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2. Murder

1) The *actus reus* of homicide

- ### (1) The voluntary act requirement
- Voluntariness is fundamental to criminal responsibility – i.e. involuntary conduct leads to acquittal
- This is only a **requirement of a "willed act"**, , though its consequences may not be intended (***Ryan***)

> Per Barwick CJ, there were four possible versions of the facts open to the jury:
> – 3rd: D "voluntarily but in a panic, pressed the trigger" but with no specific intent to harm or frighten V
> – 4th: D being startled "so as to move slightly off his balance, the trigger was pressed in a reflex or convulsive, unwilled movement of his hand"

  - i.e." imports no intention or desire to effect a result … merely a choice, consciously made, to do an act of the kind done" (***Falconer***)
  - **So, part of the *actus reus* –legally separate from questions of *mens rea***
    - The issue is the link b/w mind and body: **there must be conscious control (of body movement),** and not…
      - 1）**Uncontrolled conduct** – spasms, sneezes, reflexes etc.
        - **Distinguish:**
          - ✅'Pure' uncontrolled conduct: "by no exercise of will could the actor refrain from doing it"
            - eg. Convulsions, seizures, sleepwalking
          - Accidents'
            - ✅**'unforeseen or unlikely' accidents,** in the total context of D's conduct,
              - That is, is there a causal connection to prior conduct that is voluntary?
            - Must be able to identify conduct that is both voluntary and causative
            - See, e.g., Barwick CJ and Windeyer J in ***Ryan*** （The gun going off；final movement may be involuntary, but the acts leading up to that action is voluntary）
      - 2）**Unconscious conduct (automatism)** – sleepwalking, dissociative states, extreme intoxication etc.
        - May be 'sane' or 'insane' – raises special issues (we will discuss in week 9)
        - Intoxication, but only where severe enough to 'divorce the will from the movements of the body'

- **It is presumed that apparently conscious person's acts are voluntary**
  - Only if the defense has pointed to evidence that there was reasonable possibility that his act is not voluntary then prosecution has to prove beyond reasonable doubt
- **Evidentiary burden on defence**
- **Legal burden then falls on the prosecution to prove beyond reasonable doubt that the conduct was voluntary**

- ### (2) Causation (the 'substantial and operating cause' test)
  - #### Factual Causation
    - 'But for' test
      - whether or not the accused *in fact* caused the death of the victim (i.e. but for the voluntary act or omission of the accused)
      - often not in dispute

- Legal Causation
  - 1) The conduct was a '**substantial and operating cause' of the death** (Royall); - this is a matter of common sense (Campbell).
    - The act played some substantial role in the chain of causation and that role subsist until the time victim died ("operating")
      - *Hallett:* test: whether the accused's conduct is "so connected with the event that it 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 … sufficiently interrupted by some other act or event"
      - Applying the test: V was beat by D and left unconscious near water, and he drowned, **chain of causation could not be broken unless**:
        - V, semi-conscious, stumbling into the water, V consciously entered the water, Or act of god/extreme event of natural force
      - Emphasis by court was on "violence" by the accused that left the victim to unconsciousness
      - There, the act of the accused still played a substantial and subsisting role to the death of the victim
        - It is not so much about the foreseeability, as causation is men area, we approach it from an objective perspective. so foresight in relation to either the actions of V or the actions of the sea irrelevant

  - **2) That there was no intervening act that effectively 'breaks' the chain of causation**
  - **The inquiry is at every point informed by common sense**

  - **three more approaches to NIA:**
    - Natural consequences
    - Reasonable foreseeability
    - Voluntary acts

  - The main issue in 'hard cases' of causation is **whether subsequent factors have made D's conduct 'merely part of the history'** (*Smith*)
    - Again, this is first of all a question of common sense, guided by the 'operating and substantial cause' test
    - The cases dealing with **intervening acts are of three kinds:**
      - (1) Medical factors
        - **'Palpably wrong' treatment** (but unlikely)
        - **1) Type 1: Medical maltreatment/delayed death**
        - *Evans & Gardiner* [WW] 5.43:
          - Prisoner stabbing case: -failure to properly diagnose and treat a common complication of original surgery "—does not have positive adverse effect on the victim (i.e. actively harming the victim)
          - Medical omissions are very unlikely to break the chain of causation
          - The question is whether the relevant conduct has **"accelerated the death, so that it can be said to have caused the death"**

        - **i.e. subsequent conduct must be such that D's conduct is no longer a substantial and operating cause**
    - ***Cheshire:***
        - medical negligence must be 'so independent of D's act and in itself so potent in causing death that..they regard the contribution made by his acts as insignificant'
        - was shot to leg/stomach, died bc of botched emergency treatment by inserting breathing tube → not NIA
        - independent means sth not normal or routine

    - **what medical factors will break the chain of causation: key Q: has maltreatment had a positive adverse effect on V (**not just a missed opportunity to save his life)
    - ***Evans & Gardiner:*** consider whether conduct of doctors was sufficiently "incompetent, improper and unreasonable" ...
    - ... but in ***Smith*** [WW] 5.43, it was not enough that the treatment of V was "thoroughly bad and may well have affected his chances of recovery"
        - "Only if it can be said that the original wounding is merely the setting in which another cause of operates [ie. 'merely part of the history'] can it be said that the death does not result from the wound"
    - Cf. ***Jordan*** [WW] 5.43: treatment was both 'wrong' and harmful
        - Doctors knew of V's intolerance to terramycin but still administered it, along with 'abnormal' quantities of intravenous fluid→ **this was 'wrong'/positive adverse effect**

    - 2）Type 2：Refusal of treatment
- **Contributory negligence by V does not of itself break the chain of causation – even if 'obstinate'**
    - ***Holland:*** refuses to amputate finger & contracts disease, dies, not NIA
    - ***Bingapore:*** Whether victims failed to undertake treatment does not matter? As Cause is still the harm caused by the accused, not the victim's decision to refuse treatment
- General rule is that you Must take victim as you find them. This includes (but is not limited to) physical / physiological factors (Eggshell skull rule)
    - ***Blaue:*** V refuses blood infusion treatment for religious reasons Q is what cased her death and the answer is stab wound
    - Not relevant whether victim's religious beliefs which led to refusal of treatment "were unreasonable
    - i.e. the 'whole person', not just the physical person; extending the eggshell skull rule to religious reasons
- ***Swan v R***
    - 78 y.o. V was seriously injured in a home invasion and was moved to care facility; V's quality of life was significantly reduced (inc. cognitive decline); Eight months after the attack, V fell and suffered a hip fracture; V's son decided not to operate on the injury bc of his low quality of life

- Held, NOT NIA: "it was sufficient that the effects of the (initial) assault substantially or significantly contributed to the decision which, in turn, prevented the surgery that was reasonably expected to save V's life"

- (2) Human factors
  - Victims must be taken as found (eggshell skull rule)
  - Voluntary acts, but not natural / foreseeable reactions
  - Suicide and self-preservation
  - **The voluntary acts of a victim / third party may break the chain of causation,** but ....
    - *Pagett* (1983) 76 Cr App R 279: intervening acts must be "free, deliberate and informed"
      - See *Burns* (2012)
    - Does not include acts performed for self-preservation, if caused by the accused, such as jumping off moving vehicle to escape
    - A suicide may not be a voluntary act if serious injuries caused by D are a substantial factor in the decision
      - See *Stephenson* 179 NE 633 (1933) [WW] 5.45

- *Royall* **(leading authority for human factors)** re circumstances where V has done sth in RESPONSE to D
  - **Legal causation is principally a question of common sense for the jury**

  - **The first step is the substantial and operating cause test**
    - Different languages used: (but jury will still be reminded to use common sense)
    - Deane and Dawson JJ: **substantial or significant cause**
    - Toohey and Gaudron JJ: '**substantially contributed**'
    - Brennan J: '**must contribute significantly**'
    - **Only McHugh J disagrees:**
      - A 'but for' test by another name (and 'substantial' means no more than '**not *de minimis***')

  - **Where acts of the victim intervene in the chain:**
    - Mason CJ, Deane and Dawson JJ:
      - **The 'natural consequences' test:**
        - the way in which we apply the substantial and operating cause in such circumstances was: 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 (or reasonable) that the victim would seek to escape and the victim is injured in the course of escaping, the injury is caused by the accused's conduct:"
          - N.B. Starting point is substantial and operating cause

- juries should be directed in terms of natural consequences, rather than reasonable foreseeability

- Toohey and Gaudron JJ: use common sense, but note that a disproportionate or unreasonable reaction will exclude causal responsibility
  - NB. Reject the 'reasonable foreseeability' test (as above)

- McHugh and Brennan JJ prefer a 'reasonable foreseeability' test: an objective test is to be preferred: the issue is not whether V's reaction was irrational, but whether it was reasonably foreseeable

This test has two limbs:

- **(1) First: did the conduct cause in V a well-founded apprehension of harm?**
  - i.e. reasonable in all the circumstances: Deane and Dawson JJ
  - McHugh and Brennan JJ would require that the fear be reasonably foreseeable or 'likely'
  - On either approach, **an 'over-reaction' can be argued**
- **(2) Second: was it a natural or reasonable consequence of the conduct that V would attempt to escape?**
  - Is there an issue as to the mode of escape? Mason CJ adverts to the 'nature and extent' of the fear of harm
  - Brennan, Toohey, Gaudron JJ: act must be proportionate
  - Cf. ***Grimes*** *and* ***Lee***: "a better chance of saving his life than by staying?"—[not realistic]

- **(3) Natural factors**
  - Ordinary vs. extraordinary operation of natural forces

2) Mens rea for murder (Intention and recklessness)

- **(1) Intention:**
  - Where **death or "really serious injury" was D's purpose or object at the time of the conduct**
  - N.B. that 'purpose here is not to be equated with motive': ***Zaburoni*** [WW] 5.56
- **(2) Recklessness:**
  - i.e. actual knowledge or foresight, ***at the time of the conduct***, as to the consequences
  - Subjective: jury can draw inferences from the circumstances, but without 'smuggling in' objective standards
  - In the case of murder, the accused is liable if he / she was reckless as to causing either:
    - death; or
    - grievous bodily harm (not murder in NSW)
  - Reckless murder involves the prosecution proving that (two aspects of recklessness):
    - (1) D knew that death / GBH would probably result from the conduct
      - i.e. a higher standard than 'possible' knowledge
      - Probable does not mean more than 50% of chance, rather, it is a substantial, real and not remote chance

- As probably is not realistic to expect of an accused to reflect on and calculate the odds, so probable in this context may only mean "likely"
- (2) D willingly and without lawful excuse ran the risk that the consequences would occur
  - D may be indifferent to the consequences, or may even hope that they do not occur – this is irrelevant
  - Some risks will be justifiable despite knowledge that the prohibited consequence will probably occur – e.g. in a medical / surgical context

Crabbe

- Settled that "knowledge of a possibility is NOT enough" in this case
- Facts:
  - After being ejected from a bar, D waited until the 'early hours' of the morning, and – without checking if anyone was inside – drove his truck through the wall of the bar, killing five people
  - D is convicted of murder at trial, but appeals
  - The Fed Crt holds that the jury were misdirected as to the meaning of reckless murder
  - The prosecution appeals to the High Crt
- The aim is to define a **standard of knowledge** that is equivalent (morally / legally) to 'purpose'
  - i.e. "regarded for the purposes of the criminal law as just as blameworthy as … an act intended to kill or to do grievous bodily harm"
  - The standard is probability (**'likely to happen'**):
    - "A person who does an act knowing that it is probable that death or GBH will result, is guilty of murder if death in fact results. *It is* ***not enough that he does the act knowing that it is possible but not likely*** that death or GBH might result."
    - **what does 'probable' mean?**
    - ***Boughey.***
    - Held: 'likely to cause death' (Tas.) expresses a real or substantial chance as distinct from a remote possibility – not a degree of statistical probability
    - Followed in ***Faure*** [WW] 5.73:
      - "'Probable' as contrasted with 'possible but not likely' means a substantial, or real and not remote, chance, whether or not it is more than 50%"
      - But it does not mean that there is a greater than 50% chance (or more likely than not), it just means a good chance it happened
    - **[reasoning why the standard is "probable" not "possible"]:**
      - The court says the **state of mind involved in reckless murder has to be morally comparable to an intention to kill** [to distinguish from "manslaughter"], so we had to set the bar high and therefor it's not enough if the accused is aware of only a **bare possibility** that death or really serious injury would occur
        - a person who acts expecting that death or serious injury will occur is just as probable as one who intends it, just as blameworthy as one who intends it.
  - **The focus is NOT D's indifference to consequences**

- **'Wilful blindness'**
- The jury were told that D was guilty of murder if he foresaw the possibility of death / GBH, but didn't take any steps to find out if they were likely
  - N.B. the High Crt notes that there was no evidence that he 'deliberately refrained' from finding out
- **The High Crt rejects 'imputed' knowledge:**
  - "It cannot be said that an accused was wilfully blind to the consequences of his acts unless he knew that those consequences were probable"
  - On the other hand, 'deliberate abstention from inquiry' could be evidence of actual knowledge
  - HC held that wilful blindness is not a standalone head of culpability (by itself is not enough), but at most an evidence from which you can infer that they are reckless (that they actually know the consequence)

Probable knowledge

- ***Royall*** **confirms that at common law:**
  - **'Reckless' murder means:**

        - (1) actual knowledge that the relevant act will probably cause death or grievous bodily harm to some person; and
        - (2) willingly and without lawful excuse running the risk that these consequences would occur **[Actualisation of risk]**
    - **But 'indifference' is irrelevant** – as long as D willingly runs a known risk
    - The knowledge must be actual, not imputed – even if D has been 'wilfully blind'

Temporal coincidence (linking AR and MR)

- The actus reus and the mens rea of an offence must coincide in time [it's about the time when he performs the act that causes her death]
    - No such thing as 'malice afterthought'... but what if intent ceases prior to the fatal act?
    - See e.g. *Thabo Meli* [WW] 5.85C:
        - Ds assaulted V intending to kill him – then, believing him to be dead, rolled him off a low cliff where he died of exposure
        - Held: it is impossible to divide "what was really one series of acts ... the accused set out to do all these acts as parts of their plan"
- NB. Some issues of temporal coincidence can be expressed in terms of causation
    - e.g. *Royall*: V jumps to escape a life-threatening attack by D
        - The earlier attack is linked to V's jump by causation ...
        - ... but does mens rea attach to the jump?
- *Royall*: **Per Mason CJ: no need to intend or know the actual mode of death**
    - "The existence of the intent ... should be sufficient without the need to link the intent to the mode in which death actually takes place"
    - This is equally applicable to the time of death: it is enough that D has intent "at the outset of his or her execution of a series of acts designed to cause, and causative of, death"
    - There does not need to be an intention that the victim dies in a particular way and it doesn't matter how the chain of causation unfolds
- *Royall*: **McHugh J:** the requisite state of mind does not have to coincide with the time of the victim's death – i.e. the jump or fall
- But **the requisite state of mind has to coincide with the conduct that causes death**, even if at the time of death itself the accused no longer has that state of mind