

## 5. Homicide I: Murder

### Murder

#### Section 18(1)(a) of the Crimes Act 1900:

Murder shall be taken to have been committed where the act of the accused, or 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 inflict 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.

**Maximum penalty:** life imprisonment, but judges have a wide degree of discretion (s 19A CA)

#### Elements of Murder (under s 18(1)(a) CA):

- **Actus reus:**
  - **An act or omission**
  - **That caused the death of a person**
- **Mens rea:**
  - **Intent to kill OR**
  - **Intent to inflict grievous bodily harm OR**
    - **Grievous bodily harm is defined in s 4 CA:**
      - (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).
  - **Reckless indifference to human life OR**
  - **Constructive murder** - no MR requirement if a homicide was committed (by the accused OR an accomplice) **during the commission of a crime that attracts life/25 years imprisonment** (n.b. not assessable)

### AR

#### i) Act or omission

##### a) Acts

Generally in murder cases, the prosecution will rely upon a positive act of the accused (e.g. stabbing)

##### b) Omissions

The prosecution can rely on an omission of the accused to act:

#### R v SW and BW (2009, NSWCC)

**Facts:** A 7yo autistic child (Ebony) died due to a 20-month period of chronic starvation.

**Held:**

- **For the accused to be convicted of murder or manslaughter on the basis of an omission, there must be a duty upon them to act**
  - **That duty was established here due to the parent-child relationship**
  - **The mother (SW) was convicted of murder by omission, because she breached the duty imposed on her as a parent**
- **The omission here was the failure to provide adequate nourishment and medical attention to her child**

##### c) Where it is difficult to identify the relevant act or omission

In a case where there are two or more acts/omissions that are capable of being regarded as the act causing death, the jury is ultimately responsible for determining which of these was the relevant act or omission (**Ryan v R**)

### **Ryan v R (1967, HC)**

**Facts:** Ryan robbed a service station with a gun and had no intention of harming anyone. Ryan pointed the gun at the attendant. After the attendant made a sudden movement, Ryan accidentally discharged the gun due to an alleged reflex movement and killed the attendant.

**Issue:** Which was the relevant act?

- If it was pressing the trigger, it may have been done involuntarily and it could not found liability in murder
- If it was presenting the gun at the attendant, this could found liability in murder
- Or it could be said that there was a series of acts which caused death (i.e. loading the gun, pointing the gun, etc)

**Held:**

- **Barwick CJ: where there is room for argument about what the relevant act or omission is, it is for the jury to determine**
- **In determining voluntariness, the court looks at the whole context of acts, and the probable consequences of those acts (i.e. not just the 'startle' moment). As such, when the relevant sequence of acts leading up to that point is viewed holistically, it is evident that a voluntary chain of events caused the death.**

## **ii) Causation**

Generally, it is clear that a specific act or omission caused death.

But in some circumstances, there can be a controversial question as to whether a novus actus has broken the causal chain of events.

**Whenever a controversial question arises concerning causation, it is for the jury to determine what is the relevant cause of death... the jury must determine whether C2 is so overwhelming as to make C1 merely a part of history (Evans v Gardiner)**

**The jury may determine causation by applying the substantial and operational cause test (Evans v Gardiner):**

- **If at the time of the death, the original wound is still an operating and substantial cause, then the death can be said to be the result of the wound, albeit that some other cause of death is also operating.**
- **Only if the second cause is so overwhelming as to make the original would merely part of history can it be said that the death does not flow from the wound.**

### **a) Where the alleged novus actus is the act or omission of a third party**

It is, as a factual matter, for a jury to find that medical negligence is a novus actus. Overwhelmingly in cases where it is alleged that negligent medical treatment is a novus actus, juries will find that the causal chain has not been broken (see Cheshire)

### **R v Evans and Gardiner v R (1976, Vic)**

**Facts:** The two accused stabbed the victim in a prison brawl in April 1974. The victim initially recovered due to medical intervention. However, in March 1975, the victim died suddenly. The autopsy showed that a common complication had arisen from the surgery, and had not been caught in time. There was medical evidence at trial that showed the doctors should have diagnosed this

condition, and it could have been rectified. Medical negligence could be said to intervene the accused people's violence and the victim's death.

**Held:**

- **Whenever a controversial question arises concerning causation, it is for the jury to determine what is the relevant cause of death.**
- **The jury may determine causation by applying the substantial and operational cause test. (followed from Smith (1959)):**
  - **If at the time of the death, the original wound is still an operating and substantial cause, then the death can be said to be the result of the wound, albeit that some other cause of death is also operating.**
  - **Only if the second cause is so overwhelming as to make the original wound merely part of history can it be said that the death does not flow from the wound.**
- In this case, although doctors failed to diagnose the condition, that failure was not deemed to be substantial and operating cause of death. The death was caused by the blockage of bowel, which was caused by the stabbing act of D.

### **R v Smith [1959] 2 QB 35 (UK)**

**Facts:** Smith stabbed a fellow soldier, which pierced his lungs. On the way to the hospital, another soldier dropped him twice. Once at the hospital, the soldier received negligent medical care and died.

- Smith was charged with murder and convicted at first instance.
- Smith appealed on the basis that the victim would have survived but for the negligence of those treating him.

**Held:**

- The court found that it was open for the jury to determine that the stab wound was a substantial and operating cause of the victim's death; it did not matter that it was not the sole cause.
- Substantial and operating cause test
  - In order to break the chain of causation, an event must be: "unwarrantable, a new cause which disturbs the sequence of events [and] can be described as either unreasonable or extraneous or extrinsic"

### **R v Jordan (1956) 40 Cr App R 152 (UK)**

**Facts:** D stabbed V. The wound almost healed, then V was twice administered an antibiotic to which he was intolerant and given abnormal quantity of liquids which clogged his lungs. V then died from this.

**Held:**

- Here, D was acquitted. The judge found that the death of the victim was not consequent on the stab wound inflicted, as it was mainly healed at the time of death, and death was believed to be caused by the administration of dangerous substances to the victim.
  - But this disapproved in Evans v Gardiner, on the basis that this matter should have been left with the jury to determine.
- **Exceptional medical negligence (where treatment is palpably wrong) may constitute a novus actus interveniens, capable of absolving a defendant of liability for any subsequent injury or death... subject to the substantial and operating cause test.**

### **R v Cheshire [1991] 1 WLR 844**

**Facts:** Cheshire shot a man during the course of an argument. The victim was taken to hospital to have surgery and shortly after developed respiratory issues. The doctors inserted a tracheotomy tube, which remained in place for four weeks and initially improved the victim's condition. Several days later the victim complained of respiratory issues, his condition soon worsened and he died

shortly afterwards. The post-mortem found that the victim's windpipe had narrowed near the location where the tracheotomy pipe had been inserted. Cheshire was subsequently charged with murder and convicted. The decision was appealed.

**Held:**

- Cheshire's appeal was dismissed.
- It was held that it was open to the jury to find that the medical negligence was not a novus actus. In determining that question, it was for the jury to apply the substantial and operating cause test.
  - It was clear that the negligent medical treatment in this case was the immediate cause of the victim's death but that did not absolve the accused unless the treatment was so independent the accused's act to regard the contribution as insignificant.
- **The court noted that acts/omissions of a doctor may conceivably be so extraordinary as to be capable of being regarded as acts independent of the conduct of the accused, but it is most unlikely that they will be**

#### ***b) Where the alleged novus actus is an act of nature***

##### **Hallett v R [1969] SASR 141**

**Facts:** D and V's car got stuck in the sand. According to D, they ended up fighting nearby a lake. After beating V up, D left him slumped (but still moving) at the water's edge, lying on his back, a few inches in water. D went to cool off. When D came back, V was floating dead in the water, as the tide had moved. Medical evidence suggests V may have been knocked unconscious, was choked to some degree, and then died as a result of drowning in shallow water.

**Held:**

- **The ordinary operation of nature does not break the causal chain.**
  - **If the accused 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 the operating and substantial cause).**
- **If an extraordinary cause occurred completely of its own accord (e.g. a large tidal wave or tsunami, not just ordinary tidal movement), this may possibly break the causal chain. A controversial causation question is raised. Therefore, it would all depend upon whether the jury found that the accused's violence was no longer a substantial and operating cause of death.**
- **The court also noted that if the victim took some voluntary action (e.g. running out into the sea), this may possibly break the causal chain. A controversial causation question is raised... see fright/self-preservation cases.**
- In this case:
  - Since D left the deceased on the seashore unconscious (first situation), and he drowned when the tide came in (second situation), the act of D still caused the death. The ordinary operation of nature was not a novus actus.

#### ***c) Where the alleged novus actus is an act of the victim***

##### **1) Refusing medical treatment/rejecting medical advice**

##### **R v Blaue (1975, UK)**

**Facts:** D assaulted V with a knife several times after she refused his sexual advances. V was taken to hospital, but as she was a Jehovah's Witness, she chose to refuse a life-saving blood transfusion. V died the next day.

**Held:**

- **The accused must take their victim as they find them. This includes the mental characteristics and beliefs of the victim, and not just their physical condition.**

- The accused is not permitted to say that V's religious beliefs are unreasonable, and thus constitute a novus actus.
- The victim's refusal of medical treatment will not displace the accused's act as the substantial and operating cause of death.
  - The bleeding arising from penetration of V's lung was not caused by V's choice, it was caused by the act of D
  - V's rejection of a blood transfusion therefore did not break the chain of causation.

### **R v Singapore [1975] 11 SASR 469**

**Facts:** D was convicted of murder of a man in a brawl. There was evidence that he had punched him, knocked him down and kicked him. Soon after, the victim was taken to a hospital for treatment. A medical practitioner suspected internal head injuries and warned the patient of the danger of death if he left the hospital, but the patient left. Six hours later he was brought back to the hospital, operated on and died the next day.

**Held:**

- The relevant question is whether the accused's violence is the substantial and operating cause of the victim's death.
- In a case like this, it is clear how to answer that question. No controversial causation question arises.
- Here, there was no break in the causal by the victim leaving the hospital and failing to have the operation at a time when it might have saved him.
  - The substantial and operating cause of the subdural haemorrhage that killed V was the violence of D.
  - V's leaving hospital was merely a loss of possible opportunity of avoiding death.

### **2) Fright or self-preservation cases**

#### **Royall v R (1991, HC)**

**Fact:** D assaulted V in his apartment after an argument. It was impossible to prove exactly how, but V ended up falling out of the window and dying. The prosecution charged D for murder under three possible scenarios, the relevant one being that V jumped out trying to escape D, whom she believed was trying to kill her.

**Issue:** whether a voluntary act, committed because of well-founded fright or self-preservation, will break the chain of causation required to constitute an actus reus?

**Held:**

- **Majority: the causal chain will not be broken so long as the response of the victim was a reasonable or proportionate to the violence of the accused.**

#### **McAuliffe v R (1995, HC)**

**Facts:** Ds attacked and bashed a person near the edge of a cliff leaving him seriously wounded. He then fell over the cliff to his death

**Held:**

- **The HC approved the test set by the majority in Royall**

#### **RIK (2004, NSW)**

**Facts:** D yelled abused at V at Redfern Station, and moved towards him threateningly. V fled onto the railway track and was killed by a train

**Held:**

- **It open for the jury to determine whether the actions of V were reasonable or proportionate to the threat by D.**