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Preface for responses

- Unless otherwise stated, all references to legislation in the following response are to the Crimes Act 1900 (NSW).

TOPIC 1 - 4 INTRODUCTION

A crime is a legal wrong that can be followed by criminal proceedings which may result in punishment (Williams, 1983, 27). Crimes have a particular level of offending which creates a level of public interest that warrants intrusion by the state and punishment (R v Brown).

According to Findlay, Odgers and Yeo, the aims of criminal law are to prevent harm, ensure community welfare, preserve morality, and punish offenders.

Under Woolmington's golden thread, the prosecution bears the onus of proving the defendant's guilt beyond reasonable doubt, subject to any defences raised (per Lord Sankey at 481).

Actus non facit reum, nisi mens sit rea: to perform a forbidden act alone does not constitute guilt; it must also be shown that the person who performed that act had a guilty mind.

Criminal liability

Traditionally, a person would be found criminally responsible simply because they committed a criminally prohibited act unless there was an excuse. In contemporary society, there is a stronger emphasis on the accused possessing a requisite mental element. *XX discussion above*

Criminal responsibility of a person requires evidence that the accused voluntarily performed the conduct element of the offence and held the requisite mental element at the time the offence was committed, and that there is an absence of any available defences.

Alan Norrie argues that linking criminal responsibility to intention and excluding motive removes the law's capacity to 'contextualise the subject in his or her social and political environment. The poor and dispossessed could say that their motive was need, or could claim they acted on right. Motive represented a threat to legal control....' (in Brown, 180).

Findlay, Odgers and Yeo argue that there are two conflicting principles of community welfare and individual autonomy that underlie criminal law that are the 'major considerations affecting the decision whether certain wrongful behaviour should be regarded as a crime' (7).

TOPIC 5 MURDER

As *victim* has died, it must first be determined whether the unlawful killing constitutes murder or another form of criminal homicide.

Issue: As *accused* has caused the death of *victim* through *act*, it must be determined whether the elements of murder under s 18(1)(a) of the Crimes Act can be established.

The prosecution bears the onus of proof (*Woolmington per Lord Sankey at 481*) to prove beyond reasonable doubt that the act/omission of **accused** caused the death of **victim** with the requisite mens rea (intent to kill or inflict grievous bodily harm, or reckless indifference to human life) (*s 18(1)(a) of the Crimes Act*).

Actus reus

Firstly, the victim must be human, which is satisfied on the facts, and it can be assumed that the death has been confirmed under *s 33 of the Human Tissue Act*.

Furthermore, the accused's act or omission must have caused the death. The act/omission must be an 'operating and substantial cause' of death and that there are no events that have broken the chain of causation initiated by the accused (a novus actus interveniens) (*Smith per Lord Parker CJ at 42-43*).

Act: In *Swan [2020]*, the HCA found that it was open to the jury to find that the accused had substantially caused the death of the victim; an assault by Swan caused sharp cognitive and physical decline in the deceased, who died several months after the attack because of complications from a fall ([45]-[48]).

Omission: *R v BW and SW*, mother was convicted of murder as she had fully realised the probability of her child dying from starvation and neglect and omitted doing anything, which amounted to reckless indifference to human life.

As there are two+ acts/omissions **xxx** that are capable of being regarded as the act causing death, this is a question of fact for the jury to determine (*Aruthlikan v R per Kirby J at [55]*). On the facts, *xxx*. Therefore, it is highly probable that the jury would find that the act caused **victim's** death.

It is presumed that the accused acted with volition (*Bratty per Lord Denning at 402, Falconer*).

As **factors** raise an issue of whether the **accused** did the **act** with volition, **accused** bears an evidentiary burden that there was a lack of volition. > go to automatism

Novus actus interveniens

1. Act of a third party
 - a. Negligent / subsequent medical treatment
2. Act of nature
3. Act of the victim
 - a. Rejection of medical treatment
 - b. Fright or self preservation
 - c. Suicide

Issue: As **fact** may operate as a novus actus interveniens, it must be determined whether this second cause is 'so overwhelming as to make the original wound merely part of the history' (*Smith per Lord Parker CJ at 42-43*).

- Analogue to cases

Mens rea

The prosecution must establish at least one mens rea element beyond reasonable doubt under s 18(1)(a) of the Crimes Act; reckless indifference to human life, intention to kill, or intention to inflict grievous bodily harm. The jury may infer the accused's state of mind by considering the circumstances, action and subjective qualities of the defendant like age, background, education, emotional state and sobriety (Pemble per Barwick CJ at 25).

Intention to kill

The prosecution must prove that the accused intended death to result from their conduct (La Fontaine; Crabbe). An accused only intends a consequence where this is their purpose or object (Zaburoni per Kiefel, Bell and Keane JJ at [17]).

Transferred intention: As *accused* was intending to kill *person* but rather killed *victim*, this is considered transferred intention and the accused will be liable for the death of *victim* (Saunders and Archer).

If intent is established, it is immaterial that the *death* occurred by way of *xx* and not *yy* (Royall).

Intention to kill may also be inferred from an accused's post offence conduct, such as going to great lengths to conceal or distance themselves from the death, may provide the jury a basis to conclude beyond reasonable doubt that the intent necessary for murder (Queen v Baden-Clay at [74]).

Intention to inflict grievous bodily harm

Under s 4 of the Crimes Act, grievous bodily harm is defined as:

- a) the destruction (other than in the course of a medical procedure) 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)

Reckless indifference to human life

Requires subjective knowledge/awareness/foresight that death was a probable, not possible, consequence of their actions (Crabbe at 469). The accused must have foreseen the probability of death (Crabbe; Khan); recklessness as to inflicting GBH is not sufficient to establish the mental element in NSW (Solomon).

Khan: deliberately set fire to a convenience store to end the lease, foresaw the probability that anyone living above the store would die, but did not actually intend for the person to die > just reckless indifference to the probability of death

Temporal coincidence rule

Furthermore, the temporal coincidence rule is satisfied as *facts* make it clear that the prohibited conduct coincided with the guilty mind so as to constitute the crime (Meyers at 442).

The act causing death must be unlawful, however not all unlawful acts can form the basis of unlawful and dangerous act manslaughter (*Andrews v DPP*).

analyse

- Assault is a common unlawful act (eg *R v Loveridge*; s 61 common; s 59 actual bodily harm)
- Dangerous driving causing death under s 52A of the Crimes Act would be a sufficient unlawful act where the vehicle is “in effect used as a weapon” (*Pullman* at 230)
- Manslaughter by unlawful and dangerous act where the accused had provided the driver, a 16 year old learner driver, with alcohol and encouraged her to drive at excessive speeds resulting in an accident causing her death (*Cramp*)

Note

- An act performed in self defence is not an unlawful act (*Cornelissen* [2004] NSWCCA)
- If the defence of rescue is made out, it is not an unlawful act for the purpose of unlawful act manslaughter (*Downs* (1985) NSWCCA at 91)
 - *Downs*’ friend was substantially helpless on the ground and *Downs*’ reasonably believed was threatened with death or serious bodily harm, so the production of a knife solely as a threat could be regarded as a reasonable defence of the friend
- Driving in a manner dangerous to the public generally will only be manslaughter by criminal negligence (*Pullman*) > breach of traffic regulations would be insufficient

Furthermore, the act must be objectively dangerous (*Wilson* per majority at 334). A reasonable person in **accused’s** position would have realised that by doing **act** they were exposing **victim** to an appreciable risk of serious injury (*Wills* per Lush J at 212). As the risk need not be “really serious” (*Wilson* per majority at 334), **analyse act**.

- Includes physical features of the situation and the action of the accused (*RIK*; *Wills*)
- Includes facts known to the accused but not the accused’s opinion (*Lavender*)
- Does not include
 - ‘matters which are calculated to influence the judgment of the actor himself as to whether the act was dangerous or not’ reasoning and his judgement on the question of whether the act is dangerous or not’ (*Wills* per Fullagar J at 214)
 - ‘the idiosyncrasies’ of the accused person or their ephemeral emotional or mental state’ (*Wills* per Lush J at 212)
- *Burns*: the supply of prohibited drugs (methadone) was not of itself dangerous.
- *RIK*: it was a question for the jury as to whether the accused’s conduct was objectively threatening [16]

Finally, the act must have caused the death of **victim**. **go to causation principles and novus actus**

- *Burns* > “[a]bsent intimidation, mistake or other vitiating factor, what an adult of sound mind does is not in law treated as having been caused by another” [86].

Mens rea

The prosecution must establish that *accused* intended to do the unlawful and dangerous act of XX.
analyse

6.1.1 Assault and supply of drugs causing death

Assault causing death

As a jury may not be satisfied that the offence of murder or manslaughter is proven, they may still be satisfied that *accused* has committed an assault causing death (s 25C(1)(c))

As *accused* has assaulted *victim* by intentionally hitting them with *body/object* (s 25A(1)(a)), the assault is not authorised or excused by law (s 25A(1)(b)), and the assault caused the death of *accused* (s 25A(1)(c)), there has been an assault causing death.

- Punishable by 20 years imprisonment
- If intoxicated and 18+yo: additionally, the accused was intoxicated (ss 25A(2) and (6)), which was self induced (s 25A(5)(a)). > 25 years imprisonment, minimum imprisonment of 8 years (s 25B(1))

Although *accused* died as a result of hitting the ground/object as a consequence of the assault, the unlawful act is assault causing death (s 25A(3)).

Supply of drugs

Although unlawful and dangerous act manslaughter cannot be made out, *accused* may still be liable under s 25C for supply of drugs causing death, which does not apply to homicide offences under s 18 (s 25C(5)).

- As *accused* supplied the prohibited drug XX to *person* for financial or material gain (s 25C(1)(a)), the drug was self administered (s 25C(1)(b)), and the self administration caused or substantially caused the death of *accused* (s 25C(1)(c)), the unlawful act is supply of drugs causing death.
 - mens rea: *accused* would have known or ought reasonably to have known that supplying the drug would expose another person to a significant risk of death as a result of self-administering the drug (s 25C(2))
 - Not authorised to supply the drug (s 25C(3))
 - Prohibited drugs mean substances specified in Schedule 1 to the Drug Misuse and Trafficking Act 1985 (s 25C(6))

6.2 Gross negligence manslaughter

To convict *accused* for manslaughter by criminal negligence, the prosecution must prove beyond reasonable doubt that *accused* owed a duty of care to *victim*, *accused* committed an act or omitted to do an act, the act or omission of the accused caused the death, the act or omission was in breach of the duty of care, and the act amounted to criminal negligence to warrant criminal punishment as it was a great falling short of the standard of care a reasonable person would have exercised and there was a high degree of risk of death or serious bodily harm (Nydam and Lavender).

in *victim* (s 13(3) Crimes (D&P) Act), and it is not necessary for the prosecution to prove *victim* actually feared harm (s 13(4) Crimes (D&P) Act).

It may be preferable for the Crown to charge *accused* with stalking under s 13(1) after having threatened *victim* with violence due to the absence of the imminence requirement and a higher maximum penalty.

Intimidation is defined as conduct (including cyberbullying) amounting to harassment or molestation of *victim* (s 7(1)(a) Crimes (D&P) Act), or an approach by telephone/text/email/other technology that causes *victim* to fear for their safety (s 7(1)(b) Crimes (D&P) Act).

As there is a pattern of violence by *accused* [particularly as XXX is a domestic violence offence], this can be taken into consideration when determining whether *accused's* conduct amounts to intimidation (s 7(2) Crimes (D&P) Act).

Stalking is defined as: (s 8 Crimes (D&P) Act).

- 1) In this Act, stalking includes the following—
 - a) the following of a person about,
 - b) the watching or frequenting of the vicinity of, or an approach to, a person's place of residence, business or work or any place that a person frequents for the purposes of any social or leisure activity,
- b1) the monitoring or tracking of a person's activities, communications or movements—
 - i) (i) whether by using technology or in another way, and
 - ii) (ii) whether or not the monitoring or tracking involves contacting or otherwise approaching the person,
- c) contacting or otherwise approaching a person using the internet or any other technologically assisted means.
- 2) For the purpose of determining whether a person's conduct amounts to stalking, a court may have regard to any pattern of violence (especially violence constituting a domestic violence offence) in the person's behaviour.

7.2 Assault occasioning actual bodily harm

Issue: As the harm suffered by *victim* is XXX which is 'more than transient or trifling' (Donovan), therefore it must be determined whether *accused* is liable for assault occasioning actual bodily harm (s 59(1) Crimes Act).

To establish that *accused* is guilty of assault occasioning actual bodily harm, the prosecution must prove beyond reasonable doubt the assault intentionally or recklessly caused actual bodily harm without a lawful excuse (Donovan; Williams).

Actus reus

There was an assault by *accused* by doing XXX, which caused XXX harm. It is not necessary that the harm be permanent (Donovan).

- Eg bruises, breaking of the outer layer of skin eg scratches or grazes (R v Smith)

TOPIC 17 ESSAY PREPARATION

- Different theories for criminalisation of behaviour > class 1 and 2
 - Almost competing principles from different theorists about whether individual autonomy is privileged or the more paternalistic aspects of community welfare
 - Give an introduction about what the question is asking
 - Address principles of individual autonomy that privilege how the acts of the accused's subjective mens rea is privileged in the common law in determining criminal liability, but there is some pushback with regards to the principle of community welfare
 - Individual autonomy can relate to the accused person, but also the victim > the law recognises the autonomy of both people
 - NOTE - use an essay to **demonstrate understanding of law**, case law, legislation, and secondary sources
 - Secondary sources
 - Need to make an argument, supported through legislation and case law > NOT about my own opinion
 - Make a claim, and substantiate it based on LAW
 - Causation
 - Look at acts of a victim that may break the chain of causation
 - Bring up a contrast between Burns and Blaue - the tension
 - The voluntary and informed decision in Burns
 - Refused blood transfusion
 - Do they both relate to a voluntary and autonomous decision of the victim?
 - Go through the reasons
 - Factually Blaue did not choose to be stabbed - the stabbing remained an operating and substantial cause of death and refusal of medical intervention did not break chain of causation
 - Making a decision completely with free will can be constrained by her belief system
 - HCA treated a drug taker as capable of being a rational person, having autonomy, ability to make an informed and voluntary decision to take the drugs
 - Discuss victims in cases of flight or fright / self preservation
 - Eg Royall case, RIK
- He Kaw Teh and reasonable and honest mistake
 - He Kaw Teh - privileging of individual autonomy
 - The presumptions - if there is a statute seemingly silent as to mens rea, there is a presumption in favour of subjective mens rea > favours individual autonomy
 - Only a person who has made an autonomous choice to cause harm, only those people should be convicted of criminal offending
 - The presumption can be rebutted in favour of strict liability (which has the defence) and then absolute liability
 - Modern statutory offences generally avoid full subjective mens rea as it is more difficult to prove - therefore statutes now err on the side of strict/absolute liability > therefore the law's commitment to individual autonomy is questionable
 - Cf case of CTM
 - Seemingly ignores the first presumption in favour of subjective mens rea and goes straight to considering strict or absolute liability

- Discuss the Hodson reading that discussed CTM > use this academic opinion,
 - She said HTK now irrelevant, but that is not true as it has been used in later HCA decisions
 - Can create an argument for the defence
 - A narrow defence, only of fact, only where there is a positive belief, can be difficult to rely on
 - If raising, defendant needs to have ability to discharge evidential burden > wasn't discharged in CTM
- Consent as an answer to assault
 - Note consent here is different to sexual consent
 - Consent is a defence to common assault
 - **Brown** - where an assault occasions actual bodily harm or worse, the defence of consent is seemingly not available
 - Seems to say that the law does not always place value on individual autonomy
 - Look at the differences between the majority and minority judgement
 - Look at bodily autonomy from the position of the victim / complainant
 - Cases of extreme body modification - where the law has stepped in to be protective of those individuals, paternalistic role of the law even where the person consented to the procedure
 - Said there need to be constraints on people's bodily autonomy (regarding the victims)
 - Notion of bodily inviolability - no one should violate your body except with your consent
- Sexual touching, sexual acts, sexual assault offences
 - Look at the definition of consent - affirmative consent
 - Connect this to individual autonomy
 - Victim's consent or no consent > relevant to the actus reus and the mens rea > it is good to separate these
 - Look at situations under s 61HJ where the law says that there is no consent
 - Paternalistic principles of criminal law
 - Look at the mens rea in s 61HK > now has both subjective and objective mental elements
 - Construct an argument in relation to intoxication and how that affects autonomy
 - Intoxication of complainant is relevant > an intoxicated person cannot consent > where the law treats someone as being unable to consent despite their individual autonomy
 - Intoxication of the accused for the purposes of mens rea, it is not relevant > can still be culpable despite their level of intoxication
 - Make the point that it is the same consent model applicable to all of these offences, and then could use one of them as an example of how the consent model works
- Good answers
 - Link answers to the significance of the quote
 - Answer question
 - Provide accurate reflection of the legislation and case law
 - All claims need to be substantiated
 - Don't use a pre prepared essay - really obvious as doesn't engage with question sufficiently

Extreme provocation	Anglo-Australian legal history of the partial defence to murder of provocation has been described as: 'as a concession to human frailty' (Smith [2000] UKHL 49 per Lord Hoffman), and connected with male 'codes of honour' and revenge
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From Jan 1990 to Sep 2004 in SNW, there were 897 homicide prosecutions

- Provocation was raised in 115 cases (12.8%), and was successful in 75

Re ordinary person objective test

- "In a multi-cultural society such as Australia the notion of an ordinary person is a pure fiction... Unless the ethnic or cultural background of the accused is attributed to the ordinary person the objective test of self control results in inequality before the law. Real equality before the law cannot exist when ethnic or cultural minorities are convicted or acquitted of murder according to a standard that refers to the values of the dominant class but does not reflect the values of those minorities" (McHugh J in Masciantonio (1995): 73-74).
- 'There is clearly a fine line between cultural sensitivity and cultural stereotyping. This line is particularly easily confused where judges and juries are not of the ethnic background of the accused or the victim, and where expert evidence is not available to the court.' Stephen Gray, Criminal Laws: Northern Territory (2004), 121.

Beneficially, provocation is not a static defence

- The defence has been, and can be amended further, to address the gendered dimensions of its usage.
- The defence has now been amended so that the ordinary person test so that the test no longer required the provocative incident to be of sufficient 'gravity' (an abolishment of the first limb of the Stingel test)
 - This 'gravity' requirement only allowed the defence to apply to typical male responses to provocative acts, and does not reflect female patterns of behaviour, since women do not react immediately to provocative conduct; they react over time.
 - The final act may be done in response to conduct that is not sufficiently of high gravity, but the woman has done so in response to a build-up of prior domestic violence. In Chhay, the court stated that the absence of a clear triggering incident did not mean the provocation defence was not available.
- The defence has also been changed to reduce the scope of the defence so that it does not apply in traditional paradigm cases of male behaviour. For example, the killing an adulterous wife whom the husband saw kissing another man was not a sufficiently provocative conduct (Hart).
- "Non-violent sexual advances" are no longer provocative conduct for the defence per the statutory reforms to the Crimes Act, which overturned the Green decision

DPP v Camplin

Facts

- English case that defined the limits of the defence of provocation
- Camplin, was 15 years old at the time of the offence. He killed Mohammed Lal Khan by hitting him on the head with a chapati pan following Khan raping him and then laughing at him

Held

- Lord Diplock noted that the "reasonable man" was: an ordinary person of either sex, not exceptionally excitable or pugnacious, but possessed of such powers of self-control as everyone is entitled to expect that his fellow citizens will exercise in society as it is today
- Lord Diplock noted that in the facts before the court, the age of the defendant was "a characteristic which may have its effects on temperament as well as physique".