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## Murder and Manslaughter

### Source of law

- ▶ S18 Crimes Act 1900 (NSW)

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.

(b) Every other punishable homicide shall be taken to be manslaughter.

- ▶ Definition of death - Human Tissue Act 1983 (NSW) s33

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.

## Murder

Maximum sentence – life imprisonment: s19A CA

AR:

- Act of D; and
- Caused the death charged; and

MR:

- Intent to kill; or
- Intent to cause GBH or
- Reckless indifference to human life

### AR – Crown to prove BRD

1. Act or omission

1.1 Act must be voluntary, causing death and accompanied by the mens rea: Royall; Ryan

1.2 To prove murder by omission, a duty of care must be proved by the Crown

- ▶ BW & SW case

Before an omission can be found homicide liability, D must have owed a duty to the deceased.

2. Causing death – causation

- ▶ Royall v R

(Brennan J) when the death has been caused by a final fatal step taken by V thus depends on

- the reasonableness (or proportionality) of V's attempt at self-preservation AND
  - D's foresight, OR the reasonable foreseeability of the possibility that a final fatal step might be taken by V in response to D's conduct.
- ▶ Reynolds v R

When the jury determines whether D's act caused death in a fright or self-preservation case, enquiry:

- Whether the deceased's conduct was unreasonable or disproportionate, amounts to D's conduct was not a substantial cause
- For the causal chain to remain intact, D's conduct must contribute significantly to the death
- ▶ Rik

[16] Whether the response of the deceased was reasonable or proportionate in the circumstances, were questions appropriate for determination by a jury.

- ▶ Vallance v The Queen

Whether at the time when D engaged in the unlawful conduct which induced in V the fear that causing her to take final fatal step – the taking of such a step was not in fact foreseen by D and wouldn't reasonably have been foreseen by an ordinary person.

- ▶ R v Smith - substantial and operating cause test
- If what happened was a natural, probable and foreseeable consequence of what was done, anything in between was not truly a novus actus interveniens: Haynes v Harwood. Even the wrongful act of a 3<sup>rd</sup> party, if it is something which should be reasonably anticipated, will not break the chain of causation.
- At the time of death, if the original wound is still an operating cause and a substantial cause, then the death can properly be said to be the result of the 1<sup>st</sup> wound...only if the 2<sup>nd</sup> cause is so overwhelming as to make the original wound merely part of the history can it be said that the death doesn't flow from the 1<sup>st</sup> wound.
- ▶ Arutlilakan v R

Whether an act constitutes an 'act of violence' is a question of fact for the jury rather than a question of law upon which a judge is entitled to direct the jury.

- ▶ R v Cheshire
- Whether the chain of causation has been broken: it is sufficient for the judge to direct them if D's acts caused the death; they need not be the sole or main cause provided they contributed significantly to it.
- When V's negligent treatment was the immediate cause of his death, it should not be regarded as excluding D's responsibility unless the negligent treatment was so independent of his acts, and in itself so potent in causing death, that the contribution made by his acts could be regarded as insignificant.
- ▶ R v Blaue

He who inflicted an injury resulting in death could not excuse himself by pleading his victim could have avoided death by taking greater care of himself.

- ▶ R v Blaue

Chain of causation had not been broken by V's voluntary departure from the hospital.

- ▶ Hallett v R – ordinary natural cause does not break the chain
- Regardless if D fails to appreciate or takes unavailing steps to avoid its probable consequences...if at the time of death the original wound was still an operating cause and a substantial cause, death could be said to be the result of this.

If it is unclear to identify the relevant act/omission OR there is novus actus interveniens – jury to resolve: Evans and Gardiner (No2)

### **MR – Crown to prove BRD**

The Crown must prove BRD D either intended to kill, cause GBH, or held reckless indifference to human life.

1. Intent to kill OR

A series of acts (loading, presenting, firing the gun) as long as the acts were done voluntarily, it is enough to prove the requisite mens rea: Ryan; Thabo Meli

- ▶ Matthews; Zaburoni
- Can infer intent from what D says and does at the time of the relevant conduct OR in the aftermath of that incident.
- Confessions relevant bc they infer an intent to kill or cause GBH

## 2. Intent to cause GBH OR

### Definition of GBH

- ▶ S4 - GBH includes – non exhaustive list

- (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).

- ▶ Matthews v R

The Crown can only establish D's intention by the evidence of what he did and said at the time of the confrontation.

- ▶ STZAL v Minister for Immigration – meaning of 'intends'
- An intention of a person concerns that person's actual, subjective, state of mind.
- Evidence of knowledge or foresight of a result may support an inference of intention, but it was not a substitute for the test of whether the person intended the result, which required that the person meant to produce that particular result and that that was the person's purpose in doing the act.

## 3. Reckless indifference to human life – Crabbe and Solomon tests hold the reckless indifference requires foresight of probability of death arising from the act.

- ▶ Pemble v The Queen

- Reckless indifference must involve foresight of or advertence to the probability of death ~~or GBH~~
- The difference between murder and manslaughter is not to be found in the degree of carelessness exhibited; the critical difference relates to the state of mind with which the fatal act is done

- ▶ Zaburoni v R – was intent established for transmitting HIV disease

(Kiefel, Bell and Keane JJ)

- Foresight of risk of harm is distinct in law from the intention to produce that harm
- The Crown to establish that D meant to produce the result by his conduct
- The intention to be proved is a subjective one [motive is separate to intention. Motive may form intention]
- ▶ Crabbe v R
- The reckless indifference to human life should be interpreted on 'possibility' v 'probability'
- A person does an act knowing its probable consequences may be regarded as having intended those consequences to occur
- Guilty of murder if he commits a fatal act knowing it will probably cause death ~~or GBH~~
- Not guilty of murder if only knew his act might possibly cause death or GBH

In NSW, those who foresee only the probability of serious bodily harm (not death) will be guilty of manslaughter rather than murder.

Temporal requirement

- ▶ Meyers v R – a general principle, for an oNence to be committed, the mens rea must be contemporaneous with the actus reus

It may be sufficient if the mens rea is manifest at some point during

- Series of acts: Thabo Meli
- Continuing act: Fagan
- Same sequence of events: Le Brun

## **Constructive Murder**

**Source of law**

- ▶ S18(1)(a)

D may be charged with constructive murder under S18(1)(a). The Crown must prove BRD that D committed the base oNence of X, and the death of V was in attempt to commit, or during or immediately after the commission of the base oNence.

- ▶ Ryan v The Queen

Those who kill without any awareness of the risk of death or GBH, or any type of injury, provided that they do so in the course of a particular type of serious criminal enterprise (the base oNence)

**Possible base oNences:**

- ▶ S61JA – aggravated sexual assault in company | life imprisonment
- ▶ S33(2) – wounding with intent to resist arrest | 25 yrs
- ▶ S33A(2) – discharging a firearm with intent to arrest | 25 yrs
- ▶ S97(2) – armed robbery with a dangerous weapon | 25 yrs

**AR – Crown to prove BRD**

- An act causing death in an attempt to commit, during, or immediately after committing an oNence punishable by 25 yrs of imprisonment (S18(1a))
- Doesn't matter if the consequence was accidental (Ryan)
- The act causing death must be voluntary (Ryan)

**MR – no need**

The mens rea for constructive murder is one of strict liability, and MR only needs to be proven for the base oNence to substantiate the charge.

- ▶ IL v The Queen
- In a constructive murder case, the required 'malice' is supplied by D's possession of the mens rea for the foundational oNence
- To secure a conviction for murder, the Crown need only prove D performed an act causing death during his or her, or an accomplice's, commission of an oNence punishable by 25 yrs' imprisonment

## **Manslaughter by Unlawful and Dangerous Act**

**Source of law**

- ▶ Lane v The Queen

In order to sustain a conviction of UDA, the Crown to prove:

- 1) The act causing death was a breach of the criminal law (unlawful)
- 2) The act causing death was one that carried with it an appreciable risk of serious injury to another others (dangerous)
- 3) The act causing death was one that a reasonable person in the position of the accused would have realised carried such a risk; and (knowledge)
- 4) That the accused person intended to commit the act that caused death

**AR – Crown to prove BRD**

1. Unlawful act is dangerous
  - ▶ Lamb – holds the offence constituting the unlawful act must be established. The unlawful act may be identified as:
  - ▶ Burns – supply of drugs is not a dangerous act in itself
  - ▶ Wilson
    - Test: whether, objectively determined, there existed a likelihood or risk of injury such that it can be said the act in question was dangerous
    - Causes of death resulting from a serious assault, which would have fallen within battery manslaughter, will be covered by manslaughter by an unlawful and dangerous act.
    - Causes of death resulting unexpectedly from a comparatively minor assault, which also would have fallen within battery manslaughter, will be covered by the law as to assault.

2. Causing death – causation

- ▶ Hallett; Royall

Deane, Dawson and Brennan JJ affirmed the CW test of Hallett in Royall, causation is determined by considering:

- Whether at the time of death the original wound was still operating and was the substantial cause of V's death
- This is proven on the facts
- ▶ Burns v R
  - The mere supply of methadone was not an act that a reasonable person would have believed would expose the deceased to an appreciable risk of serious injury. While this could qualify as a dangerous act, it was a voluntary and informed act of the deceased and consequently D could not be said to have caused the death.
  - The deceased's act in taking the methadone broke the chain of causation.
- ▶ R v Rik

Open to the jury to conclude the deceased's response was reasonable, as a person in fear for his safety making a quick decision to what to do.

- ▶ Aired v R

The reasonableness to be considered the 'reasonable response of a drunken man' or that is being threatened by D and running across the road to escape.

- ▶ Burns

If the deceased's response in a fright case was unreasonable, the law regards it as informed and voluntary (autonomous) conduct that has broken the chain of causation between D's violence and the relevant death.

- ▶ R v Wills

The objective test to manslaughter by unlawful and dangerous act:

- The circumstances must be such a reasonable man in D's position
- Performing the very act which D performed,
- Would have realised that he was exposing another or others to an appreciable risk of really serious injury

#### **MR – Crown to prove BRD**

- ▶ Wilson – Crown to prove that,

The act was done in circumstances where the reasonable person in the position of D has an appreciable risk of serious injury.

- ▶ Wilson
  - Quantifies an appreciable risk, as one that is real or significant; rather than remote or fanciful
  - A serious injury as more than trivial or negligible
- ▶ Lane v The Queen

Manslaughter by unlawful and dangerous act is an objective test.

The only relevant intent is the intent to do the act that was unlawful and dangerous and inadvertently caused death.

- ▶ DPP v Ty; Wills – the reasonable person must be the same age as D but no idiosyncrasies are attributed to him or her.

### **Assault Causing Death**

#### **Source of law**

- ▶ S25A CA

(1) A person is guilty of an offence under this subsection if—

- the person assaults another person by intentionally hitting the other person with any part of the person's body or with an object held by the person, and
- the assault is not authorised or excused by law, and
- the assault causes the death of the other person.

Maximum penalty—Imprisonment for 20 years.

(2) A person who is of or above the age of 18 years is guilty of an offence under this subsection if the person commits an offence under subsection (1) when the person is intoxicated.

Maximum penalty—Imprisonment for 25 years.

(3) For the purposes of this section, an assault causes the death of a person whether the person is killed as a result of the injuries received directly from the assault or from hitting the ground or an object as a consequence of the assault.

(4) In proceedings for an offence under subsection (1) or (2), it is not necessary to prove that the death was reasonably foreseeable.

(5) It is a defence in proceedings for an offence under subsection (2)—

- if the intoxication of the accused was not self-induced (within the meaning of Part 11A), or
- if the accused had a significant cognitive impairment at the time the offence was alleged to have been committed (not being a temporary self-induced impairment).

(6) In proceedings for an offence under subsection (2)—

- evidence may be given of the presence and concentration of any alcohol, drug or other substance in the accused's breath, blood or urine at the time of the alleged offence as determined by an analysis carried out in accordance with Division 4 of Part 10 of the Law Enforcement (Powers and Responsibilities) Act 2002, and
- the accused is conclusively presumed to be intoxicated by alcohol if the prosecution proves in accordance with an analysis carried out in accordance with that Division that there was present in the accused's breath or blood a concentration of 0.15 grams or more of alcohol in 210 litres of breath or 100 millilitres of blood.

(7) If on the trial of a person for murder or manslaughter the jury is not satisfied that the offence is proven but is satisfied that the person has committed an offence under subsection (1) or (2), the jury may acquit the person of murder or manslaughter and find the person guilty of an offence under subsection (1) or (2). The person is liable to punishment accordingly.

(8) If on the trial of a person for an offence under subsection (2) the jury is not satisfied that the offence is proven but is satisfied that the person has committed an offence under subsection (1), the jury may acquit the person of the offence under subsection (2) and find the person guilty of an offence under subsection (1). The person is liable to punishment accordingly.

(9) Section 18 does not apply to an offence under subsection (1) or (2).

(10) In this section, cognitive impairment includes an intellectual disability, a developmental disorder (including an autistic spectrum disorder), a neurological disorder, dementia, a mental illness or a brain injury.

#### **AR**

- ▶ S25A(2), (5)-(6)
- Those who are intoxicated at the time of the assault causing death + at least 18 yrs old can be convicted of an aggravated offence.
- No comprehensive definition of 'intoxicated' in the legislation
- ▶ Johnson (No. 4)

(Button J) directed the jury – a person who was mere 'tipsy' or happy was not intoxicated.

#### **MR**

- ▶ S25A(4)
- While the hitting must be intentional, the MR in relation to the consequence of death is not directly specified.
- The legislation provides that it is not necessary for the prosecution to prove that death was 'reasonably foreseeable'

#### **Defence**

- ▶ S25A(5) – it is a defence to the offence of assault causing death when intoxicated if D can prove a balance of probabilities that the intoxication was not self-induced or that they were suffering from a significant cognitive impairment