

CRIMES OF HOMICIDE AND ASSAULT

(a) The general elements of criminal offences (1) (2)

1. Notable terms

- a. Beyond reasonable doubt:
 - i. Judges should not go into too much detail when telling the jury about reasonable doubt, cannot contrast between any doubt and reasonable doubt **R v Dookhea (2017) 262 CLR 402**
- b. The Golden Rule
 - i. It is the duty of the prosecution to prove the prisoners guilty. (Viscount Sankey) **Woolmington v DPP [1935] AC 462**
 - ii. Exceptions:
 1. Insanity: If it was for the crown to negate insanity, then it would be hard to prove.
 2. Statutory exception: where the legislation says otherwise.
- c. Evidential Burden:
 - i. The defence must produce sufficient evidence for a tribunal to call upon the other party to answer it.
 - ii. Once this is satisfied, the golden rule will apply.

2. He Kaw Teh Principles

- a. Three main actus reus elements (Brennan J)
 - i. Conduct of act or omission
 - ii. Circumstance of act or omission
 - iii. Result of act or omission

(E.g.: Actus reus for murder = Conduct, Result, Actus reus for Sexual assault = Conduct, Circumstance)

- b. To work out the relevant mens rea where statutory presumption is silent:
 - i. Infer whether parliament
- c. **First presumption**:
 - i. presumption of subjective mens rea (**SUBJECTIVE STANDARD**)
 - ii. TO REBUT, take into account:
 1. Words of the provision
 2. Purpose, subject matter of the provision
 3. The seriousness of the offence
 4. The seriousness of the potential consequences of somebody convicted.
 5. Whether proving subjective fault is too difficult
 6. Whether an objective standard has a deterrent effect
- d. **Second presumption**: Gibbs CJ
 - i. Presumption that the accused did not honestly believe on reasonable grounds that the relevant circumstances are such as to render his or her act innocent (must believe act was innocent -> **Bell v Tasmania [2021] HCA 42**) (**STRICT STANDARD/LIABILITY**)

- ii. Positive belief **SRA v Hunter District Water Board**, quite strong for summary and regulatory ones
- e. **Third Presumption**
 - i. Absolute liability: No defence and the mens rea standard is not needed, only the actus reus
- f. The He Kaw Teh discussion
 - i. He Kaw Teh will be acquitted if there is an absence of mens rea if he has proved on the balance of probabilities that he believed reasonably that there was no heroin in the suitcase.
 - 1. Objective mens rea instead of subjective (knowing that there was heroin in the suitcase)

3. Cases

a. **Woolmington v DPP**

- i. In criminal cases: The burden of proof is always on the prosecution to prove the defendant's guilt beyond a reasonable doubt.
- ii. Ruled that presumption of innocence is a vital principle.
- iii. Appeal was allowed and the Defendant was acquitted.

b. **SRA v Hunter District Water Board**

- i. Judgments
 - 1. Gleeson CJ:
 - a. **Types of belief**
 - i. Positive belief in the state of affairs
 - ii. A person who has thought about whether it exists only in a general way and has concluded that there is no reason why it would.
 - iii. A person whose mind is completely blank on the situation.
 - b. Said that this person will always be able to rely on reasonable mistake if they have positive mistake.
 - c. It would be inconsistent with the legislative purpose of the Clean Waters Act to conclude that the mere lack of knowledge that pollution was occurring, or was likely to occur, based upon a general understanding or assumption that everything was in order, would be sufficient to amount to mistaken belief.
 - ii. **The reasonable mistake of fact excuse can only be used for those who have considered such an issue and it resulted in a positive belief in a mistaken set of facts.**

c. **CTM v R**

- i. Law
 - 1. s66C(3) -> "Any person who has sexual intercourse with another person who is between 14 to 16 is liable to 10 years imprisonment".
 - 2. Silent as to fault and makes no reference to defence of reasonable mistake of fact.

ii. High Court's Decision

1. Held that it was strict as the legislature did not expressly state it being absolute
2. Honest and reasonable mistake of fact reflects fundamental values as to criminal responsibility
 - a. Court is unlikely to impose absolute liability unless the parliament expressly make its clear in language or implication
3. The repeal of a limit defence under legislation does not indicate a parliamentary intention to impose absolute liability.

Tolson (1889) 23 QBD 168, 182

- Woman married someone else, thinking her husband was dead and she was charged with bigamy
- She claimed that she honestly and reasonably believed that her husband was dead
 - She asked the husband's brother and he said that he had died on a voyage to America
 - Having received this information, the first husband reappeared
- The court by majority agreed
- Cave J: Now it is undoubtedly within the competence of the legislature to enact that a man shall be branded as a felon for doing an act which he honestly and reasonably believes to be lawful and right .. But such a result seems so revolting to the moral sense that we ought to require the clearest and most indisputable evidence that such is the meaning of the Act.
- In a provision that is silent to mens rea, we need clear evidence that the parliament intended to hold absolute liability

- Hawthorne (Department of Health) v Morcam Pty Ltd (1992) 29 NSWLR
 - Selling adulterated foods -> Conduct and Circumstance actus reus
 - Said that the producer himself honestly and reasonably believed that he was providing unadulterated foods as he was buying it from an reputable supplier
 - Strict Liability was not rebutted
 - Justice Hunt: If an accused was to be convicted of this offence, even where they honestly believed, absolute liability will not persist in unadulterated food, but obtain convictions for

conduct that is manifestly not criminal

- Even when offence is pretty trivial, the presumption in favour of strict liability will not readily be rebutted -> need clear statutory language normally for it to be rebutted, not presumed that people be convicted of such strict terms
- Some cases where absolute liability applies:
 - Stanojlovic v DPP (2018)
 - Didn't affix P plate
 - He claimed he honestly and reasonably believed that he didn't realise the p plates were on both ends of the vehicle, one had fallen off
 - He said that the prosecution had to prove that he did not honestly and reasonably believe that there were two plates on the car
 - The requirement itself is about safety and since it is a small offence, one of absolute liability occurs as it could result in too many applications and processes in court -> word can get around if you can establish a reasonable possibility that there were two plates on your car
 - Require clear and unmistakable language
- Wampfler (1987) 11 NSWLR
 - The accused has been convicted of publishing an indecent article
 - Defendant claimed that he reasonably believed that the article was decent
 - Resulted in strict liability -> presumption in favour of strict liability over absolute
 - Modern authorities show suspicion an absolute liability has been provided by parliament

(b) Homicide (1)(2), Murder and Manslaughter (Unlawful Dangerous Act, Gross Negligence)

1. Crimes Act s18(1)(a)

- 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.
 - i. In s18(2)(a): No act or omission which was not malicious, or for which the accused had lawful cause or excuse, shall be within this section.
 - ii. In s18(2)(b): No punishment or forfeiture shall be incurred by any person who kills another by misfortune only.
- b. Constructive murder: Provided that the actus reus of this base offence is performed with the required mens rea, liability in relation to the resulting death is absolute.

2. Crimes Act s19(a)

- a. (1) A person who commits the crime of murder is liable to imprisonment for life

3. Requirements for Murder:

a. Actus reus

i. Act or omission.

1. Need not prove that the accused performed an act causing death. For omission, take into concern the subjective circumstances of the accused, in their assessment -> **R v SW and BW (No. 1) [2009] NSWSC 529**
2. In a case where there is room for argument in the relevant act or omission (i.e. multiple acts that led to the event), this is not resolved by trial judge but rather the jury under proper direction -> **(Barwick J) Ryan v R (1967) 121 CLR 205**
- a. Factual determination by the Jury BYD (**Koani**)
3. **Natural Consequence Test**: Where the conduct of the accused induces in the victim a well-founded apprehension of physical harm such as to make it a natural consequence that the victim would seek to escape and the victim is injured, it is caused by the accused's conduct -> **Royall v R (1991) 172 CLR 378**

ii. Causation.

1. **Where the alleged novus actus is the act or omission of third party**

- a. **Substantial Cause Test**: (narrow down but for test) If at the time of the death, the wound is still an operating and substantial cause, then the causal chain is not broken -> **(Lord Parker) Smith [1959] 2 QB 35 approved in Evans and Gardiner v R (No. 2) [1976] VR 523**

- i. Only if the second cause is so overwhelming to make the original wound merely part of the history
- ii. Juries have usually resolved this enquiry against the stabber.
- b. Question is not whether the medical treatment was negligent or reckless but whether it broke the chain of causation ->

Cheshire [1991] 1 WLR 844

2. Where the alleged novus actus is an act of nature

- a. The act of nature must be an extraordinary act vs its normal operation to satisfy a break in the causal chain -> **Hallett v R [1969] SASR 141**
 - i. Ordinary = rolling in of the tide
 - ii. Extraordinary = tidal wave
 - iii. STILL UP TO JURY TO DECIDE under substantial cause test in Smith

3. Where the alleged novus actus is an act of the victim

- a. **R v Blaue [1975] 1 WLR 1411**
 - i. People must take the victim as they find them
 - ii. Also, for religious purposes which could be unreasonable if decided other way.
- b. There is **no break in causation** if there was no new medical cause, rather a mere loss of possible opportunity of avoiding death from a still operating and substantial cause -> **Birmingham [1975] 11 SASR 469**
 - i. Victim voluntarily discharging himself from hospital

4. Fright or self-preservation

- a. Substantial cause test depends on the natural consequence test
- b. **Natural Consequence Test further Royall v R:**
 - i. Victim had well-founded apprehension of physical harm/danger if they remained
 - 1. Nature of conduct and the fear that was provoked
 - ii. The escape was reasonable and proportionate
 - 1. Person fearful for own safety are forced to react on spur of moment, may act irrationally but this reaction may still be reasonable **RIK v R**
 - a. Applies even if there are multiple avenues of escape
 - b. Jury generally in favour of victim
 - iii. Victims voluntary act was a natural/reasonable consequence of accused's acts

Definition of death under s33 Human Tissue Act (1983)

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.

b. Mens Rea

i. Intention to kill or inflict GBH.

1. An accused's foresight of likelihood that an outcome would occur as a result of his actions cannot be substituted for proof of an accused's intention to cause or bring about that action -> **Zaburoni v R (2016) 256 CLR 482**
 - a. High level of evidence required and up to the jury to decide.
 - b. Need to show that the defendant intended a particular result and that it was their purpose/objective
 - c. Sufficient if the defendant forms intent to kill the split second before act
2. What the accused says at the time and their conduct can be used as evidence to prove that the accused had an intention for GBH -> **Matthews v R [2014] NSWCCA 151**,
 - a. Also includes what the accused do and do not do after the killing **R v Baden-Clay (2016) 258 CLR 308**
3. Inferences for intention can be drawn where a person brings about a result with knowledge or foresight that the result is an inevitable or certain consequence -> **STZAL v Minister for Immigration (2017) 262 CLR 362**

ii. Reckless Indifference. -> No intent to cause injury (set fire to a building)

1. An accused will not be guilty of murder unless he foresaw that death or grievous bodily harm was a probable consequence of his behaviour. (NOT THE foresight of possibility) (**Pemble v The Queen**) -> **Crabbe v R (1985) 156 CLR 464**
 - a. Probable means 'a real and not remote chance'
2. Position in NSW:
 - a. Reckless indifference is same in common law **except it is death not GBH that is probably foreseen** (Royall affirming Solomon)

c. Temporal Coincidence

- i. Cannot divide up mens rea and actus reus to a high degree or this leads to an unfair result -> **Thabo Meli v R [1954] 1 WLR 228**
 1. All acts treated as parts of one transaction in some instances
- ii. Act and intent must coincide. If the circumstances of the fatal altercation are such that the prosecution can prove that some acts were done with the necessary intent but cannot prove that other acts were done with intent, no conviction for murder can be returned unless the act that caused the death had the intent -> **Meyers v R (1997) 147 ALR 440**