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Basic concepts

Intro

The prosecution bears the onus of burden of proving that Angie is liable for murder under s18(1)(a) beyond reasonable doubt (*Woolmington v DPP*)

The offence is alleged to have occurred in NSW, so the relevant legislation is the *Crimes Act 1900* (NSW) . The prosecution bears the burden of proof of proving all elements of the offence beyond reasonable doubt (*Woolmington*) Section 33(1)(a) is the relevant offence provision, and is a crime of wounding with intent to cause GBH. The prosecution will be required to prove that David's voluntary wounded Vance and was done with intention to cause GBH.

The offence is alleged to have occurred in ACT, so the Criminal Code 2002 (ACT). The prosecution has the burden of proving all elements of the offence as per s56 of the Criminal Code beyond reasonable doubt (s57)

Voluntariness

Must always look at this in the **actus reus**.

The prosecution (DPP) must prove that the act was voluntary (*Ryan*; *Jiminez*)

An act or omission must be voluntary to satisfy the actus reus element of a crime such as murder (*Ryan v the Queen*)

Ryan v the Queen – presumption: willed acts are voluntary unless can be proved otherwise. i.e. An **act** is committed **voluntarily** if it is subject to the control and direction of the accused's will

For an accused to be found guilty, the relevant conduct must be willed or voluntary (*Ryan*). There is a presumption of voluntariness of acts (*Ryan*, *Bratty*); this is not rebutted by any evidence.

There are three ways in which an act may be considered at law to be involuntary

- When the criminal act was accidental
- When the criminal act was caused by a reflex action
- When the conduct was performed whilst the accused was in a state of impaired consciousness
 - i.e. intoxication (however can't look at this in crimes of specific intent)

Ryan v the Queen

- Robert Ryan decided to rob a service station at Carramar NSW and shot the attendant Noel Taylor, on his version “by accident”.
- Barwick CJ: *that the "act" of the accused, of which one or more of the various elements of the crime of murder as defined must be predicated must be a "willed", a voluntary act which has caused the death charged. It is the act which must be willed, though its consequences may not be intended*
- Barwick CJ: *the jury could have concluded that the act causing death was the presentation of the cocked, loaded gun with a safety catch unapplied and that its involuntary discharge was a likelihood which ought to have been in the contemplation of the applicant when presenting the gun in the circumstances. In that event, their verdict should have been guilty of murder.”*
 - i.e. though the shooting wasn't voluntary, the presentation of the armed weapon was

Must have temporal Coincidence between mens rea and actus reus (Fagan)

In order for an accused to be convicted of an offence, it must be proved that the fault element coincided with, or existed at the same time as, the physical element.

There is a general proposition (applicable to all crimes) that the physical and fault elements of an offence must coincide: *Meyers v R* (1997) 147 ALR 440, 442:

*‘An accused person who lawfully kills another is not guilty of murder unless he does the particular act which causes the death **with** one of the specific intents that is an essential element of the crime of murder. The particular act and the intent with which it is done must be proved by the prosecution beyond reasonable doubt. **Act and intent must coincide.** If the circumstances of a fatal altercation are such that the prosecution can prove that some acts were done with the necessary intent but cannot prove that the other acts were done with that intent, 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’*

In sum..

- The fault element must coincide with the physical element of an offence: *Ryan v The Queen*; *R v Miller* [1983]
- Courts occasionally stretch this requirement so that the fault element is imposed across a series of acts or continuing act: *Thabo Meli v The Queen* [1954]
- Required fault can be developed mid-act and so failing to remove the car from a policeman's foot can be considered as a whole continuing act: *Fagan v Metropolitan Commissioner of Police* [1969]
- Fault can be developed along with awareness after the act has begun, such as recklessness as to fire resulting in arson: *R v Miller* [1983]

Fault element imposed upon a series of acts

In *Thabo Meli v The Queen*, in accordance with a preconceived plan, the accused men took the victim to a hut, gave him beer so that he was partially intoxicated, then hit him on the back of the head. They then took the victim out of the hut and, believing him to be dead, rolled him over a cliff to create the appearance of an accident. The victim was, in fact, still alive at that stage and later died of exposure.

At the trial, the defence took a “frame-by-frame” approach to concurrence and argued that there were two acts: the first act was the attack in the hut, and whilst the fault element coincided with this act, it was not the cause of death. The second act was the rolling of the victim off the cliff, and while this could be said to be the cause of death, it was not accompanied by the fault element

The Privy Council held that it was impossible to divide up what was really a series of acts in this way. Their Lordships preferred to regard the whole of the conduct as one indivisible transaction causing death or as one continuing act. On this reading, the fault element and physical element coincided because the accused possessed the requisite fault element at the time they started the series of acts. Lord Reid stated:

“There is no doubt that the accused set out to do all these acts in order to achieve their plan, and as parts of their plan: and it is much too refined a ground of judgment to say that, because they were under a misapprehension at one stage and thought that their guilty purpose had been achieved before, in fact, it was achieved, therefore they are to escape the penalties of the law.”

i.e. in **Thabo Meli**, The mental state was present at the beginning state of the plan and that was sufficient to ground liability

Fault element imposed upon a continuing act

Another way of approaching concurrence is to view the physical element as a continuing act. In **Fagan v Metropolitan Commissioner of Police**, the accused drove his car onto the foot of a police constable (accidentally, he maintained) after being told to park his car in a particular space. When the victim told the accused to move the car which was on his foot, the accused said, “Fuck you, you can wait” and stopped the engine. The accused eventually moved the car off the victim’s foot.

On appeal against a conviction for assault, the accused argued that the act of the wheel moving onto the police constable’s foot occurred without the fault element. A majority of the Court of the Queen’s Bench rejected this argument. James J, with whom Lord Parker LJ agreed, held that the relevant act was a continuing one which started when the wheel was driven onto the victim’s foot and ended when it was removed. Viewed this way, the fault element could be super-imposed upon the physical element:

- *“It is not necessary that [the fault element] should be present at the inception of the [physical element]; it can be superimposed upon an existing act. On the other hand the subsequent inception of [the fault element] cannot convert an act which has been completed without [the fault element] into an assault.”*

R v Miller

The issue of concurrence also arose in **R v Miller**. In that case, the accused (a homeless person) fell asleep in a derelict house while smoking and, whilst asleep, his bed caught fire. He awoke to find the mattress smouldering, but instead of extinguishing the fire, he arose and moved into another room of the house and went back to sleep. The house then caught fire and damage was caused.

The accused was charged with and convicted of arson, an offence that requires a fault element of intention or recklessness as to damage to property. The problem of concurrence arose because at the time that the initial act of damage occurred, the accused lacked intention or recklessness as to damage. The prosecution relied on the accused’s recklessness after he had become aware that the bed was on fire.

The English Court of Appeal took a “continuing act” approach to the problem of concurrence, but justified it on the basis of a duty arising from the creation of a dangerous situation. Lord Diplock stated:

- *“I see no rational ground for excluding from conduct capable of giving rise to criminal liability, conduct which consists of failing to take measures that lie within one’s power to counteract a danger that one has oneself created, if at the time of such conduct one’s state of mind is such as constitutes a necessary ingredient of the offence.”*

The Court of Appeal therefore held that once the accused became aware of the danger he created, a duty arose to take reasonable steps to counteract that danger.

Intoxication

In offences of specific intent, self-induced intoxication may be taken into account in determining whether the person had the **intention** to cause the specific result necessary for an offence of specific intent. (428C)

Except in situations where the person

- (a) had resolved before becoming intoxicated to do the relevant conduct, or
- (b) became intoxicated in order to strengthen his or her resolve to do the relevant conduct

However self-induced intoxication in both offences of specific and general intent cannot be taken into account in determining the actus reus of the offence (whether it was voluntary) (428G). However it can be if it was not self-induced.

So for other offences other than those of specific intent, in determining the mens rea of an offence intoxication can only be taken into account if the intoxication was not self-induced.

At common law, the High Court majority decision in *R v O’Connor* affirms that evidence of intoxication in extreme cases may support the claim that the accused’s actions were involuntary.

Crimes Act 1900 (NSW) Part 11A Intoxication

428A Definitions

In this Part—

drug includes a drug within the meaning of the *Drug Misuse and Trafficking Act 1985* and a poison, restricted substance or drug of addiction within the meaning of the *Poisons and Therapeutic Goods Act 1966*.

intoxication means intoxication because of the influence of alcohol, a drug or any other substance.

offence includes an attempt to commit the offence.

offence of specific intent is defined in section 428B.

relevant conduct means an act or omission necessary to constitute the actus reus of an offence.

self-induced intoxication means any intoxication except intoxication that—

- (a) is involuntary, or
- (b) results from fraud, sudden or extraordinary emergency, accident, reasonable mistake, duress or force, or
- (c) results from the administration of a drug for which a prescription is required in accordance with the prescription of a medical practitioner, nurse practitioner, midwife practitioner or dentist, or of a drug for which no prescription is required administered for the

purpose, and in accordance with the dosage level recommended, in the manufacturer's instructions.

428B Offences of specific intent to which Part applies

- (1) An **offence of specific intent** is an offence of which an intention to cause a specific result is an element.
- (2) Without limiting the generality of subsection (1), the offences referred to in the Table to this section are examples of offences of specific intent.

Table

- (a) an offence under the following provisions of this Act—
(not listed here)

428C Intoxication in relation to offences of specific intent

- (1) Evidence that a person was intoxicated (whether by reason of self-induced intoxication or otherwise) at the time of the relevant conduct may be taken into account in determining whether the person had the intention to cause the specific result necessary for an offence of specific intent.
- (2) However, such evidence cannot be taken into account if the person—
 - (a) had resolved before becoming intoxicated to do the relevant conduct, or
 - (b) became intoxicated in order to strengthen his or her resolve to do the relevant conduct.

428D Intoxication in relation to other offences

- In determining whether a person had the mens rea for an offence other than an offence of specific intent, evidence that a person was intoxicated at the time of the relevant conduct—
- (a) if the intoxication was self-induced—cannot be taken into account, or
 - (b) if the intoxication was not self-induced—may be taken into account.

428E Intoxication in relation to murder, manslaughter and assault causing death

- (1) If evidence of intoxication at the time of the relevant conduct results in a person being acquitted of murder—
 - (a) in the case of intoxication that was self-induced—evidence of that intoxication cannot be taken into account in determining whether the person had the requisite mens rea for manslaughter or for an offence under section 25A, or
 - (b) in the case of intoxication that was not self-induced—evidence of that intoxication may be taken into account in determining whether the person had the requisite mens rea for manslaughter or for an offence under section 25A.
- (2) An offence under section 25A is not an offence of specific intent for the purposes of this Part.

428F Intoxication in relation to the reasonable person test

If, for the purposes of determining whether a person is guilty of an offence, it is necessary to compare the state of mind of the person with that of a reasonable person, the comparison is to be made between the conduct or state of mind of the person and that of a reasonable person who is not intoxicated.

428G Intoxication and the actus reus of an offence

- (1) In determining whether a person has committed an offence, evidence of self-induced intoxication cannot be taken into account in determining whether the relevant conduct was voluntary.
- (2) However, a person is not criminally responsible for an offence if the relevant conduct resulted from intoxication that was not self-induced.

Intention

The fault element of most serious crimes is generally expressed as an intention to bring about the requisite physical element of the offence.

He Kaw Teh v The Queen

Brennan J:

- *'intent, in one form, connotes a decision to bring about a situation as far as it is possible to do so - to bring about an act of a particular kind or a particular result. Such a decision implies a desire or a wish to do such an act or to bring about such a result'*

Oblique Intention

- This term relates to the situation where the outcome of the accused's conduct was not directly linked to his or her intention, but emerges obliquely as the consequence of that conduct. The following hypothetical is often used to illustrate the point. Imagine that a person intends to collect the insurance on a plane by placing a bomb on the plane, timed to explode in mid-air. The person does not have the direct intention to cause the death of the crew, but is aware that these deaths are virtually certain to follow from his or her action. Should that person's awareness or belief that particular consequences are virtually certain be regarded as intention for the purposes of the criminal law?

Hyam v DPP

- The accused, Hyam, poured petrol through a neighbour's letter box and lit it in order, she claimed, to frighten a woman in the house. In the ensuing fire, two of the woman's daughters died. Hyam claimed that she did not intend to kill them.
- **The House of Lords defined intention broadly to include not only direct intention but also foresight of a probable consequence**
- **Lord Hailsham took the view that to intentionally and deliberately commit an act which exposes a victim to the risk of probable grievous bodily harm or death is "morally indistinguishable" from intending to kill another person. That is on the facts, if the accused foresaw that death was a probable consequence of her actions, then she had the relevant intent to kill.**

Transferred intention/transferred malice

- Where an accused intends a particular crime and commits the requisite physical element of that crime, but with a different victim to the one they had in mind
- In these circumstances, the accused is still held criminally responsible for his or her conduct.
- **Kwok Chak Ming v the Queen:**
 - *"The principle that where A, intending to kill or seriously injure B, unintentionally but, in pursuit of that purpose, kills C may be indicted for the murder of C, applies we think with equal force even where C was only an embryo or foetus at the time when the malice was manifested and the injury inflicted but is subsequently born alive and dies of the injury."*