.** *R v Hallet [1969] SASR 141.* (left guy on beach tide rose and he drowned, did not break the chain (ordinary operation of the sea)). **BP 53.** "Extraordinary", as opposed to ordinary, operation of natural forces might break the chain of causation. (obiter). (*Royall v R* also said **objective**).

R v PL (2009) 261 ALR 365; [2009]NSWCA 256

Cause of death need not be narrowed down to one act.

TAKE YOUR VICTIM AS YOU FIND HIM/HER: THE EGG SHELL SKULL RULE

Where V, as a result of unknown frailty, dies of an injury inflicted by D and of which a normal person would not die, this

frailty cannot be argued by D to break the chain of causation. This principle can be extended to non-fatal assaults.

R v Blaue [1975] 1 wlr 1411

A Jehovah's witness stabbed and refused blood transfusion – did not break the chain.

Lawton LJ said (at 1415):

'those who use violence on other people must take their victims as they find them. ... the whole man, not just the physical man. ... what caused her death ... the stab wound. The fact that the victim refused to stop this end coming about did not break the causal connection'

THIRD PARTY INTERVENTIONS

E.g. medical treatment of the victim.

Where accused inflicts injuries on V, for which V receives medical treatment and subsequently dies:

- **ACCUSED WILL BE DEEMED TO HAVE CAUSED THE DEATH IF AT THE TIME OF DEATH, HIS ORIGINAL ACT OR CONDUCT IS STILL AN OPERATING AND SUBSTANTIAL CAUSE OF DEATH.**

R v Smith [1959] 2 QB 35. English case - distinguished Jordan on the facts.

'the treatment [was] **thoroughly bad** and might well have **affected his chances of recovery'** but didn't break in chain as *was still operating and in effect as wound had not healed.*

- **ONLY IF IT CAN BE SAID THAT THE ORIGINAL ACT OR CONDUCT OF D IS MERELY THE SETTING IN WHICH ANOTHER CAUSE OPERATES CAN THE CHAIN OF CAUSATION BE BROKEN.**

R v Smith [1959] 2 QB 35. English case

'Only if it can be said that the original wounding is merely the setting in which another cause operates can it be said that the death does not result from the wound. Putting it another way, only if the second cause is so overwhelming as to make the original wound merely part of history can it be said that death does not flow from the wound' (per Lord Parker CJ at 42-43).

- **THE SUBSEQUENT CAUSE MUST BE SO OVERWHELMING AS TO MAKE THE ORIGINAL ACT OR CONDUCT OF THE ACCUSED MERELY PART OF THE HISTORY SO AS TO BREAK THE CHAIN OF CAUSATION**

(R V JORDAN; R V SMITH AND R V EVANS AND GARDINER (NO. 2)).

R v Jordan (1956) 40 Cr App Rep 152,

Solider died of medication reaction after being in hospital for a stab wound. Medical treatment described as “palpably wrong” and therefore broke the chain of causation.

R v Evans & Gardiner (No 2) [1976] VR 523,

‘The failure of the medical practitioners to diagnose correctly the victim’s condition, however **inept or unskilful**, was not the cause of death.’ [534] The Full Court of the Victorian Supreme Court (Young CJ, Gillard and Anderson JJ) accepted Lord Parker’s test in *R v Smith* ...

‘the accused bears no burden of proving such an overwhelming cause and the burden remained on the Crown to prove that the act of the accused caused death, despite the presence of a cause that the defence might claim was overwhelming’ (at 529)

2ND CAUSAL TEST: NOVUS ACTUS INTERVENIENS

A person is **not liable for a consequence if an intervening act has broken the chain of causation and can be considered to be the sole cause of the consequence: R v Pagett (1983) 76 Cr App R 279 .**

Burns v The Queen (2012) 246 CLR 334 ; 290 ALR 713 ; [2012] HCA 35

Where a person dies as a result of consuming drugs supplied by the accused, the act of taking the drugs by the deceased was a **novus actus interveniens** between the supply of the drugs and the death (lexus nexus).

Not widely in itself as a test in Australian criminal law.

3RD AND 4TH TESTS: NATURAL CONSEQUENCE AND REASONABLE FORESIGHT

Acts of the victim, such as self-preservation BP 68.

Royall v R (1991) 172 CLR 378

Differing views/approaches 7 J’s. (eggshell test may not apply to these cases).

MAJORITY

Reaction of **Victim only severs casual chain if the reaction is unreasonable or disproportionate** to the threat posed by the

accused. (unless it was an intended consequence of the accused’s actions).

Tort concept of reasonable foresight should not be used in criminal self-preservation cases for causation.

The test is **whether the victim’s reaction was an objectively reasonable or proportionate response to the threat** posed by the accused. (irrelevant that the result was not a reasonably foreseeable consequence.).

P must prove for causation in self-preservation cases:

- **That the accused induced a well-founded apprehension of physical harm in the victim, and**
- **The apprehension must be such as to make it reasonable (or a natural consequence) that the victim would escape and**

That **the mode of escape was reasonable/proportionate/ a natural consequence.**