

# **CRIMINAL LAW**

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## Unlawful homicide (s277)

- Accused could be liable for victim's death if it is found that he unlawfully killed him.
- According to s277 an unlawful killing is either murder (s279) or manslaughter (s280). To establish either of these offences it is necessary to prove:
  1. **Unlawful**
  2. **Kill**
  3. **Another person**

### ELEMENT 1: UNLAWFULLY

- A killing is "unlawful" unless it is authorised, justified or excused by law (s268).
- An "unlawful" killing is either murder or manslaughter (s271)

### ELEMENT 2: KILL

- "Killing" is defined in s270 and requires that the **accused cause the death of a person**.
  - Death
  - Causation

### SUB-ELEMENT: DEATH

- "Death" is defined in s45(1) of the *Interpretations Act* (WA) to mean that there has been an irreversible cessation of brain functioning or blood circulation.
  - Death of the brain stem is clinically dead (*Malcherek and Steel*)
  - "Persistent vegetative state" = person who has suffered irreversible damage to the cortex of the brain, but whose brain stem remains alive and functioning → PVS is **NOT** brain death therefore a person with PVS can be killed
    - **HOWEVER** withdrawal of artificial nutrition and hydration from person in PVS causing that person's death may be **LAWFUL** because there is no duty to administer artificial nutrition/hydration (*Aierdale NHS Trust v Bland, Gardner; Re BWV*)

#### *Aierdale NHS Trust v Bland*

- **FACTS:** B is PVS.
- **ISSUE ON APPEAL:** Would doctor's "cause" B's death by stopping nutrition/hydration?
- **HELD:** Omission to act would be culpable IF there was a **DUTY OF CARE** but doctors "are neither entitled nor under a duty to continue such medical care. Therefore they will not be guilty of murder if they discontinue such care."

#### *Gardner; Re BWV*

- **HELD:** any form of artificial nutrition and hydration is a **MEDICAL PROCEDURE**, not part of palliative care, and that it is a procedure to sustain life, not to manage the dying process. Thus, the law **does not impose a rigid obligation to administer artificial nutrition or hydration to people**.

### APPLY

- "Killing" is defined in s270 and requires that the accused cause the death of a person.
- Whether accused's death has occurred is unproblematic as it states that he is dead.

### SUB-ELEMENT: CAUSATION

#### KRAKOUER TESTS: FACTUAL AND LEGAL CAUSATION

- It must now be established that the accused caused the death of victim.
- According to *Krakouer*, there are **two steps to establishing causation**.
- First it must be shown that accused is the **factual cause** of victim's death.
  - This is done by applying the "but for" test (note: this test can establish indirect cause i.e. *Vera James*)

#### *Vera James* [

- **FACTS:** A inserted a 'rigid implement' into victim's womb to procure an abortion. Victim died 12 days later from broncho-pneumonia, apparently brought on by septicaemia
- **HELD:** Abortion here an indirect cause of death → "But for" the abortion, the victim would not have died.

- Second, it must be shown that accused is **legal cause** of victim's death.
  - This is done by asking whether accused's action/omission was a **sufficiently substantial or significant cause of the victim's death** (*Krakouer*).

### **Krakouer**

- **FACTS:** The appellant K and the victim got into a fight. During the course of the fight C hit the deceased at the base of his chin with a mallet, so as to inflict a mortal wound. After the victim had fallen to the ground, K ran into nearby bushland and grabbed a post and struck the victim on the back of his head, so as to fracture the deceased's skull
- **PROCEDURAL HISTORY:** K was convicted of murder → appealed against his conviction on the basis of the TJ's directions on causation (K contended that a jury, properly instructed, could not have concluded that his actions were a cause of the death given that a mortal wound had already been inflicted)
- **HELD (WACCA):**
  - Test for causation is **whether the accused's action is a substantial or significant cause of the death** (adopting Deane and Dawson JJ's approach in **Royall**).
  - What the accused did (or omitted to do) **need not be the sole cause of death** for the accused to be held criminally responsible.
  - K guilty and appeal dismissed.

### **APPLY:**

- Victim would not have died "but for" the accused [doing act] therefore there is factual causation. The main cause of the victim's injuries which led to his death was caused by accused's act. Therefore, accused significantly contributed to victim's death and there is legal causation.

### **CAUSATION: DUTY TO ACT (s262 - s267)**

- Difficulty in establishing factual/legal causation when the accused has failed to act.
- The duty sections establish a causal link between the accused's omission and the victim's death provided the accused has a duty to the victim. Person with duty must do whatever they reasonably can do to avert harm, otherwise they have breached their duty.
- **When will the duty be breached?**
  - NEGLIGENCE: At least criminal negligence required (**Callaghan**)
  - INTENTIONAL: Duty may be intentionally breached (**MacDonald**)

### **DUTY TO PROVIDE NECESSITIES OF LIFE (s262)**

- **s262** provides that it is the duty of every person who **has charge of another** person (who is unable to withdraw himself from such charge and who is unable to provide himself with the necessities of life), to **provide that person with the necessities of life**.
- **Meaning of "Necessities of life"**
  - What is regarded as the "necessities of life" is an objective test 'according to the plain common-sense ideas of the ordinary people' (**MacDonald**)
    - Whether the accused did not intend to breach the "necessities of life" is not relevant (**MacDonald**).
  - Medical aid is included in the "necessities of life" (**MacDonald, Heaton**)

### **MacDonald v MacDonald**

- **FACTS:**
  - 14-year-old daughter brought to live with her father and step-mother; victim was healthy/robust when she arrived
  - Within a few months, victim became emaciated with broken ribs and sores on her body
  - No medical aid was provided to victim; victim died of exhaustion

### **Heaton v The State of Western Australia**

- **FACTS:**
  - Accused injected victim with heroine (at victim's request); discussed that it was her first time and that care should be taken to prevent overdose. Accused fell asleep and could not be woken. Accused put unconscious victim in his car.
  - Need for medical attention for victim was raised by third-party to accused; accused rejected and warned off third-party from touching victim.
  - Victim died in car.

### **Brightwater Care Group v Rossiter**

- **FACTS:**
  - Mr R lived at BCG facility and required hydration/nutrition tube to be fed and hydrated.
  - Mr R requested to die - requested that hydration/nutrition tube be removed.
  - BCG uncertain about their duty under s262 to provide the "necessities of life" to Mr R.

- “**Having charge of another**”:
  - **Heaton**: a person “has charge of another” if he has **knowledge** of other person not being able to provide themselves with the necessities of life (i.e. due to drug-taking) and then **assumes control** of the situation. A person can **assume control** by **secluding other person** so as to **prevent others from rendering aid** to that person.
    - Heaton deliberately took victim to his car and rejected offers from others to render help to the victim.
  - **BCG v Rossiter**: a person “has charge of another” if he assumes the charge of another person who “**lacks the capacity to direct or control their own destiny** and is therefore dependant upon the person ‘having charge’ of them”.
    - Rossiter (although paraplegic) was not “in charge of” BCG as he had (1) full mental capacity (2) the ability to give directions about his future care (therefore able to ‘withdraw himself’).
  - **NOTE**: facts that increase strength of argument that accused had “charge” of victim
    - Accused was related to victim and had knowledge of...
    - Accused was a nurse and had medical expertise (i.e. **MacDonald**)

#### **DUTY OF PERSONS DOING DANGEROUS ACTS (s265)**

- **S265** provides that it is the duty of every person who is doing anything that may be **dangerous to human life**, including **surgery**, to have **reasonable skill and use reasonable care**.
- Applies to “gross negligence” relating to (1) surgical procedures (2) judgements about patient’s conditions (3) judgements about the risk to patients of surgical procedures (**Patel**)

#### **DUTY OF PERSON IN CHARGE OF DANGEROUS THING (s266)**

- S266 provides that it is the duty of every person in **charge/control of a dangerous thing** to use **reasonable care and take reasonable precautions** to avoid danger.
- Objects which are not inherently dangerous may become dangerous given the context in which they are used (i.e. **Dabelstein** pencil in vagina caused haemorrhage)

#### **CHAIN OF CAUSATION: DEEMING PROVISIONS (s272 – 275)**

- Next, it must be determined whether the chain of causation has been broken. If the chain of causation is broken the accused is not criminally liable.
- The deeming provisions, outlined in s272 to s275, deem the accused to have caused the victim’s death in certain circumstances where there has been an event subsequent to the accused’s action.

- **THREAT CAUSING DEATH: s272** makes it clear that if the accused threatens/intimidates/deceives the victim, and this causes the victim to do something which leads to their death, the accused will be held to have caused the death.
  - In **Royall**, the victim was threatened by the accused and jumped out a window. The court held that it was “natural” and “reasonable” that the victim tried to escape and that the only “mode of escape” was out the window, thus the victim’s death was caused by the accused’s conduct.

#### **Royall v R**

- **FACTS**: Victim fell to her death after falling from the bathroom window of a 6<sup>th</sup> floor flat. There was a violent argument between the victim and the appellant prior to her falling.
- **PROSECUTION ARGUED**: applicant caused the death in one of three ways:
  - He pushed her out the window;
  - He physically attacked her and in retreating she fell out of the window;
  - That immediately before falling she had a well-founded and reasonable apprehension that if she remained she would be subjected to further violence, so she jumped to escape;
- **HELD**: the accused’s actions to be a substantial or significant cause of death in all three scenarios (with s272 applying to the third scenario and thus no break in chain of causation).

- **ACCELERATION OF DEATH: s273** makes it clear that if the accused does or omits to do any act which hastens the death of another person, who is suffering from a disease/disorder, the accused will be held to have caused the death.
- **PROPER PRECAUTION: s274** makes it clear that where a person has done bodily injury to the victim and the victim dies, it is immaterial that the death could have been prevented by proper precaution (medical treatment) on the part of the victim.
  - In **Blaue**, victim was stabbed and refused blood. Court held that the accused caused victim’s death.

- In **Bingamore**, victim suffered bodily harm from accused and left hospital against medical advice. Court held that the accused caused victim's death.
- **SUBSEQUENT TREATMENT: s275** makes it clear that if the accused has **done GBH** to victim and the victim dies and as a result of medical treatment, so long as medical treatment was "reasonably proper" and applied in "good faith", the accused is deemed to have caused the death
  - GBH is defined in s1 as 'bodily injury of such a nature as to endanger life, or to cause, or be likely to cause, permanent injury to health'.

**Levy: medical treatment = "reasonably proper" but still dead victim = continued chain of causation**

- **FACTS:** stabbed victim administered drugs, drugs triggered underlying condition and he died
- **HELD:** Wolff J found that treatment was "reasonably proper" because of the limited information in emergency treatment situation → "the circumstances as viewed by the medical attendants at the particular time or period, according to the reasonable information then at their command." → no break in chain of causation

**Jordan: medical treatment = not "reasonably proper" = broken chain of causation**

- **FACTS:** stabbed victim administered drugs he was allergic to twice and given "wholly abnormal quantities" of liquids intravenously → victim died from waterlogged lungs
- **HELD:** Court of Appeal allowed the appellant's appeal on the basis that the chain of causation had been broken by the medical treatment which was 'palpably wrong' and 'wholly abnormal'. Medical treatment NOT "reasonably proper" = break in chain of causation

**Cook – PRECEDENT: non-administration of treatment if deliberate/considered is still "reasonably proper" and thus does not break chain of causation**

- **FACTS:** The appellant stabbed the victim in the back, who died of a pulmonary embolism 10 days later. The embolism could have been prevented by anti-coagulant drugs but these were not administered by the doctors because, on balance, the view was taken that the risk of haemorrhage which could have resulted in paraplegia, was more likely
- **HELD:** Non-administration of the drugs constituted "treatment" → no evidence that the treatment was not a proper one in the circumstances → No break in chain of causation

**ELEMENT 3: ANOTHER PERSON**

- According to s269, a person is capable of being killed if they fully emerge in a living state from their mother's body.
  - NOTE: A child born alive but doomed to die is classified as a 'human being' capable of being killed (**Castles**).
  - A person cannot be convicted of homicide where they do something or omit to do something which leads to the death of the baby before it is born.
    - This is a separate offence → s290 (Killing an Unborn Baby)
      - person can be guilty of this offence even if the unborn child was not of an age where it would have been capable to live independently of mother (**Waigana**).
  - BUT, where the baby is fatally wounded in the womb and then born alive but later dies of its injury → the accused may be convicted of murder/manslaughter under s271 (**Martin**).

**Martin**

- **FACTS:** Stabbed pregnant mother, baby died at 7 months from brain damage after it was born (obtained from stabbing of mother)
- **ARGUMENT:** Accused argued that unborn child was not a "person" when stabbed.
- **HELD:** Martin caused death of baby.
  - s 270: you kill if you cause a person's death "directly or indirectly by whatever means"
    - INDIRECT (as stabbed mother) → need "deeming" causation provision to ESTABLISH CAUSATION
  - "Deeming" causation provision → s271: "**Death by Acts Done at Childbirth**"
    - "When a child dies **in consequence of an act** done or omitted to be done by any person **before or during its birth**, the person who did or omitted to do the act **is deemed to have killed the child.**"

**CONCLUDE:**

- Accused has caused the death of victim. Next, it must know be determined whether this is a case of murder or manslaughter.

## Murder (s279)

- Accused could be liable for murder (s279).
- This offence requires:
  1. Kill
  2. With an intention
    - to kill [s279(1)(a)] **OR**
    - to do a bodily injury that endangers or would be likely to endanger life [s279(1)(b)]

**OR**

  3. “Dangerous Act Murder” [s279(1)(c)]
    - specific act
    - that was likely to cause death; AND
    - done for an unlawful purpose

## MURDER WITH INTENT to kill s279(1)(a) + to do GBH 279(1)(b)

### ELEMENT 2: AN INTENTION TO KILL/DO BODILY INJURY THAT ENDANGERS OR WOULD BE LIKELY TO ENDANGER LIFE

- Murder in s279(1)(a) and (b) requires an intention to kill or to do a bodily injury that endangers or would be likely to endanger life.
- Intent is assessed subjectively (*Schultz*).
  - Evidence of the mental capacity of the accused is relevant as it affects the thinking process by which the accused forms intent (*Schultz*).
  - The accused’s subjective opinions are not relevant to the assessment of intent (*Watson*).

#### *Schultz* [WA]

- **FACTS:** S killed victim. Evidence of evidence of borderline mentally-defective intelligence.
- **HELD (on appeal):** Intention is by its nature subjective. Subjectivity is affected by **mental capacity** therefore evidence of borderline mentally-defective intelligence of Schultz should have been admitted on the basis of its **effect on his thinking processes in relation to INTENT**.

#### *Watson* (QCCA)

- **FACTS:** Accused killed partner. Accused’s argument that it was a cultural practise for men to beat women and thus he did not intend serious harm
- **HELD:** Evidence was inadmissible – had nothing to do with the mental capacity of the accused.

#### MEANING OF INTENT

- Connolly J in *Wilmott* held that the ordinary meaning of “intent” is to **have in purpose**. *Zabouroni* supports this reasoning, holding that to prove intent the prosecution must prove that it is what the accused “**meant to do**”.

#### MOTIVE/DESIRE AND INTENT

- *Wilmott* held that **intent is not the same as motive or desire**. *Zabouroni* tempered *Wilmott* by suggesting that a relationship between intent and motive/desire exists, holding that that motive “describes the reason that prompts the formation of the accused’s intention”.

#### INTENT AND FORESIGHT

*Zabouroni* held that foresight of consequences will not be enough to satisfy proof of intention. This overrules *Wilmott* (which held that Intent may be inferred if the jury believe BEYOND REASONABLE DOUBT that accused foresaw the consequence of his act being (1) death or (2) GBH as a “PROBABLE” one).

#### INTENT AND EXTREME EMOTION

- Emotions such as extreme anger may prevent intent from being formed because emotion may inhibit the “capacity for the accused to reason and to understand what the consequences of the action may be” (*Turner*).

#### TIMING OF INTENT

- If the accused believes the victim to be dead (but the victim is not) and then the accused does something to the victim that actually kills them, the accused will be held to have intent. The point of time in which the accused attacks the victim with the intent to kill/cause GBH to the time where the victim actually dies is a “continuing assault” (*Jackson*).

### For s279(1)(b) INTENT TO DO BODILY INJURY THAT ENDANGERS OR WOULD BE LIKELY TO ENDANGER LIFE

- The test for **s279(1)(b)** is both **subjective and objective**, according to *Schmitt*. First, the accused must **subjectively intend** to cause bodily injury. Second, the bodily injury must **objectively endanger** or would be likely to endanger life.
  - “Likely” means a substantial or real and not remote chance” (*Hind and Harwood*)

***Schmitt [WASCA]***

- *FACTS*: A pushed V into window. V fell through window and died. A charged with Murder.
- *HELD*: Prosecution needed to prove that the A intended to push the V THROUGH the window (not just into it) to prove that accused subjectively intended to cause bodily injuries that would objectively endanger life.

***APPLY***

- There is nothing on the evidence to suggest that it was not the accused’s purpose to kill the victim, therefore he is not liable under **s279(1)(a)**.
- It was, however, the accused’s purpose to do the victim bodily injury, as the accused [did act].
- This injury had a “real and not remote” chance of endangering the victim’s life, as it [affected some important function].
- Therefore, the accused is liable for murder under **s279(1)(b)**.