

# HOMICIDE II: UNLAWFUL & DANGEROUS ACT MANSLAUGHTER; GROSS NEGLIGENCE MANSLAUGHTER

## Murder v manslaughter

- Conduct element is the same: an act or omission causing death
- Fault/mental element is different (this is what distinguishes the two)
  - Manslaughter is less blameworthy, either because D lacked the MR for murder, or because mitigating circumstances were present
- The Crimes Act does not define manslaughter, except to provide that it comprises all unlawful homicides other than murder: **s 18 (1)(b)**
- The maximum penalty for manslaughter is 25 years: **s 24**
- ‘...Manslaughter is almost unique in its protean character as an offence... in its objective gravity it may vary, as has been pointed out, from a joke gone wrong to facts just short of murder; *R v Forbes*

*Lane v R*: concerning the relationship between the offences of murder and manslaughter (both voluntary and involuntarily)

- All unlawful killings that do not amount to murder may lead to charges of manslaughter: **s 18 (1) (b)**

## Two categories of manslaughter

### Voluntary manslaughter

- The mental element for murder is present
- But culpability is reduced by the defences of extreme provocation (**s 23**), substantial impairment due to abnormality of mind (**s 23A**), excessive self-defence (**s 421**), or infanticide (**s 22A**)

### Involuntary manslaughter

D commits an unlawful homicide, but lacks the necessary mens rea for murder

- The mental element for murder is not present
  - (i) Unlawful and dangerous act (UDA) manslaughter; and
  - (ii) Manslaughter by criminal negligence (MCN)
    - By negligent acts
    - By negligent omissions

## The significance of fault and the role of objective standards in criminal law

### INVOLUNTARY MANSLAUGHTER

- The difference between involuntary manslaughter and murder is based on mens rea requirements: involuntary manslaughter can be charged where D lacks the mens rea for murder, and even where D has no mens rea at all
- Nothing ‘involuntary’ about the act/omission causing death in these cases; rather, the accused does not intend to kill the deceased – or have any of the other requisite mental states for murder
- NSW is covered by the common law, with two heads of involuntary manslaughter:
  1. **Manslaughter by unlawful and dangerous act**; and
  2. **Manslaughter by gross negligence**
- Manslaughter by gross negligence is usually in issue where the Crown alleges that the accused’s omission caused death; but this is not invariably the case
  - As *Nydam* and *Lavender* show, manslaughter by criminal negligence may also arise where the Crown alleges that there was an act causing death
- The same facts may also give rise to liability under each of these rules: *Burns*

## UNLAWFUL & DANGEROUS ACT MANSLAUGHTER

Under the common law, D can be liable for manslaughter where D kills V by an act that is both unlawful and dangerous

### Elements

Based on *Wilson*, the prosecution must prove:

- ❖ An unlawful act (including the actus reus and mens rea of a criminal offence);
- ❖ Caused the death of V; and
- ❖ Created an appreciable risk of serious injury

### Physical element

- An unlawful and dangerous act that causes death
  - Act must be 'unlawful'
  - Act must be 'dangerous'
  - Act must cause death (causation)

### Mental element

- Intent to do the unlawful and dangerous act

### Unlawful act

Before the reasonable person test is triggered, the prosecution must prove that there was an unlawful act

- *Lamb v R*: the unlawful act must be a criminal wrong
  - FACTS: Lamb jokingly pointed a revolver at his friend. L pulled the trigger, w/o realising that the cylinder rotated when the trigger was pulled. Gun was discharged and his friend was killed
  - HELD no unlawful act: L did not have the mens rea for assault
- A breach of civil law is insufficient: *Pemble v R*
  - Even a minor breach of criminal law could satisfy the requirement, however: note that the act must also be dangerous, and sufficiently dangerous to justify the application of the criminal law: *R v Borkowski*
- Omissions cannot form the basis of an unlawful act: *R v Lowe*
  - Where V dies as a result of D's failure to fulfil a legal duty, D may be liable for negligent manslaughter
- Prosecution must prove both the physical and fault element of the unlawful act i.e. they must prove all components of the foundational offence
  - The intent to be shown must be the intent to do the unlawful, criminal act
  - Thus, if D is able to justify the foundational act e.g. through self-defence, the act does not constitute an unlawful act for the purposes of this head: *R v Turner*
    - *Downs*: if D's production of a knife solely as a threat could be regarded as reasonable defence of his friend, who was substantially helpless on the ground and whom D reasonably believed was threatened with death or serious bodily harm, this was not an unlawful act for the purposes of unlawful act manslaughter because 'the defence of rescue' would be made out
  - In *Lamb*: couldn't prove the MR of the unlawful act
- An assault is a common unlawful act for UDA manslaughter e.g. *R v Loveridge*
  - Before the one-punch laws
  - Still the necessary MR to do the act of punching the victim (which caused his death)
  - Never any intent to kill someone, but did have the intent to assault someone
- Identifying the unlawful act causing death can be important, especially because it determines what mental element the prosecution is required to prove

# LARCENY

## GENERAL

- Originally law concerned right to **possess/use** objects – now w/ the right to **own**
- **Punishment** for larceny is set out in **s 117 Crimes Act: five years**
- **Defined** at common law: see *Illich v R*

## THE ELEMENTS

*Illich v R*

### THE ACTUS REUS

#### 1. Takes and carries away (asportation);

This is the only physical action in the offence

- There must be **asportation: physical removal** of the property
- **Slightest movement** is **sufficient**; *Wallis v Lane*
  - Removing earring to point of entanglement in hair sufficient: *R v Lapiere*
  - Moving two bike toe clips from open box to be hidden on tray; *Wallis v Lane*
- Must be a **positive act**, mere intention to take/passive retention insufficient: *Potisk*
  - Formation of a mental resolve ('movement of mind') to appropriate the thing later on that was not manifested in some overt act insufficient

#### 2. Anything capable of being stolen;

- Must be **tangible** i.e. have a **physical form**; can be 'taken/carried away'; *R v White*
  1. **Choses in action** cannot be stolen e.g. **money in a bank account**; *Croton*
  2. Not a **security** – e.g. a bill of exchange: *R v Potisk*
    - Not **copyright** in a song; *Kidd and Walsh*
  3. Can be **gas**; *Low v Blease*
    - Note some intangible property can now be stolen: *Crimes Act*
- Must be **moveable**
  - **Land cannot** be the subject of larceny: *R v Young* (but ex. in *Crimes Act*)
- Must be **of some value**; even the slightest value will be sufficient: *R v Perry*
- Must have an **owner**
  - **Wild animals** often **can't** be stolen: *Shickle* (but ex. in *CA*)
  - **Neither can abandoned property**; *R v MacDonald*
- **Corpses cannot** be property and thus cannot be **stolen**: *R v Sharpe*
  - Yet *Kelly v R*: larceny as stole corpses used for medical research

NB: prosecution need not prove which precise objects have been stolen; *Russell v Smith*

#### 3. Which belonged to another; and

Larceny was developed as an offence against possession (*Illich*), but has been extended to include offences against ownership and control.

- Property may simultaneously belong to more than one person as ownership, possession and control are not mutually exclusive: *Duyo John Anic v R*

#### Possession

Possession:

- (i) Some degree of physical control of the property at some stage; and
- (ii) Intention to maintain that physical control

- **Actual possession:** person has present physical custody of property/has it in such a place that person alone has the power to place his hands upon it and take custody of it: *Moors v Burke*
- Person in possession need not be aware of the existence of the property (e.g. golf balls on golf club grounds); *Hibbert*
- Includes:
  - o **Illegal property** (unlawful possession): *Anic* (e.g. drugs)
  - o **Constructive possession;** where person does not have actual possession of the property, but has the legal right to assume possession wish to do so (e.g. car dealer who allows employer to test drive); *Williams v Phillips*
    - Questions of whether a person has maintained constructive possession when handing over physical custody are a matter of fact and degree

### Control

Where a person has 'manual custody' of the property, or has it 'where he alone has the exclusive right or power to place his hands on it, and so have manual custody when he wishes': *Moors v Burke*

- Property can be stolen from someone who is merely in control of the property (rather than having possession of it); *Hibbert*

### Ownership

- Property can be stolen from an owner who is not in possession or control of property
- Owner of property can be guilty of larceny if the owner takes the property from the person who is lawfully in possession of it: *Rose v Matt*

#### 4. **Without the consent of the owner:** *Croton*

- The taking of the property must amount to a trespass: *Ellis v Lawson*
  - o A trespassory taking occurs when property is taken against the will of the possessor: *Davies*
  - o **Section 94AA** overrides the requirement of a trespassory taking in relation to stolen goods
- Lack of positive intention to pass possession is sufficient: *Middleton*
  - No need to be against the possessor's will, but without it; *Kennison v Daire*
- Facilitation does not amount to consent: *Kennison v Daire*
  - Difference between mere facilitation and consent will be a matter of degree: Q of fact whether or not the possessor has consented
- When property is delivered personally/at owner's direction; cannot deny consent
- If a possessor only gives A temporary custody, through **implied licence**, consent can be absent where the property is dealt with in breach of that license
  - E.g. implied licence in shops for bona fide customers: *Kolosque v Miyazaki*
    - o **Kolosque:** if goods are taken with the view of depriving the owner, e.g., to damage the goods such as removing frozen goods that needed to be in a fridge, this is outside terms of consent

### Consent due to mistake:

1. **Unilateral mistake:** D obtains property due to a mistake, and D is aware of the mistake at the time; and
  2. **Mutual mistake:** D obtains property due to a mistake and only subsequently becomes aware of the mistake (D lacks MR at time of taking)
- Historical approach: D guilty since consent was vitiated due to mistake
    - **R v Middleton:** D given extra money and was aware; guilty
    - **R v Ashwell:** To circumvent the problem that D didn't have MR at the time of taking; held that D was not in possession of the coin until he knew so
      - o **Postik** criticised: where something more valuable than intended is handed over, and D takes the property in good faith and in ignorance, D should not be guilty upon formation of a subsequent guilty intention (mistake not induced by D's fraud)

# MENTAL ILLNESS & SIAM

## Mental illness

Mental illness (insanity) is a **full defence** that can apply to **any offence**

Since the issue of mental illness arises only where, if D were mentally competent, he would be guilty of the offence charged, the jury in the first place must consider whether the offence is proved: *Stiles v R*

### BURDEN OF PROOF

- Prosecution is entitled to presume that A is sane and possesses a sufficient degree of reason to be responsible for his crimes (until the contrary is proven): *Da-Pra*
- A must first satisfy the **evidentiary burden**
- A has the **legal burden** of proving mental impairment on the **balance of probabilities**: *R v Porter*
  - Unless prosecution raises MI (same burden of BOP): *R v Ayoub*
- Crown must prove the AR ingredients, but not required to prove the MR: *Re Attorney-General's Reference (No 3)*

### THE ELEMENTS

The elements are derived from the common law *M'Naghten* rules

It must be proved, on the **balance of probabilities**, that at the time of the committing of the act:

#### **(i) A was labouring under a **defect of reason****

Did he have a defect of reason in the **legal** (NOT medical) sense?: *Da-Pra*

- Whilst judgment is not a medical judgment to be made by expert psychiatrist, expert medical opinion evidence is typically adduced
- Defect must result from an underlying pathological infirmity of the mind (whether temporary or permanent) as distinct from the reaction of a healthy mind to extraordinary stimuli': *Falconer*

#### **(ii) The defect of reason was due to a **'disease of the mind'****

- Only concerned w/ condition of the mind at the time the act was done; not A's subsequent/previous condition: *Porter*

Definition of 'disease' of the mind from *Dixon J* in *Porter*, Dixon J gave a wide definition of 'disease of the mind':

'D's state of mind must have been one of **disease, disorder or disturbance**. Mere **excitability** of a normal man, **passion** – even stupidity, obtuseness, lack of self-control, and impulsiveness – are quite **different** from what I have attempted to describe as a state of disease or disorder or mental disturbance, **arising from some infirmity, temporary or of long standing.**'

- Synonymous with mental illness (*Radford*); includes major mental diseases, psychoses such as schizophrenia: *Bratty*
- One major factor in determining whether a disease of the mind exists is the likelihood of reoccurrence (policy reasons of safety)

*Mental Health Act 2007, s4:*

**Mental illness** means a condition that seriously impairs, either temporarily or permanently, the mental functioning of a person and is characterised by the presence in the person of any one or more of the following symptoms:

- (a) delusions,
- (b) hallucinations,
- (c) serious disorder of thought form,
- (d) a severe disturbance of mood,
- (e) sustained or repeated irrational behaviour indicating the presence of any one or more of the symptoms referred to in paragraphs (a)–(d)

#### Examples of diseases of the mind

- Arteriosclerosis: *Kemp*
- Hyperglycaemia: yes in *R v Hennessy*, no in *R v Quick*:
- Sleepwalking: *R v Burgess*
- Schizophrenia: is an example of a disease of the mind; *R v Burfield*
- NOT epilepsy: *R v Sullivan*
- NOT psychopathy/ASPD: *Willgoss v R*

- (iii) **So as to not to know:**
- (a) **The nature and quality of the act; OR**
  - (b) **That the act was wrong**

#### Nature and quality of the act

Concerns the physical nature and consequences of the act, rather than its moral aspects: *Porter*

#### Knowledge of wrongfulness

- A did not have capacity to understand the moral quality of act at the particular time: *Porter*
- 'Wrong': morally wrong according to the ordinary/everyday standards of right and wrong adopted by reasonable people: *Da-Pra*; rather than legally wrong: *Porter*
- A mere difficulty with reasoning is far too low a standard: *Cheatham*
- Main question: whether D was able to reason with a moderate degree of sense and composure

### LIMITATIONS ON THE DEFENCE

Irresistible impulse (D unable to control his actions)

In and of itself, irresistible impulse is not a defence: *Attorney-General for South Australia v Brown*

Self-induced mental impairment

Intoxication, in and of itself, will not permit the defence, as it will not amount to a disease of the mind.

Defence arises only if the intoxicant acts as a trigger to an underlying disease of the mind: *Attorney-General for Northern Ireland v Gallagher*

- No defence if defect of reason is self-induced to provide the impetus to kill (dutch courage)

### RESULT IF SUCCESSFUL

**Special verdict** of not guilty by reason of mental illness: s 38 MHFPA + risk of involuntary detention for an indeterminate period

- Court has discretion: s 39 MHFPA
  - Order indeterminate psychiatric detention (with periodic review); or
  - Release on conditions or unconditionally (if satisfied on balance of probabilities that A or public not seriously endangered)

D will be detained until D is no longer perceived as a danger to society, or to himself: s 39(2) *Mental Health (Criminal Procedure) Act 1990 (NSW)*