

MURDER – s 18(1)(a)
(SPECIFIC INTENT)

Must have all 3 actus elements | Only need one of the 3 mens rea elements.

The onus of proof is on the **PROSECUTION** which has a legal burden to prove beyond reasonable doubt that the accused is guilty of committing murder. (*Woolmington*)

Maximum penalty: 25 years

ACTUS REUS

1. ACT OR OMISSION

Identify the exact act causing death. (*Arulthilakan v R*)

- Where there are two or more potential acts, it is for the jury to decide which one to use. (*Royall; Ryan*)
- All acts are presumed to be 'voluntary and willed' (*Bratty 1963*)
- **Omission:** The accused must first owe a duty of care to the deceased and exercise deliberate choice to do nothing. (*R v SW and BW*)

2. CAUSATION

There must be a causal link between the act and death of the victim. Generally, causation will be obvious but if not, it becomes a question of whether there was a *novus actus interveniens* breaking the chain of causation.

3 Categories:

a) **Act of 3rd Party** – Generally an issue of medical negligence.

- Where there is a controversial question of causation relating to medical negligence, it is one for the jury to decide. (*Evans and Gardiner; Jordan*)
- **TEST:** If at the time of death, the original wound is still a substantial and operating cause then the death can properly be said to be the result of the wound albeit that some other cause of death is operating. (*R v Smith*)
- As a practical matter, juries are unlikely to return a decision favourable to the accused – will almost always find that medical negligence has not broken the chain of causation between the act and death. (*Cheshire*)
 - Whether the conduct of the doctors is negligent or reckless, there will be an issue of causation that must be resolved by the jury.

b) **Acts of Nature**

- The ordinary operation of acts of nature (eg. tide) will not break the chain of causation. (*Hallett*)
- An extraordinary natural cause such as an earthquake or tidal wave might break the chain of causation, but it is for the jury to resolve by applying the substantial and operating cause test from *Smith*.

c) **Acts of the Victim** – Generally a free, informed and voluntary act of the victim can break the chain of causation. (*Burns*)

(i) **Refusing medical treatment/rejecting medical advice**

- The rejection of medical treatment will not break the chain of causation. (*Blaue; Bingapore*)
- Must take your victim as you find them. (*Blaue*)
- It is still the initial injury which is substantial cause of death and the act of the victim was not to stop the end from coming. (*Bingapore*)

(ii) **Fright or self-preservation cases**

- **TEST:** Was the **response** of the victim a reasonable or proportionate one? (*Royall per Deane and Dawson JJ, Toohey and Gaudron JJ; Burns*)
 - If **YES:** The chain of causation between the violence of the accused and the death of the victim will remain intact.
 - If **NO:** Then causation is not established.
- The **means of escape** doesn't need to be reasonable/irrelevant. (*Royall*)

3. DEATH

The accused's act has caused the death of the victim in accordance with s 33 of the *Human Tissue Act 1983* when there is irreversible cessation of all function of the person's brain or circulation of the blood around the body.

MENS REA

Subjective Test: Actual intention (mens rea) of the accused can be inferred from what they do at the time of the relevant conduct (*Stokes & Difford*) as well as their conduct afterwards. (*The Queen v Baden-Clay*)

- Age, background, education, emotional state and state of sobriety are things that can be considered. (*Pemble 1971*)
- At the time of relevant events, words of the accused can also be considered (eg. I'll kill you) (*Matthews v R*) as well as what you do
- Wilful blindness is not enough to establish mens rea for murder – it is evidence that bears on the real question of mens rea that you foresaw.

EXAM: If facts show clear intent to kill (ie. Stab in heart, push off cliff, shooting) then only discuss intent to kill and/or commit GBH. If the facts are more like *Khan* where there is no direct killing act then only need to discuss reckless indifference murder because it is clear there is no intent to kill/commit GBH.

1. INTENT TO CAUSE DEATH (KILL)

- Anyone. (*Saunders & Archer 1575*)

2. INTENT TO INFLICT GBH

- **s 4 definition of GBH:** Permanent or serious disfiguring of person s 4(1)(b), any grievous bodily disease s 4(1)(c) or destruction of foetus s 4(1)(a).
 - 'Serious': Need not be permanent or consequences of injury long lasting or life threatening, only that it be really serious (*Houli*) – natural and ordinary meaning. (*DPP v Smith*)

3. RECKLESS INDIFFERENCE TO HUMAN LIFE

- **TEST:** To establish reckless murder at common law, the Crown must prove that the accused foresaw the **probability** of death or GBH. (*Crabbe*)
 - ****NSW Position**:** Foresight of the probability of *death*, GBH not enough (*Royall; Solomon*)

TEMPORAL COINCIDENCE

Applies generally to all offences.

Mens Rea and Actus Reus must coincide. (*Meyers*)

- There is no conviction unless the jury can reasonably find that the act of the accused was done with necessary intent.

Exceptions:

- No need for coincidence where a series of acts have been **done pursuant to a plan to kill someone.** (*Thabo Meli*)
- Where unlawful application or force and the event causing death are part of the same sequence, it doesn't exonerate the accused where the act causing death was done to **conceal the commission of the unlawful assault.** (*Le Brun*)
 - Where the second act *is* an act of rescue, then the coincidence rule might prevent the accused from being convicted.

CONSTRUCTIVE MURDER

Broadens the crime of murder and also known as the 'Felony murder rule'.

ACTUS REUS

1. Act or Omission

- Identify the exact act causing death.
- Voluntary and willed act.

2. Causing death

- Operating and substantial cause of death.

3. During or immediately after the commission of a crime punishable for life, for 25 years or more

- Immediately after/before: Case to case and a question for the jury. (*Hudd*)

BASE OFFENCES: Actus reus of base offence

- s 32 – Impeding endeavours to escape shipwreck (25 yrs)
- s 47 – Using explosive substance or corrosive fluid (25 yrs)
- s 61JA – Aggravated sexual assault in company (life)
- s 98 – Robbery with arms (weapons) and wounding (25 yrs)
- s 96 – Robbery with wounding (25 yrs)
- s 33(2) – Wounding with intent to resist arrest (25 yrs)
- s 33A(2) – Discharging a firearm with intent to resist arrest (25 yrs)
- s 97(2) – Armed robbery with dangerous weapon (25 yrs)

MENS REA

1. Mens Rea for base offence

- NOT required to show mens rea for murder
- Accidental killing can be convicted – Defendant must negate voluntariness not to be convicted. (*Ryan*)

ACTUS REUS

****R v SW and BW (No. 1) [2009]***

Omission causing death.

FACTS: Parents were charged over child's death from chronic malnutrition.

- Mother found guilty of murder (father for manslaughter) for breaching their duty of care as parents to provide adequate nourishment to their child and their duty to provide medical attention to their child.

PRINCIPLE: Before an omission can found homicide liability, the accused must have owed a duty of care to the deceased.

Taber (2002)

Omission causing death.

FACTS: Charged with murder after robbing victim and leaving her bound and gagged, resulting in death by dehydration.

- Characterised the actus reus as a continuing act:
 - Continuous act commencing when she was attacked and ending when she died
 - As an act commencing when she was attacked and ending when she was abandoned and an omission commencing then ending when she died.
- However, cause of death is categorised it seems accurately to be described as a single transaction.

PRINCIPLE: A person who deliberately puts another in danger, comes under a duty to remove that danger.

- Failure to do so may constitute an omission causing death and if at any time during the period of omission that accused has the relevant state of mind (regardless of what it was at the commencement of the omission period) the accused is liable for murder.