

Criminal Law, Process, and Research II

LAWS1028 Scaffolds

TOPIC 1 INTRODUCTION	3
1. Criminal liability and responsibility	3
2. Age of criminal responsibility	4
TOPIC 2 DRUG OFFENCES	4
TOPIC 3 MURDER	5
3.1 Constructive murder	8
TOPIC 4 MANSLAUGHTER	9
4.1 Unlawful and dangerous act manslaughter	9
4.1.1 Assault and supply of drugs causing death	10
4.2 Gross negligence manslaughter	11
4.2.1 Criminal negligence by act	11
4.2.2 Criminal negligence by omission	12
TOPIC 5 ASSAULT	13
5.1 Common assault	13
5.1.1 Stalking and intimidation	14
5.2 Assault occasioning actual bodily harm	15
5.3 Wounding	16
5.4 Grievous bodily harm	17
TOPIC 6 LARCENCY	20
TOPIC 7 SEXUAL OFFENCES	22
7.1 Sexual touching	22
7.1.1 Aggravated sexual touching	26
7.2 Sexual act	26
7.2.1 Aggravated sexual act	28
7.3 Sexual assault	28
7.3.1 Aggravated sexual assault	32
7.3.2 Aggravated sexual assault in company	33
7.4 Assault with intent to have sexual intercourse	34
7.5 Marriage and special offences regarding children	34
TOPIC 8 EXTENDING CRIMINAL LIABILITY - COMPLICITY	35
8.1 Accessorial liability	36
8.2 Joint criminal enterprise ('acting in concert')	37
8.3 Extended joint criminal enterprise ('extended common purpose')	39
TOPIC 9 SELF DEFENCE	42
12.1 Excessive self defence	44

TOPIC 10 MENTAL DEFENCES	45
10.1 MHICI (Mental Health Impairment or Cognitive Impairment)	45
10.2 SIMHICI (Substantial impairment because of mental impairment or cognitive impairment)	48
TOPIC 11 AUTOMATISM (INVOLUNTARINESS)	51
TOPIC 12 EXTREME PROVOCATION	55
TOPIC 13 DURESS AND NECESSITY	58
13.1 Necessity	58
13.2 Duress	60
TOPIC 14 THE USE OF EVIDENCE OF (I) MENTAL ILLNESS OR (II) SELF-INDUCED INTOXICATION TO NEGATE INTENT	62
14.1 Mental illness to negate specific intent	62
14.2 Self induced intoxication to negate specific intent	64
TOPIC 15 SENTENCING AND PUNISHMENT	66
15.1 Purposes of sentencing	66
15.2 Maximum penalty	67
15.3 Imprisonment	67
15.4 Seriousness	67
15.5 Aggravating and mitigating factors	68
15.6 Applicable guideline judgements	70
15.7 Relevant subjective features	71
15.8 Discount for a guilty plea	71
15.9 Discount for pre-trial disclosures and assistance to law enforcement authorities	72
15.10 Overall proportionate sentence	73
TOPIC 16 ESSAY PREPARATION	75

- Appeal to HC based on X7 - based on state here vs federal legislation in X7, appeal unsuccessful as the examination is a matter of 'practical reality', and the SC's power's to prevent unfairness sufficient to protect accused's' accusatorial rights
- Minority Kiefel J (but reasoning for outcome No 2): [187] the state must establish guilt by evidence independently and freely secured, 'may not by coercion prove its charge against an accused out of his own mouth'

Lee [2014] HCA 20 (Lee No 2) > successful appeal

- Produced evidence that Commission gave to P the transcript and documents from the compulsory examination
- Full HC held that the disclosure was a removal of the privilege against self incrimination, and affected the criminal trial fundamentally as it altered the position of the prosecution to the accused > the fundamental principle

TOPIC 3 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).

Accused's intent to kill *victim* occurred *time amount* before *victim* was killed, suggesting that the prohibited conduct did not coincide with the guilty mind. English courts have effectively diluted the temporal coincidence rule through a 'one transaction' approach where the court may find a defendant guilty even where the original intention to kill had ceased before the actus reus occurred (Thabo Meli per Lord Reid at 374). However, the HCA in Meyers did not cite English cases, and rather has adopted a stricter view that takes a 'snapshot' approach where mens rea and actus reus must coincide (Meyers at 442). Therefore, under Australian common law, the courts may not find that murder has been made out.

Conclusion

As the actus reus and mens rea of murder have been established, *accused* is liable to imprisonment for life (s 19A(1)).

NOTE RE COMPLICITY

s 18 imports common law rules of complicity, and therefore an accused may be found guilty of murder even if they did not commit the act which caused the death charged provided the act was committed by an accomplice of the accused in the course of carrying out a joint criminal enterprise to which both were parties (IL v the Queen per Bell and Nettle J at [60]).

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))

4.2 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).

4.2.1 Criminal negligence by act

Duty of care

There is a general common law duty not to cause harm to another person (implicit in Nydam v The Queen at 445); *accused* held such a duty of care.

Criminal degree of negligence

There is a high degree of criminal negligence required such that it is a great falling short of the standard of care that a reasonable person would have exercised (Nydam at 444) that it could be seen as 'wicked' and not merely unreasonable (Lavender at [58]). *compare to Lavender*

The necessary intent is no more than an intent to do the act (Lord Salmon in Newbury's Case at 923; Nydam at 444), which is evident on the facts as *accused* acted consciously and voluntarily by doing XX.

Reasonable person in the position of the accused

Finally, it must be determined whether *accused* failed to act as a reasonable person would have done in the circumstances (Nydam at 444). This is an objective test, but accounts for the attributes of the accused including age, special knowledge, and skills (R v Sam at [14]). Personal beliefs, views, and attitudes of the accused are disregarded (R v Sam at [22]). Therefore, a reasonable person with *X

age, skills etc* and an ordinary firmness of character and strength of mind (R v Sam at [14]) would
xxxx.

- s 428F Crimes Act: a D's intoxication is not to be taken into account when determining the state of mind of the reasonable person

4.2.2 Criminal negligence by omission

Duty of care

As not every moral obligation involves a legal duty to act (Instan), and the courts are reluctant to impose obligations on the accused to do a positive act, *accused* must owe *victim* a legally recognised duty of care. Here, *accused* would owe *victim* as:

- Status relationship: eg dependent familial relationship (parental/child) (Russel) (s 43A)
- creation of dangerous situation (Miller)
- voluntary assumption of duty of care for a person who cannot care for themselves (Stone and Dobinson) and so secluded the person to prevent others from rendering aid (Taktak)
- But not the relationship between supplier of prohibited drugs and recipient, particularly because there is no element of control (Burns)
- There is a statutory obligation under s 44 of the Crimes Act to provide necessities of life, which includes sufficient nutrition, shelter, and required medical care

Criminal degree of negligence

Accused's omission to act must amount to such a high degree of negligence or recklessness that a reasonable person would have exercised so as to be called wicked (Taktak per Yeldman J at 245-6).

Reasonable person in the position of the accused

Finally, it must be determined whether *accused* failed to act as a reasonable person would have done in the circumstances (Nydam at 444). This is an objective test, but accounts for the attributes of the accused including age, special knowledge, and skills (R v Sam at [14]). Personal beliefs, views, and attitudes of the accused are disregarded (R v Sam at [22]). Therefore, a reasonable person with *X age, skills etc* and an ordinary firmness of character and strength of mind (R v Sam at [14]) would
xxxx.

- s 428F Crimes Act: a D's intoxication is not to be taken into account when determining the state of mind of the reasonable person

Punishment

As it is likely that the elements of assault occasioning actual bodily harm are made out, *accused* is liable to imprisonment for five years (s 59(1) Crimes Act).

As it is likely that the elements of assault occasioning actual bodily harm are made out, and the assault was in the company of *person/s*, *accused* is liable to imprisonment for seven years (s 59(2) Crimes Act).

If there has been consent:

Unlawful - mostly

Although *victim* consented by *express/implied conduct* to *act*, there is a general rule that one cannot consent to assault occasioning actual bodily harm or more (Brown per Lord Templeman).

Lawfully recognised exceptions

Although there is a general rule that one cannot consent to assault occasioning actual bodily harm or more (Brown per Lord Templeman), *victim* had consented by *express/implied conduct* to *act*, which is a lawful exception to the general rule (Brown per Lord Templeman).

- Surgery (by qualified professionals), tattooing, piercing, contact sports, a level of parental chastisement (reasonable and moderate force), rough horseplay
 - Note that in sport, if the act is not done within the legitimate pursuit of the objects of the game and involves reckless or intentional application of physical force, then accused may be liable (Stanley)
 - If surgery is not done by qualified health practitioners in licensed premises, it is not in the public interest that a person can voluntarily submit to a significant surgery (Russell at [85]-[96])
 - Note that consent of victim is no defence to female genital mutilation (s 45(5) Crimes Act; Russell v R)
 - Body modifications are not analogous to tattoos or piercings (R v M(B)), but branding initials was analogous to a tattoo (Wilson; UK though)
- Injury a foreseeable incident of a lawful activity

5.3 Wounding

Issue: As the harm suffered by *victim* is XXX, which appears on the facts to have broken the interior layer of the skin as XXX (R v Smith), it must be determined whether *accused* is liable for wounding (ss 33(1)(a), 35(4) or 35(3)(in company) Crimes Act).

With intent

As *accused* by saying/doing XXX, it indicates an intent to harm *victim*. Therefore, to establish that *accused* is guilty of wounding with intent, the prosecution must prove beyond reasonable doubt that *accused* wounded *victim* with an intent of causing grievous bodily harm (s 33(1)(a) Crimes Act).

Actus reus

As there is *XXX eg presence of blood*, this indicates an injury that has broken or cut the interior layer of the skin (R v Smith). This was a voluntary act done by *accused* as XX.

Mens rea

By doing XXX

Punishment

As it is likely that the elements of wounding with intent are made out, *accused* is liable to imprisonment for 25 years (s 33(1) Crimes Act).

Reckless (+ for in the company of another person/s s 35(3))

As *victim* has sustained an injury that may amount to a wound, it must be determined whether *accused* is guilty of reckless wounding with intent under s 35(4) Crimes Act. The prosecution must prove beyond reasonable doubt that *accused* wounded *victim* and was reckless as to the possibility of causing actual bodily harm (s 35(4) Crimes Act).

Actus reus

As there is *XXX eg presence of blood*, this indicates an injury that has broken or cut the interior layer of the skin (R v Smith).

Mens rea

By doing XXX, *Accused* would foresee the possibility, not the probability (Coleman), that the act would cause actual bodily harm to *victim*.

Punishment

As it is likely that the elements of reckless wounding are made out, *accused* is liable to imprisonment for 7 years (s 35(4) Crimes Act).

As it is likely that the elements of reckless wounding are made out, and the assault was in the presence of person/s, *accused* is liable to imprisonment for 10 years (s 35(3) Crimes Act).

If there has been consent:

Go to actual bodily harm - will be a no

5.4 Grievous bodily harm

Issue: As the harm suffered by *victim* is XXX, which is a bodily injury of a really serious kind (DPP v Smith) it must be determined whether *accused* is liable for grievous bodily harm (ss 33(1)(b), 35(2), 54 Crimes Act).

1. Grievous bodily harm with intent

To establish that *accused* is guilty of grievous bodily harm with intent, the prosecution must prove beyond reasonable doubt that *accused* causes grievous bodily harm, and intended to cause grievous bodily harm (s 33(1)(b) Crimes Act).

- bodily injury of a really serious kind (DPP v Smith) but need not be permanent (R v Ashman)

- But for fungibles (exchangeable items eg money), even if *accused* intended to repay, it is still larceny as the actual coins/notes won't be returned (Feely)

Without a claim of right made in good faith; a bona fide claim of legal right is a good defence (Fuge)

- Must be belief in a legal not just moral entitlement
- Claim of right may arise because of mistake of fact or mistake of law (Lopatta)
- Mistaken belief need not be reasonable (but unreasonable beliefs may not be accepted by jury) (Lopatta)
- *accused* cannot, even if unintentionally, take more than honestly believed entitled to (Astor v Hayes) but does extend to taking equivalent in value (Langham)
- *accused* has **evidential burden** > then P has onus to disprove beyond reasonable doubt

Unsure

There must be a coincidence or actus reus and mens rea; if *accused* has obtained the property innocently, a later conversion is insufficient to establish common law larceny (Thurbon) but it may be a continuing trespass (Riley)

s 117 Punishment for larceny

- Whosoever commits larceny, or any indictable offence by this Act made punishable like larceny, shall, except in the cases hereinafter otherwise provided for, be liable to imprisonment for five years.

Other offences

- s 124: If A acquires property innocently, liable if then fraudulently appropriates property for own use or for reward
- s 125: Larceny by Bailee: where A in possession as 'bailee' (eg: A hires car from V) & A then takes/converts property (deals with it in way that is contrary to rights of owner) fraudulently
- s 154A: temporary taking of conveyance will suffice: eg joyriding (ie do not need intention to permanently deprive)

TOPIC 7 SEXUAL OFFENCES

7.1 Sexual touching

Issue: As *accused* has done *act* to *victim*, it must be determined whether this constitutes sexual touching under s 61KC of the Crimes Act.

The prosecution must prove beyond reasonable doubt that the defendant intentionally touched the complainant (or incited the complainant to touch the accused sexually or third persons), the complainant was not consenting, and that the defendant knew the complainant was not consenting.

s 61KC of the Crimes Act: Any person (the accused person) who without the consent of another person (the complainant) and knowing that the complainant does not consent intentionally—

- sexually touches the complainant, or
- incites the complainant to sexually touch the accused person, or

START WITH JCE AND IF IT DOES NOT APPLY THEN MOVE TO ACCESSORIAL LIABILITY

NOTE that the HCA has questioned running both lines of argument in one case (Huynh)

8.1 Accessorial liability

Must initially establish that prosecution will be able to prove commission of offence by P1 (but not P1's guilt) to prove that P2 is liable

Issue: If *principal 1* is guilty of *offence*, it must be determined whether *person* has accessorial liability due to *fact eg intentionally encouraging principal 1*.

Actus reus

Where the crime is committed by P1, P2 is usually present at the time and aids or abets P1 (Phan; Lam)

- generally P2 does not perform any physical elements of the offence (if P2 does, go to JCE)

Presence may be either actual or constructive

- However mere presence is not conclusive of aiding (Phan)
 - Phan argued he was unconscious in the back seat of the car at the time of the shooting by P1 due to a prior assault by the deceased and therefore not an accessory at the scene of the crime

Assisting or encouraging an offence

Mens rea

Knowledge and intent (Giorgianni; Stokes & Difford)

P2 must know the 'essential matters' of P1's offence (actus reus and mens rea) (Stokes & Difford), but need not know the precise detail of the offence or way it was carried out.

- Recklessness is not sufficient (Stokes & Difford)

P2 need not know the consequences of P1's conduct (Stokes, Likiardopoulos).

- Eg where P1 is guilty of murder, P2 must know that P1 intended to perform an act with an intention to inflict GBH etc but the prosecution need not prove that P2 knew that death would result from P1's act

Punishment

Every principal in the second degree in any serious indictable offence is liable to the same punishment to which the person would have been liable had the person been the principal in the first degree (s 345).

Every accessory before the fact to a serious indictable offence may be indicted, convicted, and sentenced, either before or after the trial of the principal offender, or together with the principal offender, or indicted, convicted, and sentenced, as a principal in the offence, and shall be **liable in**

either case to the same punishment to which the person would have been liable had the person been the principal offender (s 346)

Any person who aids, abets, counsels, or procures, the commission of a minor indictable offence, may be proceeded against and convicted together with or before or after the conviction of the principal offender and may be indicted, convicted, and punished as a principal offender (s 351)

351B Aiders and abettors punishable as principals

- (1) Every person who aids, abets, counsels or procures the commission of any offence punishable on summary conviction may be proceeded against and convicted together with or before or after the conviction of the principal offender.
- (2) On conviction any such person is liable to the penalty and punishment to which the person would have been liable had the person been the principal offender.
- (3) This section applies to offences committed before or after the commencement of this section.
- (4) This section applies to an indictable offence that is being dealt with summarily

8.2 Joint criminal enterprise ('acting in concert')

Issue: as *person* and *person* have carried out the offence of XXX together, it must be determined whether they were acting in a joint criminal enterprise (JCE).

If a JCE is established, each defendant has primary liability (Osland; Hawi). The prosecution need not prove the commission of the offence by the person who carried out the actus reus of the offence; whether that person is guilty of a crime or a lesser crime is irrelevant (e.g. not guilty due to mental illness or age) (Hawi; Likiardopoulos). The Crown must prove:

1. There was an understanding or arrangement amounting to an agreement to commit a crime
2. One of the parties to that agreement did, or the parties did between them, all the things that are necessary to constitute the crime
3. The accused participated in the commission of the crime (unclear whether this requires presence)

Actus reus

Agreement between the parties

An agreement can often be difficult to prove directly; it need not be express and the Crown may rely on evidence that infers the existence of an agreement (McAuliffe)

- Agreement does not have to be reduced to writing or require formality, it is usually an inferred 'mutuality of assistance' (Kanaan at [226])
- Understanding need not be express (Osland per McHugh J)
- It can be an unspoken understanding or arrangement amounting to an agreement (Tangye)
- It can arise spontaneously during the unfolding of events (Chishimba at [223]), however this can be difficult to prove (Hawi) and depends on the facts (Wellgreen)
 - Mere presence without more is not sufficient: Chishimba majority: group of men on floor in room where sexual assault occurred not sufficient evidence of encouragement as they might have been asleep or drunk