



HD APPROVED

CRIMINAL LAW

MLP114

COMPREHENSIVE NOTES

-UPDATED FOR 2026-

NB: The word *here* refers to the preceding case in *blue*.

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## Capacity: Is the alleged offender old enough for criminal liability?

### Capacity - mental capability required to be culpable for an offence

- **9 years or under:** no capacity whatsoever - s 344 *Children, Youth and Families Act 2005* (Vic)
- **10-13 years old:** rebuttable presumption that the child is not capable of culpability
  - Can be rebutted by prosecution with evidence that the child knew acts were “seriously wrong” - *R v ALH* (2003)
    - Dictum from this case suggests that the mere facts of the offence could be enough to demonstrate this knowledge -- BUT HCA in *RP v The Queen* [2016] obviously wrong acts cannot rebut the presumption on their own
- **14 years and over** - fully capable of criminal liability

### Companies/ Corporations:

- Doctrine of **vicarious liability** - was a crime committed by an employee acting within the scope of their employment? - *Morgan v Babcock Ltd*
- Doctrine of **Identification** - *directing the mind and will*: was the accused sufficiently senior in the company that their act and the act of the company cannot be reasonably separated?
  - *Universal Telecasters (Qld) v Guthrie*
- NB: corporations cannot be convicted of offences that require acts by a natural person (eg. sexual assault)
  - Nor can they be convicted of common law offences that are only punishable by imprisonment (eg. murder)

# Unlawful Homicide

## Actus Reus elements for Murder/ Manslaughter

### 1. Voluntary act

- Voluntary: willed, conscious and deliberate muscular movement
  - Rebuttable presumption (to be overcome by the accused) that the accused's action was voluntary - *R v Falconer*
  - Intention or lack thereof behind the act doesn't speak to its voluntariness - *Ryan v The Queen*
    - The act which causes the death must have been voluntary, even though the consequence may not have been intended - *R v Butcher*
    - Further, a court does not look to one singular act and determine whether it was voluntary, but rather a whole series of acts relevant to cause of death
      - *Here*: while R didn't intend for the gun to go off, his brandishing weapon and pointing at victim are voluntary acts
  - Examples of Involuntary acts: Accidents, being forced by another, a reflex, acts done in a state lacking conscious volition (no knowledge of actions)
    - Eg. sleep disorders, epileptic fit
- OR omission of action where a duty is owed - *R v Russell*
  - Includes where someone assumes responsibility of a victim such that others refrain from also helping - *R v Taktak*

### 2. Actual Death of the Victim

- *R v Huttly* - a human must be in a state of "in being" (fully born and living an independent existence) to qualify as a victim of murder
- Death occurs when (s 41 *Human Tissue Act*):
  - Irreversible cessation of brain function, or
  - Irreversible cessation of blood circulation
    - These leaves uncertain the case of someone on life support wholly reliant on medical machinery to remain "alive"

### 3. Causation

Causation - There are multiple ways to establish a causal link between an accused's act and the outcome of a crime

#### Factual causation

(*Easy, don't spend too much time analysing this*): The accused's conduct is the "**but for**" cause of death/harm

- Difficulty arises when there are two or more concurrent causes, any of which would individually have caused death
- Doctrine of Innocent Agency
- Omissions can only give rise to criminal causation where a duty to act exists - *R v Russell*

## Legal causation

(*More substantial, marks to be had here*): accused's actions have i) **contributed significantly** to death, AND ii) there is no ***novus actus interveniens***

- i) “Contributed significantly” tests
  - Common sense test - did the accused's act cause the death? - (*appropriate for simple fact patterns eg. did the accused thrusting the knife into the victim's chest cause them to die?*)
    - Practically the same as the “Reasonably Foreseeable” test and the “Natural Consequences” test - was the victim's death a natural consequence of the accused's actions?
  - **Primary Test: Substantial and operating cause test: *R v Hallet***
    - Accused's actions are a **substantial and operating cause** of the victim's death where events proceed in a ordinary way flowing from the accused's act
      - Without any intervening extraordinary act that severs the chain of causation
    - *Here*: accused knocks out victim on beach, leaves him unconscious as the tide rises and drowns him => rising tide is a natural event that is not sufficient to break the chain of causation between the punch and the victim's death
      - An act of god would have been sufficiently extraordinary to break the chain of causation, but the tide rises consistently every day
    - *R v PL* - don't have to identify the specific act that begins the causal chain resulting in the death of the victim in order to meet the element of legal causation
    - **Eggshell skull rule** - you must take your victim as you find them, their particular frailties or beliefs contributing to death cannot be deemed to break the chain of causation - *R v Blaue*
    - medical treatment of a victim of the accused's act can only break the chain of causation if it is **palpably** wrong - *R v Jordan* (doctor gave treatment that they knew the victim was allergic to, resulting in their death)
      - The second cause has to be so overwhelming that the initial injury caused by the accused becomes merely part of the history leading up to the death - *R v Smith*
        - *Here*: being dropped multiple times by the hospital staff and them not having enough blood for treatment is substantially wrong, but not **palpably** wrong as required in *R v Jordan*
          - Easier to establish “palpably wrong” with respect to affirmative acts (giving wrong medication) vs omissions (lack of care in dropping victim)
      - *R v Evans & Gardiner* - victim's apparent recovery then subsequent death from injury inflicted by accused is not an intervening event unless treatment meets the test in *R v Jordan*
        - *Here*: victim's medical treatment didn't entirely fix shiv wound, doctors failed to diagnose the improper treatment, and despite living for several years, he eventually dies
          - Held stabbing was still substantial and operating cause of death
    - Fright and self preservation by the victim as an intervening act - *Royall v The Queen* - overrules Eggshell Skull rule only for fright and self preservation
      - Fright and self preservation **CAN** break the chain of causation, unless the following additional elements are proved by the prosecution:
        - Accused induced a well-founded apprehension of physical harm in the victim
        - It was reasonable for the victim to attempt to escape from the accused
        - That the victim chose a reasonable mode of escape

- Looking at the victim's immediate response to the threat of physical harm, can it be said that their reaction is unreasonable / disproportionate => breaks the chain of causation

## Mens Rea Elements for Murder

The accused caused the victim's death while intending to kill or cause serious injury, or being reckless to that result (common law offence)

The below must be established in addition to elements 1, 2 & 3 of Unlawful Homicide above

*Mens Rea* - The accused committed those acts while either ... :

### Intentional Murder - intending to kill *someone* or cause really serious injury

- **Intent** - subjective test - conscious objective to bring about an unlawful result
  - **Temporal coincidence** - intention (or foresight below) must be held by the accused at the time of the act
    - however, two or more acts can be aggregated for the purpose of establishing temporal coincidence of intention to kill - *Thabo Meli*
      - Must establish an unbroken chain of causation between the initial act with intention and the subsequent acts
      - Here: hitting a man over the head, then bundling him up and throwing him off a cliff to fake an accident are one continuous act
        - temporal coincidence of intention can be established from the act of hitting over the head despite the fact this isn't what resulted in the victim's death
    - Transferred Malice - Need not intend to kill the specific victim, just an intention or recklessness with regards to someone (eg. I intend to stab Bob but miss and stab Francine) - *La Fontaine v R*
  - **Really serious injury** - bodily harm that is more than a slight injury, but not necessarily life-threatening -- open to the jury to determine using an objective standard - *R v Rhoades*

### Reckless Murder - knowing the **probable** outcome was death or really serious injury

- *R v Crabbe*: Not just a possible outcome, but a probable one (likely to happen) -- distinguish between what is merely possible and what is probable
  - Do not apply a mathematical formulation of probability, look at the issue holistically - *Bouhey v The Queen*
- Foresight - subjective test - the accused must have *actually* know their actions would probably have caused really serious injury or death,
  - *R v Crabbe*: driving a semi trailer into a bar was known to driver to probably cause death or serious injury
  - Avoid the plain meaning of recklessness in establishing reckless murder, rely only on the definition here - *La Fontaine v R*

### Constructive Murder

- Statutory Constructive Murder - s 3A *Crimes Act* - mens rea is imputed
  - Elements 1, 2 & 3 of Unlawful Homicide above; and

- Unintentional Death
- Death occurs in furtherance of an offence with potential sentence of 10 years or more
- Death is caused by an act of violence and stems from an offence that includes violence as an element
  - In reality, likely can only stem from the offences of robbery and armed robbery
- Common Law Constructive Murder - accused caused the death of the victim in the course of violently resisting or escaping from lawful arrest - *R v Ryan and Walker*
  - No requirement for any intention or foresight of the consequences of actions

## Mens Rea Elements for **Involuntary Manslaughter**

Act or omission that causes the death of another without lawful excuse -- only where circumstances do not amount to murder

- ALWAYS consider **both** U&DA IM and Negligent Manslaughter (below) when considering the charge of Involuntary Manslaughter - these charges are NOT mutually exclusive
- Based on an OBJECTIVE test - no subjective mens rea component
  - Instead: how would a reasonable person in the circumstance of the accused have acted?

## **Unlawful and Dangerous Act** Involuntary Manslaughter (UDA IM)

Leading case: *Wilson v The Queen*

1. Requires unlawful homicide actus reus elements (1. 2. and 3.) above, plus:
  - In addition to causation, to establish the actus reus for UDA IM, it must be established that it is the accused's **unlawful act** that caused the victim's death, not some other act
    - Eg. unlawfully discharging a firearm must cause the victim's death, rather than some unrelated otherwise legal act of the accused
    - Does not matter if the act was not targeted or directed at them - *R v Mitchell*
2. Accused's act that causes death was unlawful; and
  - Affirmative (not omission) act must have been a (any, including minor offences) breach of criminal law - *Pemble v R*
    - This **requires mens rea** for the particular criminal act, along with actus reus
    - Exclusion: Culpable Driving Causing Death - s 318 *Crimes Act*
3. Accused's unlawful act was dangerous - *Wilson's test*
  - Did the accused's act carry an "appreciable risk of serious injury"? - majority of HCA in *Wilson v The Queen*
    - Also: "objectively dangerous" - minority in *Wilson*
  - => would a reasonable person in the accused's position performing the same act realise they were exposing another to an "appreciable risk of serious injury"?
    - Who is the reasonable person? - *Here*: someone in the same circumstances, characteristics, skills, knowledge (*Kerr v The Queen*) etc, also possessing common knowledge, and normal physical and mental fortitude (*R v Edwards*) of someone with these characteristics
      - Can be assumed that peculiarities of a victim can be known to a reasonable person if they are reasonably observable - *R v Watson*
      - Characteristics of the accused that cannot be transferred to the reasonable person: mistaken beliefs (*R v Ball*), idiosyncrasies and emotional state of accused (*R v Wills*), clouded judgment as a result of intoxication (*R v Wills*)
    - "Serious injury" and "appreciable risk" are not defined by the court -- fact-specific assessment required by the jury

- Assessing appreciable risk cannot use reference to the notion of what is “likely” - *R v Gould*
- French CJ in *Burns v The Queen* - “appreciable” is a qualitative assessment and is linked to causation
- **Exception:** s 4A *Crimes Act* - “one punch law”
  - (1) Any single punch or strike that a) is delivered to the head or neck, or 2) by itself causes injury to the head or neck
  - (2) Is deemed to be a dangerous act - **no jury consideration required**
  - (4) ss 1) applies where the strike itself is not lethal but results death from other means (contact of head with surface)
- Note - most common unlawful and dangerous acts that can give rise to IM: assault, robbery, burglary or discharging a firearm in public

## Criminally Negligent Manslaughter

Death of the victim resulting from a voluntary act or omission on the behalf of the accused where there is a **duty of care** between the two parties

- Accused failed to foresee probable outcome of serious harm or death resulting from act or omission, where this failure is a “**gross departure**” from the standard of care of a reasonable person in the position of the accused
  - No Mens Rea element required: just assessment of actions of the reasonable person against those of the accused, and judgment by the jury -- whether the divergence is “**gross**”
- Elements of Criminally Negligent Manslaughter:
  - 1: A conscious voluntary act or omission of the accused *without* intention of causing death or grievous injury - *Nydam v The Queen*
  - 2. Legal causal connection between the act of the accused and the death of the victim
  - 3. A duty of care was owed by the accused to the victim
    - Eg. parent-child (*R v Russell*) - man watches wife drown children
    - Wife-husband
    - Teacher-student
    - Doctor-patient
    - Lawyer-client
    - employer-employee (*R v Lowe*)
    - contractual duty of care
    - security officer holding scene of a crime for police (*R v Edwards*)
    - *R v Taktak* - includes accused’s **assumption of responsibility of the wellbeing of the victim** where they seclude them such that nobody else can come to their aid
      - *Here:* T picks up prostitute from party after heroin overdose, doesn’t take her to hospital
        - => not criminally negligent because it could not be established that T’s omission to render appropriate aid was the substantive and operating cause of V’s death
    - situations where accused has created a dangerous situation (*R v Taber*)
    - *Nydam v The Queen* - there **MIGHT** be circumstances where conduct is such a gross breach of what is expected of a reasonable person in the position of the accused that no duty of care is required to establish Criminally Negligent Manslaughter

- [Here](#): accused confronted his crush by spraying gasoline around her place of work and setting it alight
  - => Safer approach is to reason that in creating a dangerous situation, the accused is also creating a duty of care with those who may come into contact
- 4. There is a breach of that duty of care (*articulate how the actions of the accused breach the established duty of care*)
- 5. The act or omission is “**a great falling short**” of the standard of care that a reasonable person in the accused’s position would deliver - [Nydam v The Queen](#)
  - Objective test - assess what the conduct would be of a reasonable person in the same situation -- then assess the degree of divergence
  - Another way of looking at this test: would a reasonable person have foreseen that there was a probability of death or GBH resulting from that conduct? - [R v Edwards](#)
    - If yes, what mitigating actions (like not doing the act) or precautions would the reasonable person have taken?
      - If there is a gross divergence, you can establish breach
    - Do not impute the same physical and mental state of the accused onto the reasonable person
      - but you are able to apply special knowledge or skills held by the accused onto the reasonable person in the same situation
  - Is the degree of breach sufficient to justify criminal sanction?
    - Is breach “wicked gross culpable and complete”? - [Andrews v DPP](#)

# Assault - unlawful application of force or threat against a person without consent

## Common Law Assault

*Fagan v The Commissioner of Metropolitan Police*: Assault is an act which i) causes another to apprehend immediate and unlawful violence, or ii) the actual use of physical force against another without consent

- i) **Common Law Apprehension Assault** - any act whether intentional or reckless which causes another to apprehend immediate and unlawful violence - *Fagan*
  - Actus Reus elements:
    - An Act - must be affirmative (cannot be an omission)
    - Threat of force in the mind of the victim - subjective test
      - Includes threats that cannot be carried out - *R v Everingham*
        - Eg. use of toy gun creates a valid apprehension of physical harm even if not capable of causing such
      - If a victim believes something that removes apprehension of violence, then assault is vitiated
        - *R v Lamb* - russian roulette with the mistaken belief that the cylinder did not contain a bullet means that no apprehension is possible
        - *Wilson v Kuhl, Ryan v Kuhl* - stabbing a knife through a hole in a toilet cubicle, but victim knew they could not be hurt if they just remained in the cubicle => no apprehension of violence
    - Immediacy - no definition, but threats of future violence do not fulfil this requirement
      - However, do not form a strict interpretation of what is in the future versus in the present, as the determination of immediacy is fact-specific - *Barton v Armstrong, Zanker v Vartzokas*
      - Hypothetical Threats - statement made to another but the “true meaning” is that there is no intention - *Turberville v Savage*
        - Eg. If it were not for X, I would cause you harm => no intention because X is true
      - Conditional Threats - threatens another with force if a condition is not met - *Rozsa v Samuels*
        - Types of conditions:
          - Legal right to impose condition: Assault if the level of force threatened exceeds what the law allows
            - Eg. no assault: “I will remove you from the premises for being drunk and disorderly”
            - Cf assault: “I will stab you for being drunk and disorderly”
          - No legal right to impose the condition: Assault regardless of the condition
            - Threat with a deadly weapon or of extreme force has no legal basis, so this conduct will constitute assault
        - The condition must completely nullify the threat of violence such that it becomes hypothetical, such as above

- The condition could also be so convoluted or time intensive that the conditional threat does not give rise to apprehension of *immediate* violence
      - but again, courts are not strict in applying any test of immediacy
    - Here: V: “I ought to punch you” A: “I will cut you if you try” => assault established because the conditional element of the threat is not sufficiently hypothetical
      - Without Consent - *R v Wilkes & Briant* (below)
  - Mens Rea - Accused is intentionally or reckless in causing apprehension of immediate and unlawful contact
    - Recklessness - likely to a possibility standard rather than a probability standard (lower burden than usual) - *R v Venna*
    - Temporal coincidence is required
- ii) **Common Law Contact Assault** - contact or application of physical force to the body of another absent consent
  - Actus Reus: Application of physical force
    - Any contact aimed at the victim or object/ structure on which the victim is supported - *R v Salisbury*
      - Includes contact from the accused’s body to the victim’s body through any intermediary object: *Fagan* - driving car onto police officer’s foot
    - Any degree of force is sufficient, including non-hostile touching - *Collins v Wilcock*
      - No Injury is required to establish this assault
      - However: “implied consent” to the contact that is a necessary consequence of everyday life (eg. brushing past someone on a crowded train carriage is not assault)
        - Some degree of additional contact is required to elevate the conduct to the level of assault - *Collins v Wilcock*
  - Without consent - free and willful consent to assault can be given by words or conduct, or both - *R v Wilkes & Briant*
    - However, no conduct or words are sufficient to consent to actual bodily harm
    - Prosecution must prove (beyond reasonable doubt) that the victim did not consent - *R v Clarence*
  - Mens Rea - Act committed intentionally or recklessly
    - Recklessness: physical force that is reckless to the possibility of contact with another can also sustain Common Law Contact Assault - *R v Venna*
      - Here: Victim vigorously resisting arrest by multiple officers thrashes legs and breaks an officer’s hand
    - Temporal coincidence - intention formed at any stage of a continuing act fulfills this component of the Mens Rea requirement for CL Assault - *Fagan v CoMP*
      - Here: while driving onto foot initially may have been an accident (no intention to fulfill Mens Rea component at time of initial contact):
        - subsequent conduct of sitting in the car while the wheel remained on the police officer’s foot, turning off the ignition, and verbalising an intention to keep the car on the officer’s foot (“Fuck you, man”)
          - => produces sufficient intention and attaches to the continuing contact

## Statutory Assaults

- Statutory Assault (summary offence): anyone who unlawfully assaults another shall be guilty of an offence - *Summary Offences Act* - s 23
  - Similar AR and MR to Common Law Contact Assault
  - this section is mostly redundant as courts are more willing to consider Common Law Assault
  - Short sentence (3 months)

Aggravated Assaults (indictable offence)

## Intentionally Causing Serious Injury - s 16 *Crimes Act*

- Elements:
  - Serious Injury (see below at Intentionally Causing Injury)
  - Causes - see Causation above with regards to Involuntary Manslaughter and Murder
  - Intentionally - see Intent to Cause Death or Greivous Bodily Harm above with regards to Involuntary Manslaughter
    - Intention to perform the act that caused injury to the victim is insufficient, the accused must have actual intention to cause *serious* injuries - *R v Westaway*
  - Without lawful excuse - (see defences below)

## Recklessly Causing Serious Injury - s 17 *Crimes Act*

- Elements:
  - Serious Injury (see below)
  - Causes - see Causation above with regards to IM and Murder
  - Recklessness - see Reckless Murder above
    - Accused has acted recklessly if they knew that harmful outcomes (not necessarily specific outcomes) would probably result from their actions, but proceeded anyway
      - *R v Campbell* applying *R v Crabbe* for all offences in Victoria with recklessness as an element
  - Without lawful excuse - (see defences below)

## Intentionally or Recklessly Causing Injury - s 18 *Crimes Act*

- Elements:
  - Intention or Recklessness - see above with regards to IM and Murder
  - Causation - see above with regards to IM and Murder
  - Injury
    - Delineation: Degree of Injury (Serious Injury versus Injury) - s 15 *Crimes Act*
      - Serious Injury - a) injury (including cumulative injuries) that i) endangers life; or ii) is substantial and protracted; or b) destruction of foetus of a pregnant woman (even absent any other harm)
      - Injury - a) physical injury (including unconsciousness, disfigurement, substantial pain, infection with a disease and an impairment of bodily function); or b) harm to mental health (excludes distress, grief, fear or anger unless it triggers harm to mental health)
  - Without lawful excuse - see defences below

## Negligently Causing Serious Injury - s 24 *Crimes Act*