



LAWS1016: CRIMINAL LAW

S2 2019

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1. Elements of Murder – s 18(1)(a) *Crimes Act*

Section 18(1)(a) of the Crimes Act provides:

- Murder shall be taken to have been committed where the act of the accused, or a thing by him or her omitted to be done, causing the death charged, was done or omitted with reckless indifference to human life, or with intent to kill or cause grievous bodily harm 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 punishable by imprisonment for life or for 25 years.

2. Actus Reus

2.1 Act or Omission

- If the Crown is to secure a murder conviction, it need not prove that the accused performed an act causing death. See, for example, the NSW case of *R v BW and SW (No. 1)* [2009] NSWSC 529.
- Usually the relevant act or omission will easily be identified. But in the exceptional case where two or more acts/omissions are capable of being regarded as the crucial one, who must isolate the one upon which to focus? See Mason CJ in *Royall* (1991) 172 CLR 378, 386, citing with approval Barwick CJ in *Ryan* (1967) 121 CLR 205, 218.

2.2 Volition

- Action must be a voluntary, willed action (liberal political philosophy – choice to act). Usually not an issue – there is a presumption of volition (efficiency).

2.3 Causation

Test for causation:

- General Approach (*R v CAMPBELL* [1981] WAR 286, 290 (Burt CJ)):

- 'It would seem to me to be enough if juries were told that the question of cause for them to decide is not a philosophical or scientific question, but a question to be determined by them applying their common sense to the facts as they find them, they appreciating that the purpose of the enquiry is to attribute legal responsibility in a criminal matter.'
- Operating and Substantial Cause (R v SMITH [1959] 2 QB 35, 42-43 (Streatfield and Hinchcliffe JJ))
 - 'It seems to the court that if at the time of death the original wound is still an **operating cause and a substantial cause**, then the death can properly be said to be the result of the wound, albeit that some other cause of death is also operating. 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 the history can it be said that the death does not flow from the wound.'

Accepted test is the substantial cause test: *Royall v R* (1990) 172 CLR 378:

- If, at the time of death, the defendant's act was a substantial and operating cause of the death, then the defendant will be deemed as causing that death: *Royall*.
 - This extends to a situation where the act of the defendant brought about a further event (e.g., exposing the victim to a new danger, causing the defendant to take certain actions) which actually caused his death: *Royall*; *Hallett*.
 - This also extends to any acts done 'involuntarily', or in self-defence, in response to the defendant's action: *Pagett*.
 - The chain of causation will only be broken if a completely coincidental event has occurred, such as an act of god (*Hallett*), or if the victim completely overreacted (*Royall*).

2.4 Intervening Acts

Third Party Conduct:

- *R v Jordan* (1956) 40 Cr App R 152:
 - Facts: in treating a victim of stabbing, whose wound was substantially healed, the medical staff administered a substance (to prevent infection) despite the fact that an intolerance was discovered, and it was also administered in huge quantities.
 - Held: Chain of causation was broken because of medical treatment that was “palpably wrong”.
- *R v Smith* [1959] 2 QB 35:
 - Facts: The accused had inflicted two bayonet wounds on the deceased in the course of a fight. Unknown to anybody, one had pierced his lung and caused haemorrhage. While he was being carried to the medical station, he was accidentally dropped twice. At the medical station, the medical staff, who were under a lot of pressure at the time, did not appreciate the seriousness of the deceased’s injuries. The best treatment would have been a blood transfusion but instead he was given oxygen and artificial respiration after an attempt to give him a transfusion of saline had failed. Evidence was that a wound of this kind would tend to heal on its own accord. A doctor had given evidence that, if there had been blood transfusion facilities and a transfusion had been administered, the deceased’s chances of recovery were as high as 75%.
 - Held: the original act of the defendant was still an operating and substantial cause of death. The treatment by doctors does not break off this chain.
 - *Evans and Gardiner (No 2)* [1976] VR 523
 - Facts: V was stabbed by 2 fellow prisoners. After he was treated, he resumed normal activities. A year later he became sick and received medical treatment, but subsequently died a week later. An autopsy showed that the cause of death was a fibrous ring causing a small stricture in the small bowel site of the resection operation. Medical evidence was that such a stricture was not an

uncommon sequel to that operation. It was open to the jury on the evidence that the doctors should have diagnosed the condition and that operative treatment would have rectified it.

- Held: Accused will still be liable for the death of the victim where the medical treatment is the proximate cause of death whether such treatment is proper or improper or even thoroughly bad. Both were convicted of manslaughter.

- Third Party Conduct in Self-Defence:

- *Pagett* (1983) 76 Cr App R 279:

- Facts: The accused shot at armed police who were attempting to arrest him while he used the deceased as a shield. The police returned his fire and, in doing so, shot and killed the deceased. English Court of Appeal rejected the argument that where the act that immediately resulted in fatal injury was the act of another party, albeit in legitimate self-defence, then the ensuing death was too remote or indirect to be imputed to the original aggressor.
 - Held: The court likened a reasonable act of self-defence to an act performed for the purpose of self-preservation (*Royall*), and held the accused's act of self-defence, as "an involuntary act caused by the act of the accused", this did not break the chain of causation.

Act of God

- *Hallett* [1969] SASR 141:

- Facts: The Defendant [Hallett] and the victim's [Whiting] car got stuck in the sand. According to the Defendant they began fighting, and ended up fighting nearby a lake or some water. After beating the victim up, the Defendant left the victim slumped (but still moving) at the water's edge, lying on his back, a few inches in water. The Defendant went to cool off. When the Defendant came back, the victim was floating dead in the water. Medical evidence suggests the victim may have been knocked unconscious, was choked to some degree, and died as a result of drowning

in shallow water. The body was also mutilated after death - the Defendant claiming he became completely unbalanced after seeing the victim dead.

- Held:
 - If at the time of death the original wound is still an operating and substantial cause then there is a causal connection, even if some other cause is also in operation.
 - If a defendant causes a situation, which then puts the victim in danger of being affected by another perilous situation, and the victim ends up dying because of the new situation, the chain of causation remains unbroken (since the first is still a substantial cause).
 - If the new situation happened completely of its own accord (eg, an '**act of god**'), then the chain will break. In this case:
 - Since the Defendant left the deceased on the seashore unconscious (first situation), and he drowned when the tide came in (second situation), the act of the Defendant still caused the death.
 - If an extraordinary tidal wave had come and drowned the victim, it may have broken the chain of causation, as an independent act of god. However, the natural tide at the site of the drowning was not an intervening event.

Act of Deceased

- Voluntarily Taking Drugs:
 - *Burns* (2012) 246 CLR 334:
 - Facts: D supplied methadone to the deceased (who died subsequently taking the drug in combination with another prescription drug). The Q was whether the supply of methadone caused the death.
 - Held: D's act to take the methadone broke the chain of causation. "D was a sane adult. It is not suggested that his decision to take the methadone was vitiated by mistake or duress. His ability to reason as to the wisdom of taking methadone is likely to have been

affected by the drugs that he had already taken but this is not to deny that his act was voluntary and informed.

- Means of Escape:
 - *Royall v R* (1990) 172 CLR 378:
 - Facts: Case where victim and defendant got into big argument, victim was trapped in a bathroom with only a window. Victim jumped out.
 - Held: Mason CJ stated that the mode of escape must be a natural consequence of the deceased's apprehension for his safety. This refers to a situation where there are several modes of escape (in *Royall*, there was only the window).
- Refusing Medical Treatment/Rejecting Medical Advice:
 - *Blaue* [1975] 3 All ER 446:
 - Facts: Case where victim was a Jehovah's Witness; refused to undergo blood transfusion.
 - Prosecution admits that had the victim taken the blood transfusion.
 - Held: "It has long been the policy of the law that those who use violence on other people must **take their victims as they find them**. This in our judgment means the whole man, not just the physical man. It does not lie in the mouth of the assailant to say that his victim's religious beliefs which inhibited him from accepting certain kinds of treatment were unreasonable. The question for decision is what **caused her death**. The answer is the stab wound (operative cause). The fact that the victim refused to stop this end coming about did not break the causal connection between act and death."
 - *Bingapore* [1975] 11 SASR 469:
 - Facts: Case where victim left the hospital against the advice of medical personnel. Victim was brought back to hospital the next day in an emergency, died subsequently.
 - Held: chain of causation still not broken with reference to substantive/operative test.

2. Mens Rea

The mens rea for murder can be found under s 18 of the *Crimes Act 1900* (NSW):

1. Intention to kill
 2. Intention to inflict grievous bodily harm (see s 4 for definitions)
 3. Reckless indifference to human life
 4. Constructive murder:
 - a. No mens rea requirement if a homicide was committed (by the accused OR an accomplice) during the commission of a crime that attracts life/25 years imprisonment.
- Post-death conduct of accused may shed light on his/her state of mind: *R v Baden-Clay* (2016) 258 CLR 308
 - Intent to kill or inflict GBH and 'reckless indifference to human life' involve subjective fault.
 - However, can be established via inference from objective circumstances: see *g Pemble v R* (1971) 124 CLR 107, *Matthews v R* [2014] NSWCCA 151

3.1 Intention to Kill

- Prosecution must prove that the accused intended death to result from their conduct: *La Fontaine v R* (1976) 136 CLR 62; *Crabbe* (1985) 156 CLR 464.
- Jury can infer intention (or foresight) in D by looking to all the circumstances, including the D's actions, age, background, emotional state – any evidence admitted at trial – look at what D said and did (including conduct post offence): *Matthews v R* [2014] NSWCCA 151.
- Transferred intention: If an accused strike at one and missing him kills another, whom he did not intend, this is homicide: *R v Hale* [1978] 68 Cr App R 415

3.2 Intent to Inflict Grievous Bodily Harm ('GBH')

- **S 4 of the *Crimes Act*** defines GBH (note that it is not exhaustive):

- (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
- (b) any permanent or serious disfiguring of the person, and
- (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).
- **Case Law** provides:
 - *DPP v Smith* [1961] AC 290: Really serious injury
 - *Haoui v R* [2008] NSWCCA 209: Injury does not need to be permanent or life threatening; only that injury is a really serious one.
 - *Swan v R* [2016] NSWCCA 79: consider whether need for surgery, how long in hospital and if further treatment is required after discharge. Are there fractures, and if so, its extent etc.?
 - *Rhodes v R* (1984) 14 A Crim R 124: jury entitled to find that intention to asphyxiate victim (to silence her) to point of unconsciousness by suffocation was intention to cause GBH.

3.3 Reckless Indifference to Human Life

- *Crabbe v R* (1985) 156 CLR 464:
 - Awareness/knowledge that death was a probable consequence
 - Subjective test
 - Note the difference between possible and probable consequence: *La Fontaine*:
 - “Is it probable?” = I believe/expect it to happen, though I concede it’s not absolutely certain it will.
 - “Is it possible?” = You believe/expect it is unlikely to happen, though you concede it may. If it is believed that the act is possible to cause GBH, guilty of manslaughter.
 - Recklessness as to inflicting GBH is not enough to form the mens rea for murder.

3.4 Constructive Murder

- If death results during the commission of an applicable offence, then even if the accused did not intend to kill (or inflict GBH/or act with reckless indifference), the law states the circumstances in which it occurred are such that a fault element is 'constructed' so that the accused may be responsible for murder.
- **Conduct Element:** The act or omission causing death was done during or immediately after the commission of a crime punishable by imprisonment for life or for 25 years. For example, armed robbery (s 98 *Crimes Act 1900*).
- **Mental Element required:** Mental element for the offence relied upon (e.g. in *Ryan (1967) 121 CLR 205*, D needed to have the mens rea for armed robbery):
 - Mens rea for murder satisfied if the accused causing death during:
 - An attempt to commit
 - During the commission
 - Immediately after the commission
 - Punishable by imprisonment for life or for 25 years
 - This means that the prosecution does not need to prove intent or mens rea for murder – merely a proof of voluntariness is required.

Presumption of volition

- Like all offences, voluntariness must be proven for criminal culpability. In most cases, it is not disputed.
- Presumption of capacity and volition, i.e. that an accused's act is 'conscious and willed' and voluntary: *Falconer (1990) 171 CLR 30*.
- The presumption can only be displaced by evidence. The accused bears the evidentiary burden to bring evidence that raises the lack of capacity and volition.

3. Temporal Coincidence

Generally: if D does prohibited conduct, D must have 'guilty mind' at time of doing it:

- 'Act and intent must coincide. If the circumstances of a fatal altercation are such that ... some acts were done with the necessary intent but ... other acts were [not], no conviction for murder can be returned unless there is evidence on which the jury can reasonably find that the act which caused the death was one of those done with the necessary intent.'
 - *Meyers v R* (1997) 147 ALR 440, 442.

But see:

- *Thabo Meli v R* [1954] 1 WLR 228:
 - Treated the acts as a series which are connected.
 - An intent to kill at some stage of a series of acts constitutes the requirement for murder.
 - "It does not matter if some of the accused's acts are done without mens rea, provided that mens rea is contemporaneous with other acts by the accused which forms part of their overall conduct."

Week 3 (Class 6): Homicide II; Unlawful and Dangerous Act Manslaughter; Gross Negligence Manslaughter

Defined in the *Crimes Act 1900* (NSW) ss 18(1)(b), 24:

- Involuntary Manslaughter:
 - No mental element for murder
 - Negligence Manslaughter
 - By negligent acts/omissions
 - Unlawful and Dangerous Act Manslaughter
- Voluntary Manslaughter:
 - Mental element for murder is present
 - But culpability is reduced by:
 - Extreme provocation: s 23
 - Substantial impairment due to abnormality of mind: s 23a
 - Excessive self-defence: s 421
 - Infanticide (s 22a).

Murder vs manslaughter:

- Conduct element is the same
- Fault/element is different
- Crimes act does not define manslaughter except to provide that it comprises all unlawful homicides other than murder
- Max penalty for manslaughter: 25 years

1. Involuntary Manslaughter

1.1 Unlawful and Dangerous Act Manslaughter

- Voluntary act (not accidental) of the accused causes the death of the deceased.
- *Mens rea* is required: intent to do the unlawful and dangerous act.