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TOPIC 1: INTRODUCTION TO CRIMINAL LAW

1.1 What is a Crime? – A Positivist View

Theory: Williams defines a crime in the following terms –

“A crime (or offence) is a **legal wrong** that can be followed by **criminal proceedings** which may result in **punishment**”

Focus on Criminal Proceedings

In the Australian legal system – and in other legal systems based on the English model – it is possible to identify and describe *criminal proceedings* as distinct from *civil proceedings*. The above definition is thus a **positivist** definition, focusing on the form of the law – whether the law has *correctly made* – rather than its substance – its content, together with the societal issues it confronts and tackles.

Ashworth reiterates this idea, commenting:

“One way of **distinguishing criminal cases from civil** is generally, and subject to exceptions and various hybrids, by reference to the **procedure adopted** – *public prosecutor, conviction and sentence* – rather than by reference to the content of the law itself”

Focus on Punishment

Williams’ definition also points to **punishment** as means of distinguishing crime from civil wrongs. Many laws prohibit conduct, but **only the criminal law has the power to impose punishment**. Punishment, which typically follows from conviction of a crime, is different from other unpleasant consequences – such as being required to pay compensation in civil cases.

1.1.1 Critiques of Positivism

Theory: The positivist definition of crime is problematic for a number of reasons, including –

- 1) **Circular definition** – Williams’ definition (see above) may be deemed circular. ‘Crime is a legal wrong’ merely states that conduct is criminal because it is a crime i.e. a crime is a crime.
- 2) **It provides no rationale as to why certain types of behaviour are considered criminal and others not** – because it focuses on the *form* of the law, the positivist view merely looks at what is criminal activity, not why it is criminal. The definition is thus *descriptive*, rather than *normative*.
- 3) **Feigns objectivity** – the positivist definition pretends to be objective, but may actually be value-laden and culturally relative, depending on the social norms and morals of the legislators at the time. A ‘legal wrong’ at one point in time may be quite different at another point in time.
- 4) **Assumes there is a clear distinction between Civil and Criminal Law** – the lines between criminal and civil law have become increasingly blurred. As Hayne J describes (*CEO Customs v Labrador Liquor Wholesale* (2003)):

“[The Positivist definition] seeks to divide the litigious world into **only two parts** when, in truth, that world is more complex and varied than such a classification acknowledges. Indeed, there are proceedings with **both civil and criminal characteristics**...”

1.2 The Parts of the Criminal Law

Theory: The study of Criminal Law is divided into 3 parts –

Criminal Procedure

Criminal procedure includes the following:

- 1) **Police pre-trial investigation processes** – after a person has committed a crime, police have the power to –
 - a. Arrest the suspect if there is reasonable suspicion;
 - b. Detain the suspect for questioning; and
 - c. Search and seize the accused's property in order to prove the accused has committed a crime.
- 2) **Criminal Prosecution in the Courts** – involves processes such as bail, remand, committal hearings and whether the case can be heard before a judge and jury.
- 3) **Sentencing and Punishment practices** – if accused is guilty, they either suffer fines, community correction orders, or imprisonment.

Substantive Law

The Criminal Law itself is derived from Common Law and Statute, including:

- 1) **Specific crimes** – as defined in the Crimes Act eg. Murder, assault, theft. Offences may also be present in the Common Law.
- 2) **Specific defences** – as defined in the Crimes Act, but the Common Law demonstrates the application of defences.
- 3) **General principles of Criminal Responsibility** – for example –

“*Actus non facit reum nisi mens sit rea*” – “An act is not culpable unless the mind is guilty”

This is an oft used defence meaning ‘eventhough a vicious act was committed, there was **no vicious will accompanying it**, and therefore no crime. Indeed, in order to be found guilty of a crime, the prosecution must prove the accused had the necessary ***actus reus*** – *physically wrong or guilty act* – and that this act was accompanied by ***mens rea*** – *a guilty mind*. There is no criminal liability without a guilty mind.

Actus Reus + Mens Rea – Defence = Guilty

- **Actus Reus:** External, physical and voluntary conduct defined as criminal.
- **Mens Rea:** The guilty mind; the fault or mental element.
- **Defences:** Where there are none, are unacceptable to the jury, or where jurors find guilt *beyond reasonable doubt*.

Evidence

Evidence establishes proof by which criminal responsibility is attributed. Evidence includes rules on how to ask witnesses questions, what can and can't be said in court etc.

1.3 Criminal Law v Civil Law

Theory: Criminal law is, as a body of law, in many respects different from civil law –

	Criminal Law	Civil Law
Who can bring the case?	State	Plaintiff
Possible outcomes of the case	Guilty = Punished	Liable = Have to pay damages and other types of compensation
Standard of Proof	Beyond reasonable doubt	Balance of probabilities
Objectives of Criminal Law	Organised means of controlling revenge: <ul style="list-style-type: none">a) Preventing harm to citizens;b) Protect citizens from public wrongs;c) Protect citizens from moral wrongdoing.	<ul style="list-style-type: none">a) To regulate private relationships;b) To right wrongs and settle disputes.

1.4 Principles of the Criminal Law

Principle 1: Rule of Law and Equality Before the Law

- a) No person can be punished without due process of the law – everyone is entitled to a fair and unbiased trial before judge and jury.
- b) The rule of law applies to everyone equally.
- c) Everyone is entitled to be trialed according to law and no one is above the law – the principle of justice ‘being blind’. Legal principles are founded on an established logic that goes beyond individual prejudice and whim.

Principle 2: Criminal Responsibility

- a) People will only be held criminally responsible when perpetrating criminal acts with intention or ‘guilty mind’ (***mens rea***).
- b) The deeds of the accused are punished, not the character of the accused.¹

Principle 3: The ‘Golden Thread’

There is a presumption of **innocence until proven guilty**. *Woolmington v DPP*: Woolmington was charged with the murder of his wife, who’d previously left him. There was evidence that the killing was deliberate, but Woolmington contended it was by accident. The court stated that if killing was proven to be deliberate, then he should be liable, *unless he can prove otherwise*. In passing sentence, the court said:

“It is the duty of the **prosecution** to prove prisoner’s guilt. If there is a *reasonable doubt* as to guilt, the prisoner is not guilty”.

¹ This point has been somewhat controversial. Sometimes, **indefinite detention** sentences are administered eg. For terrorist activity, dangerous sexual offenders. In these circumstances, a person is often detained not for their deeds, but for their character as a *prior status offender*.

Principle 4: Beyond Reasonable Doubt

This is the highest standard of proof known to law. In order to convict an accused of a crime, there cannot be any reasonable doubt as to their innocence. The rationale behind this principle is as follows:

“It is better that 10 guilty men go free than send 1 innocent man to the gallows”.

Principle 5: Fairness

In criminal law, fairness is attained by giving every person the **right to a fair trial**. This ensures all persons receive a fair and public hearing in front of a competent, independent and impartial court.

1.4.1 Victorian Charter of Human Rights and Responsibilities Act 2006

Theory: The Victorian Charter of Human Rights also outlines principles that must be taken into account when legislating. They are –

Section 8: Recognition and Equality before the Law

- (1) Every person has the right to recognition as a person before the law.
- (2) Every person has the right to enjoy his or her human rights without discrimination.
- (3) Every person is equal before the law and is entitled to equal protection of the law without discrimination and has the right to equal and effective protection against discrimination...

Section 22: Humane treatment when deprived of liberty

- (1) All persons deprived of liberty must be treated with humanity and with respect for the inherent dignity of the human person.
- (2) An accused person who is detained or a person detained without charge must be segregated from persons who have been convicted of offences, except where reasonably necessary.
- (3) An accused person who is detained or a person detained without charge must be treated in a way that is appropriate for a person who has not been convicted.

Section 21. Right to Liberty and Security of Person

- (1) Every person has the right to liberty and security.
- (2) A person must not be subjected to arbitrary arrest or detention.
- (3) A person must not be deprived of his or her liberty except on grounds, and in accordance with procedures, established in law.
- (4) A person who is arrested or detained must be informed at the time of arrest or detention of the reason for the arrest or detention and must be promptly informed about any proceedings to brought against him or her...

Section 24: Fair hearing

- (1) A person charged with a criminal offence or a party to a civil proceeding has the right to have the charge or proceeding decided by a competent, independent and impartial court or tribunal after a fair and public hearing.

Section 25: Rights in criminal proceedings

- (1) A person charged with a criminal offence has the right to be presumed innocent until proven guilty according to law.
- (2) A person charged with a criminal offence is entitled without discrimination to the following minimum guarantees –
 - a. To be informed promptly and in detail of the nature and reason for the charge in a language or, if necessary, a type of communication that he or she speaks or understands; and
 - b. To have adequate time and facilities to prepare his or her defence and to communicate with a lawyer or advisor chosen by him or her; and
 - c. To be tried without unreasonable delay; and
 - d. To be tried in person, and to defend himself or herself personally or through legal assistance chosen by him or her; and
 - e. To have legal aid provided if the interests of justice require it, without any costs payable by him or her...

1.5 Aims of the Criminal Law

Theory: Fitzjames Stephen, a famous English jurist, thought that the real aim of the criminal law was to provide an *organised means for controlling the passion of revenge* i.e. unless a community provides for the punishment of offenders, the people injured by offences would take matters into their own hands and blood feuds would run riot.

Philosophically, however, there are **3** major justifications for criminalisation:

The Prevention of Harm

That is, the prevention of harm to others. It is argued that the criminal law should not be used to prohibit *non-harmful behaviour*, or to prevent individuals from *harming themselves*. This serves to balance the **interests of the State** while **protecting the autonomy of the individual**. Thus, it is urged that if two people of full age and understanding wish to engage in certain conduct which will not cause injury to themselves or to others, their conduct should not be prohibited by the law *merely because a majority of the community may consider it to be morally wrong*.

The Public Interest

On this notion, an act will only be labelled a crime if it is thought to be more than an offence against *one or more individuals* i.e. it must be injurious to the public in general. This reinforces the criminal/civil distinction – public wrongs will be the subject of criminal law, while private wrongs can be addressed through civil law.

Morality

On this argument, for conduct to warrant classification as criminal, it must involve *moral wrongdoing*. However, not every transaction that can be considered morally wrong is treated by law as a crime. As St Thomas Aquinas pointed out ‘it is necessary to tolerate certain evils lest worse evils should rise from the effort to repress them’. It is on this basis that certain ‘immoral acts’, such as alcohol consumption and adultery, have not been deemed criminal.

1.5.1 Personal Freedom and the Criminal Law

Theory: There is a complex relationship between personal freedom and morality when it comes to the criminal law. Should criminal law **merely target those individuals who harm others** – maximising individual freedom in other areas – or should criminal law **seek to uphold a societal morality**?

Case: *R v Brown (1994)*



Facts: The appellants belonged to a group of sado-masochistic homosexuals who, over a 10 year period, willingly participated in the commission of acts of violence against each other, including genital torture for the sexual pleasure it engendered in the giving and receiving of pain. The passive partner/victim in

each case **consented** to the acts being committed, and suffered **no permanent injury**. The activities took place in **private**, at a number of different locations, and **video cameras were used to record the activities**. These tapes were then distributed amongst members of the group.

The police eventually got a hold of these tapes, and charged the appellants with *assault occasioning bodily harm* and *unlawful wounding* (under ss. 20 & 47 of *Offences Against the Person Act 1861*).

Issue:

*Should criminal law regulate sado-masochism to **reflect society's moral standards**, or should **individuals be able to consent to harm**?*

Ruling:

(House of Lords – *majority*):

Consent is irrelevant as a defence to *actual* bodily harm in the course of S&M. However, consent is still available as a defence if it fell within one of the pre-existing exceptions occasioning bodily harm i.e. surgery and sport. Regardless, **public policy** requires acts such as sado-masochism to be punished as a crime.

- *Lord Templeman*: "Society is entitled and bound to protect itself against a **cult of violence**"
- *Lord Jauncey*: "Possibility of **proselytisation and corruption** of young men is a real danger"
- *Lord Lowry*: "Sado-masochistic homosexual activity **cannot be regarded as conducive to the enhancement and enjoyment** of family life and the welfare of society"

(House of Lords – *minority*):

There is **no harm to the public** when *consensual* activities are **done in private**. Therefore, there is **no public benefit in criminalising** this behaviour, no matter how immoral it may appear to the public. Consent should be available as a defence.

- *Lord Mustill*: "The state should interfere with the rights of an individual to live his or her life as he or she may choose **no more than is necessary to ensure a proper balance** between the *special interests of the individual* and the *general interests of the populace* at large".
- *Lord Slynn*: "If society takes the view that this kind of behaviour, even though sought after and done in private, is either so new or so extensive or **so undesirable that it should be brought within the criminal law**, then it is for the legislature to decide".

Summary:

- MAJORITY: Behaviour which is **immoral according to the norms of society** ought to be illegal and punished i.e. **Criminal Law should uphold morality above everything else**.
- MINORITY: If there is **no harm to the public, consent is provided** and acts are done **in private**, then the State should *not interfere*. i.e. **Private acts between consenting adults should not be criminalised. Individual freedom is paramount. Also, it is not for courts to criminalise this behaviour; rather, it is for the government to do so.**

5.2 ACTUS REUS – ‘THE PHYSICAL THING’

Theory: The *Actus Reus* of a crime has several properties –

- i. It is the ‘harm’ aspect of a crime.
- ii. The action is different for each offence, and can involve multiple components i.e. more than one act can make up the *Actus Reus*.
- iii. The prohibited actions in crimes are defined both in common law and statute.

For an *Actus Reus* to be evident, three elements have to be proven:

- 1) **VOLUNTARY ACT** – the action committed must have been voluntary on the part of the accused. A compulsion of will or duress will not amount to a voluntary act for the purposes of a crime.
- 2) **CAUSATION** – there must be a causal link between the act of the accused and the end result. This is evidenced by an unbroken chain in causation.
- 3) **ACTUAL INJURY** – the harm suffered by the victim must be actual and physical, and fall within the common law or statutory definition.

5.2.1 Automatism and Voluntariness

Theory: An involuntary, unwilled or automatic act is one where actions are made independent of the exercise of will. Unwilled acts include accidents, reflex actions, actions which occur in an altered state of consciousness (eg. sleep),² etc. Where automatism is present, a person is either unaware of what they are doing, or aren’t in control of their actions. In all cases of automatism, there will be *no Actus Reus* because voluntariness is lacking.

It is the role of the prosecution to establish voluntariness. On the other hand, voluntariness will generally be presumed; it is the role of the defendant to displace this presumption.

Case: Ugle v The Queen (2002)



Facts: On the night in question, the appellant deliberately went to the deceased’s home carrying a kitchen knife. He claimed that this was both a scaring tactic and act of protection. Upon arrival at the deceased’s home, the deceased attacked the appellant with a cricket bat to fend him off. In the process of fending off the appellant off, the appellant claimed the deceased impaled himself on the knife he was holding. The appellant claimed he did not know that the deceased was stabbed, and merely took the knife to the deceased’s house as a self-defence measure – not to attack. The appellant was convicted of murder, and appealed to the High Court.

² Acts committed when a person is in an altered state of consciousness may not exclude liability as it is the defendant’s own voluntary conduct which brings about the altered state.

Issues:

- Did the defendant put the knife into the body of the deceased, or did the deceased impale himself on the knife the defendant was holding?

Ruling:

(High Court):

The question to be asked is whether the insertion of the knife into the body of the deceased was a **voluntary and willed act** of the appellant, or whether the knife entered into the body of the deceased independently of the appellant's will.

To establish guilt, an act must be willed or voluntary. Whether an act is involuntary or unwilled is a question for the jury. Only once a jury is persuaded beyond a reasonable doubt that an act is voluntary or willed, can an accused be held liable. However, in this case, the jury was not, but ought to have been, directed to the matter of willed and unwilled acts. Hence, they could not give a true verdict. An appeal must be allowed – *Appellant successful*.

Kirby J: The circumstances in which this set of events transpired make the outcome unrealistic. The accused had assumed a special risk when walking into an angry confrontation wielding a knife.

Principles of Case:

- To establish guilt, an act or omission must be **willed or voluntary**. If unwilled or involuntary, the defence of automatism will be allowed and an accused cannot be held liable.
- It is up to the jury to decide whether an act is willed and voluntary, or whether an act occurred independent of the perpetrator's will. If a jury is not directed to the notion of willed and unwilled acts, their verdict is tainted and the accused cannot be held liable.

Case: *R v Falconer* (1990)



Facts: Falconer had suffered 30 years of abuse at the hands of her husband – the deceased. After another night of sexual abuse, she killed her husband. According to Falconer, she had a *complete blank in memory* until she woke up with the gun next to her and her husband dead. At trial, the testimony of 2 psychiatrists were given as evidence to support the notion of **sane automatism**; that is, both contended she was sane at the time of shooting, but that –

- **Psychiatrist 1:** She panicked which may have triggered a *dissociative state* in which she acted without awareness of what she was doing.

- **Psychiatrist 2:** She was in a setting of psychological conflict in which she was only capable of acting in an *automatic* way.

The trial judge rejected the evidence of these 2 psychiatrists, allowing for the accused's appeal.

Issues:

- *Can sane automatism constitute a defence to homicide, indicating a lack of Actus Reus?*

Ruling:

(High Court):

A person will **not be responsible** for an act or omission that occurs independently of the will of the person. Acts which are unwilled can often be caused by an external psychological factor or blow. There is a distinction between the *actions of a sound mind affected by a psychological blow* and those actions of an *unsound mind* i.e. mental illness.

Actions by an insane mind are **still voluntary acts**, but they are governed by the insanity defence. On the other hand, actions affected by an external psychological blow are **not voluntary acts**. In this case, the psychiatrists' testimony that the accused was acting in a dissociative state were relevant to her defence of *sane automatism*. Sane automatism indicates involuntary actions. If an act is involuntary, a person cannot be held criminally responsible, and there must be acquittal – *Accused successful*.

Principles of Case:

- A person cannot be held criminally responsible for involuntary and unwilled acts.
- Involuntariness and automatism may be evidenced when actions are affected by an **external psychological blow**.
- Sane automatism – acting in a dissociative state – evinces a lack of *Actus Reus*.

Further examples of involuntary acts include:

- Spasms (epilepsy, coughing fits etc)
- Reflex actions
- Sleepwalking
- Gross intoxication
- Falling asleep at the wheel

The onus is on the **defence** to prove their act was involuntary.

LAW3301: CRIMINAL LAW A

ASSAULT – COMMON LAW

ASSAULT: *Summary Offences Act, s. 23* - Any person who unlawfully assaults or beats another person shall be guilty of an offence.

"An assault is any act which **intentionally – or possibly recklessly** – causes another person to apprehend immediate and unlawful personal violence. Assault is generally synonymous with the term 'battery', a term used to mean the actual intended use of unlawful force to another person *without his consent*" (*Fagan v Metropolitan Police Commissioner*).

ASSAULT

AR ELEMENTS:

1. **Positive Acts/Words** – the prosecution needs to prove the accused performed a *voluntary, positive act*; mere omissions do not suffice (*Fagan*). Silence and words are considered acts within the meaning of assault if they create the apprehension of imminent and unlawful violence (*R v Ireland*).

2. **Apprehension of Contact/Violence** – the victim must have *apprehended* the immediate possibility of the application of force or imminent physical violence. 'Apprehension' requires the victim possess knowledge of the imminent physical violence. Lack of knowledge, and thereby lack of fear of imminent harm, mean common law assault cannot arise (*R v Pemble*). The test is a subjective one; assault cannot arise if the victim does not subjectively apprehend or fear violence (*Ryan v Kuhl*). However, in QLD, the test is an objective one; it is unfair to find an assessment depending on whether the victim was timid or courageous (*Brady v Schatzel*). Test does not apply in Victoria.

3. **Imminence of Contact/Violence** – contact/violence must follow relatively immediately after the apprehension is created. However, it is extended to situations where the threat of assault is continuing; that is, where the victim has *no reasonable means of escaping the threat*. In such circumstances, there will be *no reasonable possibility of a novus actus interveniens* breaking the causal link between threat and expected infliction of contact/violence (*Zanker v Vartzokas*).

4. **Conditional Threats** – may amount to assault in some circumstances. However, where the threatening words – the condition – indicates that no violence will ensue, the words will be taken to have a negating effect on the threatened act, and no assault will be found. *A condition on the use of force may dispel the threat* (*Tuberville v Savage*).

NOTE: It will not be an assault if the person making the threat has a *lawful right* to threaten contact, such as in the protection of private property. However, this is subject to 2 limitations:

- The threatened contact must be *proportionate* in the circumstances; and
- The threatened contact must be used for *legitimate self-defence*.

If the threatened contact is disproportionate and goes beyond the pale of legitimate self-defence, the threatening party will be guilty of assault (*Rosza v Samuels*).

ASSAULT (BATTERY)

AR ELEMENTS:

1. **Physical Interference** – the prosecution needs to prove the accused performed a *voluntary act* which caused force to be applied to the victim's body. The force must be transmitted directly through the person (eg. punching) or via an instrument (*Fagan*). However, not all force can amount to battery; it must be unlawful and *beyond acceptable lawful physical contact between 2 people* (*Collins v Wilcock*).

MR ELEMENTS:

1. **Intention** – the accused must have intended contact (*battery*) or intended to create in the mind of the victim an apprehension of immediate and unlawful physical contact (*assault*).

2. **Recklessness** – the accused must have foreseen the possibility of contact (*battery*) or the creation in the mind of the victim an apprehension of immediate and unlawful physical contact (*assault*). **NOTE:** The test of recklessness is whether it was foreseeably probable that injury would result from someone's actions; it is not enough that the accused performs an act knowing that injury is possible or might result (*R v Campbell*).

NOTE: For assault to be found, the AR and MR elements must be contemporaneous i.e. occurring simultaneously. If there is a continuing act, the MR may be superimposed on the AR (*Fagan; Thabo Meli v R*).

MURDER

Crimes Act, s. 3: "Notwithstanding any rule of law to the contrary, a person convicted of murder is liable to

(a) Level 1 imprisonment (life); or

(b) Imprisonment for such other term as is fixed by the court as the court determines". Look to Common Law for definition and elements...

AR ELEMENTS:

1. **VOLUNTARY ACT** – the accused must have performed a willed and voluntary act which caused the victim's death (*Ugle v The Queen*). At law, there is a presumption that an act is voluntary. It is the onus of the defendant to rebut this presumption by showing their act was automatic or reflexive (*R v Falconer*; *DPP v Farquharson*). The act causing death must be assessed by reference to the surrounding circumstances, but ultimately it is a matter for the jury to decide which was the cause of death (*Ryan v R*).

2. **CAUSATION** – where a crime is a result crime, like homicide, the prosecution must prove a causal connection between the defendant's actions and the resultant death. Causation is assessed by 3 tests:

i) **Operating and Substantial Cause** – the defendant's voluntary act must be the *substantial and operating cause* of death. This must mean that the act was a) at least a cause of death, b) was a predominant cause, subsisting and continuing at the time of death – even where the act was commissioned a period of time before, and c) was not broken an intervening act – *novus actus interveniens* – that relegated the primary action and operating cause to the mere setting and history within which the victim died (*R v Hallett*).

ii) **Natural Consequence** – the defendant's actions must have made it a natural consequence that the victim would seek to escape/avoid an attack by D, the act of escaping contributing to the victim's ultimate death (*R v Royall*).

iii) **Reasonable Foreseeability** – the victim's death must be a reasonably foreseeable consequence of the defendant's action. This is an objective test – whether a reasonable man would have foreseen the victim's death resulting from the defendant's actions (*R v Royall*).

2A. **INTERVENING ACTS – NOVUS ACTUS INTERVENIENS** – intervening acts between the defendant's actions and the victim's death can break the chain of causation, leading to acquittal. Intervening acts come in one of three categories:

a) **Acts of God** – acts of God will generally break the chain of causation. However, acts of God are distinguishable from natural occurrences; natural occurrences will not generally break the chain of causation (*R v Hallett*).

b) **Acts of the Victim** – a victim will not be considered to have broken the chain of causation if the victim's action was a natural/reasonable consequence of his/her well-founded fear in response to the defendant's behaviour (*R v Royall*).

c) **Acts of a Third Party** – causation may still extend to the defendant if the acts of a 3rd party are free, deliberate and informed in the context of self-preservation (*R v Pagett*). A 3rd party responsible for bad medical treatment that ultimately results in death will rarely break the chain of causation (*R v Smith*; *R v Evans & Gardiner*; *R v Malcharek & Steel*; *R v Blaue*) unless the treatment is so palpably bad that it relegates the original wound to the mere setting and history within which the victim died (*R v Jordan*).

MR ELEMENTS (NOTE: The MR for murder does not require maliciousness or pre-meditation).

1. **INTENT TO KILL** – intent to kill has several components:

- a. *Direct Intention* – D's aim/purpose is to bring about the result;
- b. *Subjective Test* – D's actual mental state needs to be determined; it is irrelevant whether a reasonable person could have foreseen the consequences of their act (*Pemble*);
- c. *Mode of Death* – exact mode need not be intended. Merely need to show D intended death (*R v Demirian*).
- d. *Person* – the exact person need not be intended (*R v Martin*)
- e. *No presumption* – there is no presumption D intended the natural and probable consequences of his actions (*Demirian*). However, where a person deliberately refrains from making inquiries because he prefers not to know of the consequences, he will have engaged in *wilful blindness* and may be treated as having the knowledge he refrained from acquiring (*R v Crabbe*).

2. **INTENT TO CAUSE GBH** – It is unsettled what 'GBH' means at law. It has been stated to be 'damage of a really serious kind' (*DPP v Smith*). Other cases have said that GBH may be inferred from the totality of the injuries. Serious injury can include stabbing, bunching, acts rendering the victim unconscious (*Meyers v R*), and even holding a pillow over a victim's head to stop them from screaming. There are an infinite number of situations which may give rise to GBH. The jury must decide if the act falls within the scope of GBH (*R v Rhodes*).

3. **RECKLESSNESS AS TO CAUSING DEATH OR GBH** – if intent cannot be shown, recklessness as to death or GBH may be proven. A person who does an act knowing that it is probable – not merely possible or likely – that death or GBH may result may be found liable for murder (*R v Crabbe*). 'Probability' is the notion of a substantial – a "real and not remote" – chance, regardless of whether it is less or more than 50% (*Boughey v R*).

DOCTRINE OF TRANSFERRED MALICE – it is settled law that if a defendant shoots at a victim, and hits another person instead, the defendant is guilty of both the murder of the other person as well as the intended murder of the victim. This is known as the *doctrine of transferred malice*. There need not be an intention to kill a specific victim, just the intent to kill someone (*R v Saunders & Archer*; *R v Martin*). However, there is controversy re the issue of harm done to a pregnant woman which later kills the foetus. Transferred malice may be attributed to a foetus where the foetus dies upon birth i.e. when a legal person (*R v Martin*). **AG Ref. 3** – no transferred malice unless original intent was to harm foetus directly. **VIC not bound**.