

1 Introduction

This topic examines the foundational elements of criminal offences under Victorian law, focusing on the distinction between common law and statutory offences, the concepts of actus reus (AR) and mens rea (MR), and the principles of voluntariness, causation, and contemporaneity. It addresses how these elements are derived, applied, and proven, using case law and the Crimes Act 1958 (Vic). The topic includes short answer questions and scenarios to illustrate practical application.

2 Sources of Law

2.1 Common Law Offences

Common law offences are judge-made, with elements derived from case law, evolving through judicial decisions.

Examples: Common assault (physical and non-physical), murder, and manslaughter.

Authority: Cite case law for elements (e.g., *Fagan v MPC* [1969] for physical common assault).

Exceptions:

- Cases applying statutory offences may inform common law elements (e.g., *Brady v Schatzel* [1911] for apprehension in non-physical assault, despite its statutory context).
- Statutory provisions may apply to common law offences (e.g., s 4A of the Crimes Act for dangerousness in unlawful and dangerous act manslaughter).

Clarification: Only cases directly interpreting a common law offence should typically be cited, but exceptions allow cross-application for specific elements.

2.2 Statutory Offences

Statutory offences are created by legislation, primarily the Crimes Act 1958.

Authority: Cite the relevant section for elements (e.g., s 16 for intentionally causing serious injury).

Additional Sections: Other sections may define terms (e.g., s 15 defines injury for multiple offences).

Interpretation:

- Start with a literal reading of the statute.
- Supplement with case law interpreting the provision (e.g., *R v Westaway* [1991] for s 16 mens rea).

Clarification: Statutory analysis requires precise legislative reference, enhanced by judicial interpretation for clarity.

2.3 Universal Authority

Some principles apply to both common law and statutory offences, with relevant case law usable across contexts.

Examples: Voluntariness, causation, and contemporaneity.

Clarification: These shared elements allow consistent application of foundational concepts, regardless of offence type.

3 Elements of a Crime

3.1 General Principles

The common law presumes offences align with the maxim **actus non facit reum nisi mens sit rea** (an act does not make one guilty unless the mind is guilty).

Most offences have:

- **Actus Reus (AR):** Physical elements (act or omission).
- **Mens Rea (MR):** Mental elements (fault).

Contemporaneity: AR and MR must overlap in time, with MR present before the AR is complete (spent).

Prosecution Burden: Must prove AR and MR beyond reasonable doubt. If a defence is raised, the prosecution must disprove at least one defence element.

Clarification: The maxim underscores the need for both physical and mental culpability, with rare exceptions for strict liability offences.

3.2 Structure

The prosecution must prove:

- An act (or, rarely, omission, series of acts, or omissions) satisfied the AR.
- The accused had the requisite MR before the act was complete.
- Any raised defence is disproven.

4 Actus Reus

4.1 Acts and Omissions

The law distinguishes acts (positive conduct) from omissions (failure to act).

Acts: Most offences are based on a specific act.

Omissions: Liable for omissions in specific offences (e.g., s 24, negligent manslaughter) when a duty to act exists.

Omission Definition: Not just inaction, but failure to meet the legally required standard of care (reasonably).

Clarification: Omissions require a legal duty, distinguishing them from mere passivity.

4.2 Scope of Liability

Liability is assessed per act or omission, requiring consideration of:

- Whether one act/omission contravenes multiple offences (start with the most serious, then lesser alternatives).
- Whether multiple acts/omissions require separate analysis.

Series of Acts/Omissions: Rarely, AR may involve a series (e.g., *Thabo Meli v R* [1954]).

Multiple Failures: Negligence arguments may cite multiple failures to prove a single culpable omission.

Clarification: Each offence is tied to a specific act/omission, ensuring precise liability assessment.

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- (1) Discharging the gun voluntarily, intending to kill: Guilty, as both AR (voluntary act) and MR (intent to kill) are satisfied.
- (2) Discharging the gun voluntarily, intending to frighten: Potentially guilty, if the jury finds recklessness (foresaw probable death or serious injury) or intent to cause serious injury.
- (3) Discharging the gun voluntarily, in panic without specific intent: Potentially guilty, if recklessness is established, as panic does not negate voluntariness.
- (4) Discharging the gun involuntarily: Not guilty, as an involuntary act negates the AR.

Answer: Option (4) absolves the accused, as involuntariness negates the voluntary act requirement.

Question 2: Would you accept that pointing the loaded gun was the voluntary act causing death, and would the mens rea be satisfied?

The voluntary act of pointing a loaded gun at the victim could be the AR, as it set the stage for the discharge. Causation is satisfied if the pointing led to the fatal shot (*Royall*). The mens rea depends on the accused's state of mind. Pointing a loaded gun suggests recklessness, as a reasonable person would foresee probable death or serious injury. If the jury finds the accused foresaw this risk, the mens rea for murder is satisfied. However, if the discharge was truly involuntary, the pointing alone may not suffice unless it independently caused death (unlikely here).

Clarification: The jury's role is critical in assessing voluntariness and intent, balancing the accused's claims against the dangerous act of wielding a loaded gun.

5 Causation

5.1 Factual and Legal Causation

Causation requires:

- **Factual Causation:** The but for test: would the victim have died but for the accused's act? (*Royall v The Queen* (1991)).
- **Legal Causation:** The act was a substantial and operating cause of death up to the moment of death (*Hallett v R* [1969]).

Clarification: Factual causation is a threshold test, while legal causation assesses culpability, allowing liability even if the act was not the sole or immediate cause.

5.2 Legal Causation Principles

The act need not be the sole, main, direct, or immediate cause. Other contributing factors (e.g., third-party acts, events) do not automatically negate liability if the accuseds act remains a substantial cause (*Royall*).

Clarification: Legal causation focuses on whether the accuseds act significantly contributed to the death, maintaining culpability despite intervening factors.

5.3 Intervening Events

Intervening events may interrupt the chain of causation, negating legal causation. Specific tests apply to different categories of intervening events, used within the substantial and operating cause framework.

5.3.1 Categories and Tests

1. Natural Events (*R v Hallett* [1969]):

Test: Did the event occur in the ordinary course of events, or was it an act of God (e.g., an extraordinary tide)? In *Hallett*, the victim was left unconscious on a beach, and a normal tide caused drowning. The tide was not an act of God, so the accuseds act remained the cause.

2. Victims Acts of Self-Preservation (*Royall v The Queen* [1991]):

Test: Did the accused induce a well-founded and reasonable apprehension of physical harm, making the victims self-preservation act a natural or reasonable response? In *Royall*, the victim jumped from a high window to escape the accuseds violence. The jump was proportionate to the threat, as the victim was trapped, so the accuseds act caused the death.

Clarification: Proportionality is assessed flexibly, recognizing impulsive responses. The victims lack of safer alternatives strengthens causation.

3. Victims Traits (*Blaue v R* [1975]):

Test: The accused takes the victim as they find them, including physical and mental traits. In *Blaue*, the victim, a Jehovahs Witness, refused a blood transfusion and died. Her religious belief did not break causation, as the accuseds stabbing necessitated the transfusion.

4. Refusing Life-Saving Treatment (*R v Swan* [2003]):

Test: Did the accuseds act have a persistent, long-term, and catastrophic effect on the

victims quality of life, leading to their refusal of treatment? In *Swan*, the victims refusal was linked to the accuseds severe injuries, maintaining causation.

5. Voluntary Acts of Third Parties (*Payett v R* [1983]):

Test: Was the third partys act free, deliberate, and informed? In *Payett*, a police officer shot the victim, used as a human shield by the accused. The officers act was not free, as it responded to the accuseds threat, so causation was not broken.

6. Medical Acts of Third Parties:

Test: Did medical negligence accelerate the death so significantly that the accuseds act became merely historical? Cases include:

- *Evans and Gardiner* (1976): Surgery for a stab wound caused an undetected bowel stricture, a common complication, killing the victim. The negligence was not a novus actus interveniens (NAI), as the accuseds stabbing necessitated surgery.
- *R v Smith* (1959): Delayed treatment for a stab wound reduced survival chances, but was not a NAI, as the accuseds act remained a substantial cause.
- *R v Malcherek; R v Steel* (1981): Turning off life support, based on a bona fide medical decision that the victim was brain-dead, is not a NAI.
- *Jordans Case* (1956): Grossly negligent administration of an abnormal drug, to which the victim was intolerant, was a NAI, as it overwhelmed the accuseds act.

Clarification: Medical negligence rarely breaks causation unless it is palpably wrong (e.g., *Jordan*). Normal complications or delays maintain the accuseds liability.

6 Statutory (Constructive) Murder

6.1 Overview

Section 3A of the Crimes Act 1958 (Vic) creates statutory murder, replacing the abrogated common law felony-murder rule. It is a form of murder, not a distinct offence, allowing conviction without proving common law murders mens rea. Historically, statutory murder attracted lower penalties, though recent sentencing trends may align with common law murder.

Clarification: Statutory murder is constructive, imputing liability based on the acts context (a crime of violence) rather than intent or recklessness.

- **Legal Onus** (s 322I(2)): If the evidential onus is met, the prosecution must disprove one or more elements of the defence beyond reasonable doubt.

Clarification: The evidential onus does not require the accused to prove the defence but merely to introduce evidence that could support it. Once raised, the prosecution bears the heavy burden of disproving the defence, aligning with the principle that the prosecution must prove guilt beyond reasonable doubt.

4 Statutory Defences Absolute Defences

Self-defence, duress, and sudden or extraordinary emergency are absolute defences. If the prosecution cannot disprove the defence, the accused is found not guilty, even if their conduct satisfies the elements of the offence. These defences only become relevant if the prosecution first establishes that the accused committed the offence.

Clarification: Absolute defences completely negate criminal liability, unlike partial defences (e.g., provocation), which only reduce the offences severity. This underscores their significance in achieving a full acquittal.

5 Self-Defence

5.1 Legislative Provisions

Under s 322K(1), a person is not guilty if they acted in self-defence. Per s 322K(2), self-defence applies if, at the time of the conduct:

- (a) The accused believed their conduct was necessary in self-defence (subjective test).
- (b) The conduct was a reasonable response in the circumstances as the accused perceived them (objective test, modified by subjective perception).

Scope of Self-Defence (s 322K note 2):

- For offences other than murder, self-defence includes: 1. Defending oneself or another person. 2. Preventing unlawful deprivation of liberty. 3. Protecting property.
- For murder, self-defence is limited to conduct believed necessary to defend against death or really serious injury (s 322K(3)).

Restrictions (s 322L):

- Self-defence is unavailable if the accused responded to lawful conduct and knew it was lawful at the time.

Clarification: The subjective belief test focuses on what the accused genuinely believed, while the reasonable response test evaluates whether a reasonable person, perceiving the circumstances as the accused did, would have acted similarly. The limitation for murder ensures self-defence is only available in life-threatening situations.

5.2 Elements of Self-Defence

1. Subjective Belief (s 322K(2)(a)):

The accused's belief that their conduct was necessary is assessed based on their subjective understanding of the circumstances. This includes any mistaken perceptions, provided they were genuinely held.

Example: If the accused believed they were about to be attacked, this belief is sufficient, even if no actual threat existed.

2. Reasonable Response (s 322K(2)(b)):

The response is assessed objectively, but based on the circumstances as the accused subjectively perceived them.

The reasonableness is judged against a sober, reasonable person, unless the accused's intoxication was not self-induced (s 322T).

Relevant Factors:

- Immediacy of the threat.
- Proportionality of the response.
- Impact of distress, intoxication, delusions, or other factors affecting the accused's perception.
- Opportunities to escape.
- Whether the accused initiated the violence.
- Physical and mental traits of the accused and victim.
- Degree of threatened harm.

Clarification: The interplay of subjective and objective tests ensures that the accused's personal perceptions are considered, but their response must still be proportionate and reasonable. Intoxication complicates this assessment, as self-induced intoxication does not excuse an unreasonable response.

6 Duress

Under s 322O(1), a person is not guilty if they acted under duress. Per s 322O(2), duress applies if:

- (a) The person reasonably believes:
 - (i) A threat of harm has been made that will be carried out unless an offence is committed.
 - (ii) The conduct is the only reasonable way to avoid the threatened harm.
- (b) The conduct is a reasonable response to the threat.

Restrictions:

- s 322O(3): Duress is unavailable if the threat comes from someone the accused is voluntarily associating with for violent conduct.
- s 322O(4): For murder, duress only applies if the threat involves death or really serious injury.

Clarification: Duress requires both a subjective belief in the threat and an objective assessment that the response was reasonable. The restriction on voluntary association prevents defendants in criminal enterprises from claiming duress when pressured by co-conspirators.

7 Sudden or Extraordinary Emergency

Under s 322R(1), a person is not guilty if their conduct was carried out in a sudden or extraordinary emergency. Per s 322R(2), this applies if:

- (a) The person reasonably believes:
 - (i) Circumstances of sudden or extraordinary emergency exist.
 - (ii) The conduct is the only reasonable way to deal with the emergency.
- (b) The conduct is a reasonable response to the emergency.

Restriction (s 322R(3)): For murder, the emergency must involve a risk of death or really serious injury.

Clarification: This defence applies to rare situations where immediate action is necessary to avert catastrophic harm. The test mirrors duress, requiring both subjective belief and objective reasonableness, but focuses on situational emergencies rather than threats from others.