

LAWS1022 NOTES

1	Components of criminal offences	4
1.1	Introduction	4
1.1.1	Summary vs indictable offences	4
1.1.2	The Golden Thread and the Burden of Proof	4
1.1.3	Criminal liability	4
1.1.4	Classification of offences	4
1.2	ACTUS REUS	4
1.2.1	Positive act vs omission	5
1.2.2	Voluntariness	5
1.2.3	Causation	5
1.2.4	Effect of novus actus	5
1.3	MENS REA	5
1.3.1	Subjective vs objective test	5
1.3.2	Intention	6
1.3.3	Knowledge	6
1.3.4	Recklessness	6
1.3.5	Negligence	7
1.4	Coincidence of actus reus and mens rea	7
1.5	Honest belief as to facts	8
1.6	Strict liability	8
1.6.1	Has the presumption of mens rea been rebutted?	8
1.7	Absolute liability	9
1.8	Status offences	9
2	Homicide – Offences	10
2.1	General	10
2.1.1	Manslaughter vs. Murder	10
2.1.2	The Prosecution process	12
2.2	Elements of murder	12
2.2.1	Actus Reus	12
2.2.2	Mens Rea	15
2.3	Manslaughter	19
2.3.1	Categories of Manslaughter	19
2.4	Special Circumstances	25
2.4.1	Death of Foetus	25
2.4.2	Death caused by driving	25

2.4.3	Corporate Homicide	26
2.4.4	Medical Treatments.....	27
2.4.5	EUTHENASIA	28
3	Homicide – Defences	30
3.1	Overview	30
3.2	Whole defences	33
3.2.1	The ‘Insanity’ Defences	33
3.2.2	Automatism.....	39
3.3	Partial Defences.....	43
3.3.1	Substantial Impairment	43
3.3.2	Provocation	45
3.3.3	Self-defence	52
3.3.4	Intoxication	54
3.3.5	Infanticide	57
3.3.6	Necessity	58
4	Assault & Sexual Assault.....	62
4.1	Overview	62
4.2	Elements of Assault.....	63
4.2.1	Actus Reus	63
4.2.2	Mens Rea	64
4.2.3	Consent	65
4.3	Categories of Assault.....	67
4.3.1	Common Assault.....	67
4.3.2	Aggravated Assault	68
4.3.3	Domestic violence.....	72
5	Sexual Offences.....	75
5.1	Overview of Offences.....	75
5.1.1	Sexual Assault.....	76
5.1.2	Indecent Assault.....	78
5.1.3	Act of indecency	78
6	Dishonest Acquisition.....	80
6.1	Overview	80
6.2	Larceny.....	83
6.2.1	Actus Reus	83
6.2.2	Mens Rea	84
6.3	Statutory Expansion of Larceny	86
6.3.1	Expansion of Property in the Possession of Another	87

6.3.2	Expansion of taking without consent – fraud offences	87
6.3.3	Expansion of intent to permanently deprive.....	88
6.4	Aggravated Offences	88
6.4.1	Robbery.....	88
6.4.2	Other aggravated offences: suggest a series of political issues	89
6.5	General Fraud Offences.....	89
6.5.1	Fraud – General (s 192E)	89
6.5.2	Deception	90
6.5.3	Consequences.....	91
6.5.4	Dishonesty (s 192E).....	92
6.6	Other Fraud Offences	93
6.6.1	Other Fraud offences.....	93
6.7	Alternative Verdicts	95
6.8	Other Relevant Offences	95
6.8.1	Trespass Offences	95
6.8.2	Receiving Stolen Goods (ss 188; 189).....	96
6.8.3	Goods in Custody (s 527C).....	97
7	Extending Criminal Liability	99
7.1	Overview	99
7.2	Complicity.....	100
7.2.1	General.....	100
7.2.2	Joint Criminal Enterprise (JCE).....	103
7.2.3	Extended JCE.....	104
7.2.4	Accessorial Liability	106
7.2.5	Innocent Agency	109
7.2.6	Accessory <i>after</i> the Fact.....	109
7.3	Conspiracy.....	111
7.3.1	Conspiracy	111
8	114
9	Sentencing	116

2 Homicide – Offences

Criminal Law General Rule

- To perform a forbidden act (*actus reus*) by itself does not make a person guilty of the crime; it also has to be shown that the person who performed that act had the necessary guilty mind (*mens rea*)
 - *actus non facit reum, nisi mens sit rea*
- **Onus: on the prosecution to prove the guilt of the accused beyond a reasonable doubt**
 - this is the 'golden thread' alleged to run through the criminal law

1.1 General

1.1.1 Manslaughter vs. Murder

Categories of homicide	<ul style="list-style-type: none">• Actus reus: Crimes Act 1900 (NSW) s 18<ul style="list-style-type: none">○ Act or omission causing death○ Commission of a prescribed offence constituting constructive murder• Mens rea:<ul style="list-style-type: none">○ Murder<ul style="list-style-type: none">▪ intent to kill▪ intent to GBH▪ reckless indifference to human life▪ constructive murder○ Voluntary manslaughter<ul style="list-style-type: none">▪ intent to kill but mitigating circumstances○ Involuntary manslaughter<ul style="list-style-type: none">▪ unlawful and dangerous act▪ negligence
Statutory definition	<p>Crimes Act s 18</p> <p>(1)</p> <p>(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, <u>causing the death</u> charged, was done or omitted with <u>reckless indifference</u> to human life, or with <u>intent to kill or inflict grievous bodily harm</u> 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 <i>punishable by imprisonment for life or for 25 years</i>.</p> <p>(b) Every other punishable homicide shall be taken to be manslaughter.</p> <p>(2)</p> <p>(a) No act or omission which was not malicious, or for which the accused had lawful cause or excuse, shall be within this section.</p> <p>(b) No punishment or forfeiture shall be incurred by any person who kills another by misfortune only.</p>
	<p>Crimes Act s 4 – definition of grievous bodily harm</p> <p>(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</p>

	<p>(b) Any permanent or serious disfiguring of the person, and</p> <p>(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)</p>
Causation / Actus reus	<ul style="list-style-type: none"> ○ The actus reus is common to both offences of murder & manslaughter ○ Homicide demands a <u>consequence of death</u> by the accused – otherwise <ul style="list-style-type: none"> • be acquitted of murder and manslaughter, or • has an intent to kill – charge of attempted murder (<i>Knight</i>)
Mens rea / categories	<ul style="list-style-type: none"> ○ Mens rea requirements draws the distinction between murder and involuntary manslaughter¹ <ul style="list-style-type: none"> • <u>Murder</u>: requires proof of malice aforethought <ul style="list-style-type: none"> ▪ Malice aforethought = all the states of mind that constitute sufficient mens rea for murder – i.e. intent or reckless indifference to human life (<i>see later</i>) ▪ in NSW, some degree of <i>actual awareness</i> by the accused of certain consequences which could result from his or her actions is required • <u>Involuntary manslaughter</u>: conviction is based on objective, not subjective, test <ul style="list-style-type: none"> ▪ i.e. depends on what the jury would impute to a <i>reasonable person</i> if placed in the accused position ▪ versions of objective standards which results in criminal homicide (<i>see later</i>) <ul style="list-style-type: none"> - manslaughter by criminal negligence - manslaughter by an unlawful and dangerous act ○ Other categories: i.e. exceptions <ul style="list-style-type: none"> • <u>Constructive murder</u> = act or omission causing death was ‘done in an attempt to commit or during or immediately after the commission, by the accused, or some accomplice with him, of a crime punishable by imprisonment for life or for 25 years’ (Crimes Act s 18(1)(a)) • <u>Voluntary manslaughter</u>: some ‘defences’ can either take the accused out of the criminal homicide category altogether or reduce the offence from murder to manslaughter <ul style="list-style-type: none"> ▪ Accused has the mens rea for murder ▪ Defences including self-defence, provocation, substantial impairment or infanticide (<i>see defences notes</i>) • <u>Suicide</u>: survivor of a suicide pact shall not be guilty of murder or manslaughter but may be guilty of an offence under s 31C (Crimes Act s 31A(1))
Proof of malice	<ul style="list-style-type: none"> ○ Proof of malice was <u>not an element of manslaughter</u> (<i>Lavender HC</i>) <ul style="list-style-type: none"> • i.e. s 18(2)(a) only applies to murder (s 18(1)(a)) and not manslaughter (s 18(1)(b)) ○ requirement of ‘malicious’ adds nothing to the heads of murder <ul style="list-style-type: none"> • which relies on intent to kill or cause of grievous bodily harm, or reckless indifference to human life because acts performed with these state of mind would necessarily be performed ‘maliciously’ (<i>Coleman NSW</i>) • its role in ‘constructive murder’ is implicitly rejected (<i>Munro</i>)

¹ Only deals with the degree of culpability of the accused in one dimension i.e. degree of awareness – there are other elements and factors which need to be considered

1.1.2 The Prosecution process

Charge	<ul style="list-style-type: none"> ○ Police & DPP may simply charge murder & let the jury and trial judge decide whether the accused is guilty of murder or manslaughter <ul style="list-style-type: none"> ● <u>Pro</u>: agencies not restricting the decision of the jury by charging the lesser offence ● <u>Con</u>: inefficient use of the court's time as more likely to content the murder charge by pleading not guilty
Onus of proof	<ul style="list-style-type: none"> ○ <u>Offences</u>: the prosecution has the burden to prove beyond reasonable doubt that the elements for the offence are present ○ <u>Defences</u>: (<i>see defence notes</i>) <ul style="list-style-type: none"> ● defence has evidentiary burden & prosecution has persuasive burden (balance of prob) ● insanity & substantial impairment – burden is on defence
Sentence	<ul style="list-style-type: none"> ○ Murder: imprisonment for life (s 19A) <ul style="list-style-type: none"> ● A court discretion to give a sentence of imprisonment of a specific term i.e. lessor sentence (s 21(1) Crimes (Sentencing procedure) Act) ● Life sentence if the level of culpability is so extreme that the community interest in retribution, punishment, community protection and deterrence can only be met through the imposition of that sentence (s 61 Crimes (Sentencing procedure) Act) ○ Manslaughter: imprisonment of 25 years (s 24) ○ <u>Standard non-parole period</u>: 20 years for murder (s 54A(2) Crimes (Sentencing Procedure) Act) <ul style="list-style-type: none"> ● 25 years in certain circumstances e.g. victim is a police officer or under 18 ● Court may change this period with a reason & record the reason (s 54B(2), (4))
Interconnected issues	<ul style="list-style-type: none"> ○ The trial judge must discuss the whole range of alternatives to the jury as they are unaware of whose version of the facts the jury will accept (<i>Pemble</i>) <ul style="list-style-type: none"> ● Appeal court – ascertain whether there is a misdirection on the law in relation to every possible version of fact ● A misdirection will only result in a quash of conviction if there is a 'substantial miscarriage of justice' – otherwise appeal court may dismiss appeal on proviso

1.2 Elements of murder

1.2.1 Actus Reus

- Actus reus: Crimes Act 1900 (NSW) s 18
 - Act or omission causing death
 - Commission of a prescribed offence constituting constructive murder

1.2.1.1 Causation

General	The actus reus of criminal homicide requires someone's death to be sheeted home to the accused (i.e. causation) ²
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² CL position – prosecution had to prove the death resulted within a year or a day after the victim received the injury (*Dyson*) – no longer the position in NSW (*Crimes Acts 17A*)

	<ul style="list-style-type: none"> • Causation occurs in many offences – Court focus on meaning of the concept in the precise context, rather than searching for ‘general principles’ (<i>see below examples</i>) • Case law suggests it is very difficult to break causation (<i>Royall, Hallett, Blaue</i>) • Issue of causation is one of fact left to the jury (<i>Royall</i>) <ul style="list-style-type: none"> ▪ Described as common sense, not philosophical or scientific <p>Causation for murder :</p> <ul style="list-style-type: none"> • D must have caused the death of V by voluntary act or omission • Question of fact for the jury to determine through application of common sense rather than philosophical or scientific enquiry (<i>Campbell</i>) • D’s mental state is irrelevant in determining causation • Tests are objective
Tests	<p><u>Four tests:</u></p> <ol style="list-style-type: none"> 1. Reasonable foreseeability: Objective test: would a reasonable person have foreseen V’s death arising from the conduct in which D engaged? (<i>Royall</i>) 2. Substantial cause: (<i>wounding</i>) While a number of factors may have contributed to the death of V, the conduct of D objectively assessed must be substantial or significant operating factor (<i>Hallett</i>) 3. Natural consequence: (<i>escape</i>) Applied objectively where D’s conduct induces in V a well-founded, reasonable and proportionate apprehension of physical harm such as to make it a natural consequence (or reasonable) that V would seek to escape from D. If V suffers death during such an escape, D is held to have caused V’s death (<i>Royall</i>) 4. [‘But for’: Rejected in <i>Arulthilakan</i>] but for the conduct of D, V would not have died <p style="text-align: center;">1. Reasonable foreseeability</p> <ul style="list-style-type: none"> • <u>Reasonably foreseeability test</u> is confusing & too subjective, hence the term should not be used by trial judge when directing the jury (<i>Hallett; Royall</i>) • May be relevant in malice aforethought (<i>Hallett</i>)³ <p style="text-align: center;">2. Substantial cause</p> <ul style="list-style-type: none"> ○ Test: if at time of death the original wound is still an operating cause and a substantial cause (<i>Smith; approved in Hallett; Evans & Gardiner (no 2)</i>) <ul style="list-style-type: none"> • Courts not concerned with discovering <i>the cause</i> of a particular consequence, but only whether the accused act or omission was <i>a cause</i>.⁴ • <u>Operating</u> = still in effect at the time of death (<i>see Hallett</i>) • <u>Substantial</u> = need not be leading cause, applied liberally (<i>see Blaue; compare to Jordan; also see intervening cause</i>) <p style="text-align: center;">3. Natural consequence</p> <ul style="list-style-type: none"> ○ Test: whether the victim has a well-founded & reasonable comprehension of danger, so the way of escape is a natural (or reasonable) consequence of the situation (<i>Royall</i>) <ul style="list-style-type: none"> • i.e. an act done by a person in the interest of self-preservation, in the face of violence or threats, does

³ mens rea element does not need to exist at all stages of causation – it is sufficient it was present at one essential stage (*Hallett*)

⁴ Policy consideration: not to allow a culpable person to escape liability just because someone else intervenes – Court reluctant to lower the threshold of liability or allow accused to escape liability just because there’s an intervening cause

	<p>not negative causal connexion between the threats & death</p> <ul style="list-style-type: none"> • <u>Natural consequence</u> = something very likely to happen (<i>Royall</i>) <ul style="list-style-type: none"> ▪ Mode of escape must not be irrational, unexpected or completely disproportional to the event ▪ It is a question for the jury (<i>Rik</i>) ▪ NB: it is expected that a person fearful for their own safety forced to react on the spur of the moment will not always make a sound of sensible judgment and may act irrationally (<i>Rik</i>)
Other tests?	<ul style="list-style-type: none"> ○ <u>'But for' test</u> is too wide (<i>Textbook of Criminal Law (1983)</i>)
Intervening Cause	<p>Intervening cause: breaks the chain of causation 'only if the second cause is so overwhelming as to make the original wound merely part of the history' or background information (<i>Smith</i>)</p> <ul style="list-style-type: none"> ○ <u>'Act of God' or natural forces</u> <ul style="list-style-type: none"> • may break the causation, only if it is extraordinary - e.g. lightning strike or earthquake (<i>Smith & Hogan; Hallett</i>) • if it is ordinary or re-occurring it cannot constitute intervening cause - e.g. tide (<i>Hallett</i>) ○ <u>Acts or decision of deceased:</u> does not constitute an intervening cause (<i>Blaue</i>) <ul style="list-style-type: none"> • Egg shell skull rule applies ○ <u>Acts of third party in self-defence:</u> no contributory negligence (<i>Pagett</i>) <ul style="list-style-type: none"> • E.g. using deceased as a human shield against police shooting – shooting of police is not intervening cause (<i>Pagett</i>) ○ <u>Frailty:</u> V's frailty is not a factor that might exculpate D. Killing is not less a crime because the victim was frail and easy to be killed (<i>Mamote-Kulang of Tamgot</i>) ○ <u>Medical intervention:</u> <ul style="list-style-type: none"> • Medical treatment that only delays the inevitable consequence of D's action, even if the treatment is incompetent does not constitute a break in causation. D will still be culpable of V's murder or manslaughter even if unsuccessful attempts are made to save V's life (<i>Evans & Gardiner</i>) • It is intervening cause if the original wound is almost healed & abnormal treatment caused death (<i>Jordan</i>) • Not intervening cause if (<i>Malcherek & Steel</i>) <ul style="list-style-type: none"> ▪ treatment is given <i>bona fide</i> by competent & careful medical practitioners & ▪ method is generally accepted by other medical practitioners • Discontinuing treatment or turning off life support in circumstances where the patient is for practical purposes dead,⁵ does not break the chain of causation between the initial injury & the death (<i>Malcherek & Steel</i>) • V's contributory negligence for (e.g. failing to seek or ignoring medical advice) does not interrupt causation and so does not negate D's culpability (<i>Bristow, Binapore, Cheshire</i>)

⁵ *Human Tissue Act 1983 s 33* – a person has died when there occurred an (a) irreversible cessation of all function of the person's brain; or (b) irreversible cessation of circulation of blood in the person's body.