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# INTRODUCTORY ELEMENTS

## Who can be criminally liable?

- Adults.
- Children over 14.
- Children aged 10-14 presumed incapable of committing a crime but can be rebutted (*doli incapax*). Prosecution must prove beyond reasonable doubt that the child knew what they were doing was morally wrong: **A Minor v DPP [1995] 2 WLR 383; RH v DPP [2014] NSWCCA 305.**

RP v R (2016) 259 CLR 641	
<b>Material Facts</b>	<ul style="list-style-type: none"> <li>• A child was charged with a number of offences that arose from different occasions when the accused child was aged between 11 and 12 years old.</li> <li>• Count 2 alleged an act of anal intercourse with the brother who was crying and protesting.</li> <li>• There was a trial by judge alone at which the sole issue was whether the Crown had rebutted the presumption that the child accused was <i>doli incapax</i>. The judge found that he was satisfied that the circumstances surrounding the commission of the offence charged in count 2 proved beyond reasonable doubt that the appellant knew his conduct was seriously wrong and therefore that the presumption was rebutted in relation to that offence.</li> </ul>
<b>Legal Issues</b>	Was the child <i>doli capax</i> ?
<b>Legal Reasoning</b>	<ul style="list-style-type: none"> <li>• ‘...the presumption may be rebutted by evidence that the child knew that it was morally wrong to engage in the conduct that constitutes the physical element or elements of the offence. Knowledge of the moral wrongness of an act or omission is to be distinguished from the child’s awareness that his or her conduct is merely naughty or mischievous.’</li> <li>• ‘No matter how obviously wrong the act or acts constituting the offence may be, the presumption cannot be rebutted merely as an inference from the doing of that act or those acts.’</li> <li>• ‘Answers given in the course of a police interview may serve to prove the child possessed the requisite knowledge. In other cases, evidence of the child’s progress at school and of the child’s home life will be required.’</li> <li>• ‘[The trial judge] found the appellant was most likely of ‘very low intelligence’ at the date of the offence charged in count two and, for this reason, to have had a lesser appreciation of the seriousness of his conduct...The circumstances to which his Honour referred were: the use of force; the placement of the hand over the complainant’s mouth; the complainant’s evident distress; the breaking off of the act of intercourse when an adult returned to the home; and the instruction to the complainant to say ‘nothin’.’</li> </ul>

	<ul style="list-style-type: none"> <li>• 'It is common enough for children to engage in forms of sexual play and to endeavour to keep it secret, since even very young children may appreciate that it is naughty to engage in such place. The appellant's conduct went well beyond ordinary childish sexual experimentation, but this does not carry with it a conclusion that he understood his conduct was seriously wrong in a moral sense, as distinct from it being rude or naughty.'</li> </ul>
<b>Outcome</b>	The presumption was not rebutted.

- Corporations (**Crimes Act 1914 (NSW), s 4; Criminal Code 1995 (Cth), s 12.1**).
  - Section 4 of the Crimes Act provides that any reference to a 'person' includes any 'society, company, or corporation'.

## Jurisdiction

### **Crimes Act 1900 (NSW) Section 10C – Extension of offences if there is a geographical nexus**

- (1) If—
- (a) all elements necessary to constitute an offence against a law of the State exist (disregarding geographical considerations), and
  - (b) a geographical nexus exists between the State and the offence,
- the person alleged to have committed the offence is guilty of an offence against that law.
- (2) A geographical nexus exists between the State and an offence if—
- (a) the offence is committed wholly or partly in the State (whether or not the offence has any effect in the State), or
  - (b) the offence is committed wholly outside the State, but the offence has an effect in the State.

## Mens rea and Actus reus

Actus Reus	Mens Rea
Conduct → action	Intention
Conduct → omission	Knowledge
Conduct → state of affairs	Recklessness
Result	Negligence
Circumstance	No mens rea → strict liability
	No mens rea → absolute liability

### Knowledge

- Subjective standard

- Awareness that a circumstance exists, or a consequence will ensue, in the ordinary course of events: see **Commonwealth Criminal Code, s 5(3)**.
- Needs to be actual (subjective) knowledge: **Giorgianni v R (1985) 156 CLR 473 at 504**.
- 'Wilful blindness' can support the finding of actual knowledge.
- 'A combination of suspicious circumstances and failure to make inquiry may sustain an inference of knowledge of the actual or likely existence of the relevant matter': **Pereira v DPP (1988) 82 ALR 217, 219**

## Negligence

- **Nydam v The Queen [1977] VR 430**: '[S]uch a great falling short of the standard of care which a reasonable man would have exercised, and which involved such a high degree of risk that death or grievous bodily harm would follow that the doing of the act merited criminal punishment.'

## Strict liability

- No mens rea required by can be negated by an honest and reasonable mistake of fact, i.e. 'an honest and reasonable belief in a state of facts which, if they existed, would make the defendant's act innocent affords an excuse for doing what would otherwise be an offence': **Proudman v Dayman (1941) 67 CLR 536**.
- Once a reasonable possibility of such a belief is raised, the prosecution must negate it beyond reasonable doubt: **CTM [2008] HCA 25**.
- Must be a mistake of fact not of law. Mistake of law arises when the accused intends to do the offence but does not realise it is illegal.
- All justices agreed there was a presumption of mens rea as per **Sherras v De Rutzen (1895) 1 QB 918**.
- Gibbs CJ: 'In deciding whether the presumption is displaced, one should have regard to: The words of the statute; The subject matter of the statute: Consequences for the community; Regulatory vs. 'truly criminal' offences; The extent to which strict liability would assist in the enforcement of the statute.'

# MURDER

## Section 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.

(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.

(b) No punishment or forfeiture shall be incurred by any person who kills another by misfortune only.

## Actus reus

Element one: The death of a human being.

- Beginning of life.
- End of life.

Element two: An act or omission.

- Isolating the act or omission.

Element three: Causation

- Common sense in simple cases.
- 'Operating and substantial cause' in more complex cases.

Element four: Voluntariness.

## Element one: Death of a living person

### When does life begin?

- **R v Hutty [1953] VR 338:** '[L]egally a person is not in being until he or she is fully born in a living state. A baby is fully and completely born when it is delivered from the body of its mother and it has a separate and independent existence... and is living by virtue of the function of its own organs.'

## Section 20 of the Crimes Act – Child murder when child deemed born alive

On the trial of a person for the murder of a child, such child shall be held to have been born alive if it has breathed and has been wholly born into the world whether it has had an independent circulation or not.

- Section 20 applies only to murder. It essentially adopts the **Hutty** test.