
Elements of Criminal Offences

Subjective, Strict or Absolute

- Is there capacity? Presumed.
- What are the actus reus elements?: *He Kaw Teh*.
 - o Act/omission, circumstances, and consequences: *Vallance v R*.
- What are the mens rea elements?: *He Kaw Teh*.
 - o **Subjective mens rea**: Those in which there is an original obligation on the prosecution to prove mens rea.
 - o **Strict liability**: Those in which mens rea will be presumed to be present unless and until material is advanced by the defence of the existence of honest and reasonable belief that the conduct in question is not criminal, in which case the prosecution must undertake the burden of negating such belief beyond reasonable doubt.
 - o **Absolute liability**: Those in which mens rea plays no part and guilt is established by proof of the objective ingredients of the offence.
- **[Presumption of a subjective mens rea]** If there are none:
 - o For every actus reus element, there is a presumption in favour of a subjective mens rea: *He Kaw Teh*.
 - The prosecution must prove the guilt of the prisoner beyond reasonable doubt: *Woolmington v DPP*.
 - Exceptions
 - o Defence of insanity.
 - o Statutory exceptions.
 - Proving beyond reasonable doubt does not mean that there cannot be any doubt: *Dookheea*.
- Can this presumption be rebutted?: *He Kaw Teh*.
 - o One must have regard to the **words of the statute** creating the offence.
 - Indication of Parliament's intention.
 - o The second matter to be considered is the **subject matter** with which the statute deals.
 - Purpose of the legislation.
 - Severity of punishment.
 - o It is pertinent also to inquire whether putting the defendant under strict liability will **assist in the enforcement** of the regulations.
 - Promotion of the observance of the regulations.
 - However, no good purpose would be served by punishing a person who had taken reasonable care and yet had unknowingly been an innocent agent.
- **[Presumption of strict liability]** If rebutted:
 - o An honest and reasonable mistake of fact will be a ground of exculpation in cases in which actual knowledge is not required as an element of an offence (i.e., there is a strict liability presumption): *He Kaw Teh*.
- Can this presumption be rebutted?: *He Kaw Teh*.
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 - o The second matter to be considered is the **subject matter** with which the statute deals.
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- Also consider:
 - When an offence created by Parliament carries serious penal consequences, the courts look to Parliament to spell out in clear terms any intention to make a person criminally responsible for conduct which is based on an honest and reasonable mistake: *CTM v R*.
- Rebutted?
 - No
 - Strict liability.
 - At common law an honest and reasonable belief in the existence of **circumstances**, which, if true, would make the act for which a prisoner is indicted an innocent act has always been held to be a good defence: *He Kaw Teh*; *Proudman*; *Tolson* (1889) 23 QBD 168.
 - A mistake of law (as opposed to a mistake of fact) does not provide an excuse: *Ostrowski v Palmer*.
 - The evidential burden of establishing such a belief is in the first place upon an accused. If that evidential burden is satisfied, then ultimately it is for the prosecution to prove beyond reasonable doubt that the accused did not honestly believe, on reasonable grounds: *CTM v R*.
 - When the accused bears the evidential burden, it is only necessary for there to be evidence that could lead a jury, properly instructed, to have a reasonable doubt: *Braysich*.
 - The evidence must be enough to suggest a reasonable possibility: *Jayasema v R* [1970] AC 618.
 - Qualifications
 - The reasonable mistake of fact excuse is only available to those who have thought about an issue, resulting in a positive belief in a mistaken set of facts: *State Rail Authority v Hunter District Water Board*.
 - Honest and reasonable mistake of fact requires that the mistake make the act “innocent”: *Mayer v Marchant*.
 - Note that there is some debate over whether the act has to be completely innocent or just innocent of that one crime, but just use *CTM v R* which is completely innocent.
 - Yes
 - Absolute liability.
 - The prosecution must prove the guilt of the prisoner beyond reasonable doubt: *Woolmington v DPP* [1935] AC 462.
 - Exceptions
 - Defence of insanity.
 - Statutory exceptions.
 - Proving beyond reasonable doubt does not mean that there cannot be any doubt: *Dookheea*.

Homicide: Murder

Murder

- **CA s 18** Murder and manslaughter defined
 - (1)(a) 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: 25 years: **CA s 18(1)(a)**.
- The prosecution must prove the guilt of the prisoner beyond reasonable doubt: *Woolmington v DPP*.
- Actus reus
 - Act or omission
 - Identify the exact act causing death: *Arulthilakan v The Queen*.
 - If there are multiple acts, it is for the jury to decide which one (with instruction): *Ryan v R*; *Royall v R*.
 - For omission:
 - Before an omission can found homicide liability, the accused must have owed a duty to the deceased: *R v BW & SW (No 1)*.
 - Duty of care categories: parent and child; doctor and patient; where an obligation may be imposed by statute or contract; where a person may voluntarily assume an obligation to care for a helpless person and thereby become subject to such a duty: *Burns v R*.
 - There may be an additional category of duty of care, i.e., creating or contributing to the creation of a state of affairs: *Burns v R*.
 - Causation
 - Generally
 - Test: If at the time of death the act or conduct of the accused is still an **operating cause and a substantial cause**, then the death can properly be said to be the result of that act or conduct, albeit that some other cause of death is also operating: *R v Evans and Gardiner v R (No 2)*.
 - Foreseeability is irrelevant as this is an objective test: *Hallett v R*.
 - An act of the accused can only be a cause of death if the death would not have occurred *but for* that act: *Hallett v R*; *Royall v R*; *Arulthilakan v The Queen*.
 - Cause of death is for the jury to decide: *R v Evans and Gardiner v R (No 2)*.
 - Act of third party
 - A reasonable act of self-defence is like an act performed for the purpose of self-preservation, and as “an involuntary act caused by the act of the accused”: *R v Pagett*.
 - Act of nature
 - Test: Whether an act or series of acts (in exceptional cases an omission or series of omissions) consciously performed by the accused is or **are so connected with the event that it or they must be regarded as having a sufficiently substantial causal effect** which subsisted up to the happening of the event, without being spent or without being in the eyes of the law sufficiently interrupted by some other act or event: *Hallett v R*.
 - The ordinary operation of natural causes does not prevent death from being caused by the accused: *Hallett v R*.
 - Extraordinary natural forces may be regarded as breaking the chain of causation, such as earthquake: *Hallett v R*.
 - Act of the deceased
 - Voluntary and informed decision

- A voluntary and informed act breaks the chain of causation (*though this may be limited to its facts*): *Burns v R*.
 - A fully informed act is absent intimidation, mistake, or other vitiating factor: *Burns v R*.
 - What an adult of sound mind does is not in law treated as having been caused by another: *Burns v R*.
 - There is a difference between choosing not to prevent death (as in *R v Blaue*) and choosing to accept the risk of death (as in *Burns v R*), as only the latter breaks the chain of causation.
- Refusing medical treatment or rejecting medical advice
 - Refusal of medical help does not break the chain of causation: *R v Blaue*; *R v Singapore*.
 - This is because this does not constitute a new cause, but merely the loss of a possible opportunity to avoid death from a still operating cause: *R v Singapore*.
 - Eggshell-skull rule: must take their victims as they find them: *R v Blaue*.
 - This includes religious grounds: *R v Blaue*.
- Fright or self-preservation
 - Test: Was the response of the victim reasonable or proportionate (*Royall v R*) having regard to the nature of the conduct of the accused and the fear it is likely to have provoked (*McAuliffe v R*).
 - This is a question for the jury to decide: *R v RIK*.
 - It is irrelevant that there are multiple avenues of escape: *R v RIK*.
- Death
 - *Human Tissue Act 1983 (NSW) s 33* When death occurs
 - For the purposes of the law of New South Wales, a person has died when there has occurred—
 - (a) irreversible cessation of all function of the person's brain, or
 - (b) irreversible cessation of circulation of blood in the person's body.
- Mens rea (only need one element)
 - Intent to kill
 - Subjective test: intention to kill or inflict grievous bodily harm at the time of engaging in the relevant conduct (*Zaburoni v R*) can be inferred from:
 - Age, background, education, emotional state and state of sobriety: *Pemble v R*.
 - What the accused says and does at the time of the relevant events: *Matthews v R*.
 - For example, attacking the deceased from behind would suggest intent (e.g., you would not be trying to frighten them and accidentally kill them), saying 'I'll kill you', or kicking in the head while wearing footwear other than thongs: *Matthews v R*.
 - The accused's post-offence conduct can also sometimes be used to prove that he/she had the requisite intent: *The Queen v Baden-Clay*. For example:
 - Out of proportion flight or concealment to the lesser offence that it might be found by the jury to be more consistent with the more serious charge: *R v White*.
 - Lies told by the accused post-offence suggesting that the accused acted with intention: *Lane v The Queen*.
 - Intent to inflict GBH
 - See: Intent to kill.
 - Definition of GBH (also see: Assault, Wounding and GBH)
 - **CA s 4 Definitions**
 - **Grievous bodily harm** includes—
 - (a) the destruction (other than in the course of a medical procedure or a termination of a pregnancy in accordance with the *Abortion Law Reform Act 2019*) 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).
 - Use the ordinary and natural meaning of GBH: *DPP v Smith*.
 - This means a really serious bodily injury: *Swan v The Queen*.
 - A serious injury, but one that need not be permanent, or long lasting, or life threatening: *Haoui v The Queen*.
 - Only the injury itself and its direct physical effects are relevant, not the personal, social and economic circumstances of the injury: *Swan v The Queen*.
 - Reckless indifference to human life
 - Test: A person is guilty of murder if he commits a fatal act knowing that it will **probably** cause death or *grievous bodily harm* [GBH not in NSW legislation (*Royall v R*)] but is not guilty of murder if he knew only that his act might **possibly** cause death or grievous bodily harm: *R v Crabbe*.
 - Wilful blindness is still reckless indifference: *R v Crabbe*.
 - A person cannot, in any intelligible meaning of the words, close his mind to a risk unless he first realises that there is a risk: *R v Caldwell*.
 - Acts that satisfy this can be justified or excused by law, e.g., surgeons performing hazardous operations: *R v Crabbe*.
 - Temporal coincidence
 - The actus reus and mens rea must coincide: *Meyers v The Queen*.
 - Exceptions
 - There is no need for coincidence where a series of acts have been done pursuant to a plan to kill someone: *Thabo Meli v R*.
 - Where the unlawful application of force and the eventual act causing death are parts of the same sequence of events, the interval of time is irrelevant: *R v Le Brun*.
 - This includes where the acts causing death were meant to conceal the commission of the original unlawful assault: *R v Le Brun*.
 - Constructive murder
 - Actus reus
 - Act or omission
 - See above.
 - Causation
 - See above.
 - Done in an attempt to commit, or during or immediately after the commission, by the accused... of a crime punishable by imprisonment for life or for 25 years
 - Mens rea
 - The mens rea for the base offence: *Ryan v R*.
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