

CRIMINAL OFFENCES

Topic 4 – Homicide

s 18 *Crimes Act* – 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.

(1) Murder

<i>R v SW and BW</i> [2009] <u>*Concerns murder by omission</u>	
Facts	○ Mother of deceased 7 year old child was convicted of murder, father of manslaughter, for breaching DOC imposed on them as parents to provide adequate nourishment and medical attention ○ Child died from chronic malnourishment caused by profound neglect ○ Mother sentenced to life imprisonment – jury indicated their verdict involved an acceptance that the mother fully realized the probability of her daughter dying and deliberately <u>omitted</u> to do anything about it (mens rea = reckless indifference to human life)
Decision	Held conviction was upheld by CCA.

ACTUS REUS 1 – (VOLUNTARY) ACT OR OMISSION CAUSING DEATH:

<i>Koani v The Queen</i> (2017) <u>*Importance of identifying the precise act/omission where there are multiple</u>	
Facts	○ Vic killed by single gunshot fired from shot gun accused was holding ○ Accused pleaded he was not guilty of murder, but of manslaughter ○ Prosecution argued accused discharged the gun deliberately in a fit of rage intending to kill her; also ran alternative case that if accused did not deliberately let gun off, he was still guilty of murder as the accused failed to take reasonable care in managing the gun, plus at the time he had intention to kill/cause GBH
Issues	1. Was it an <u>error of law</u> leaving the alternative case for the jury's consideration?
Decision	Held appeal allowed as it was an error of law to leave the prosecution's alternative case for the consideration of the jury.
Reasoning	Elements of the offence of murder under the QLD Criminal Code require the prosecution to prove that the unlawful killing was caused by an act or omission of the accused that was done or omitted to be done with the intention thereby of causing death or some grievous bodily harm to some other person.

<i>Ryan v R (1967)</i>	
Reasoning	<u>Barwick CJ:</u> ‘The earliest act of the applicant which in my opinion, could have been selected by the jury as the act causing death was the presentation of the gun towards the back of the deceased after...’ ‘But the choice of the act causing death is not for the presiding judge... it is essentially a matter for the jury under proper direction.’

<i>R v Smith [1959]</i>	
Facts	○ S, private soldier, charged with murder by stabbing of another soldier ○ Immediately after, whole company was put on parade and the soldiers would be kept there until they had learned who was involved ○ At trial, the judge admitted into evidence a statement from S confessing to the stabbing + a subsequent confession made the following day to the Special Investigations Branch ○ When taking vic to the hospital, he was dropped twice and shown to be given incorrect treatment ○ S convicted but appealed on grounds that confessions were wrongly admitted, and the court was not properly directed as to causation
Issues	1. Was there a proper direction as to causation
Decision	Held: conviction upheld.
Reasoning	‘... if what happened was a natural, probable and foreseeable consequence of what was done, anything coming in between was not truly a novus actus interveniens... even the wrongful act of a third party... will not break the chain of causation.’ ‘it seems to the court that if at the time of death the original wound is still an operating and a substantial cause, then the death can properly be said to be the result of the wound, albeit that some other cause of death is also operating... putting it another way, <u>only if the second cause is so overwhelming as to make the original wound merely part of the history</u> can it be said that the death does not flow from the wound.’

MENS REA 1/2 – INTENTION TO KILL/ INTENTION TO CAUSE GBH:

<i>Zaburoni v R (2016)</i>	
Facts	○ Z knew he was HIV positive but regularly had unprotected sex with his girlfriend; virus then passed on to her ○ Z charged with intentionally causing GBH; pleaded guilty to lesser offence of unlawfully causing GBH but still convicted of intentional ○ Appealed to HC that the CoA had conflated recklessness and intent
Issues	1. Was intent established?
Decision	Held evidence at trial not sufficient to support conviction of <u>intentionally</u> causing GBH.
Reasoning	‘Foresight of risk of harm is distinct in law from the intention to produce that harm.’ ‘A rational inference open on the evidence is that the appellant engaged in regular unprotected sexual intercourse with the complainant because it

	enhanced his sexual pleasure and he was reckless of the risk of transmitting HIV to her.’ ‘Where the accused is aware that... his or her conduct will certainly produce a particular result, the inference that the accused intended, by engaging in that conduct, to produce that particular result is compelling.’
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<i>Matthews v R</i> [2014] <u>*What evidence might assist in inferring that the accused had an intention to kill/inflict GBH?</u>	
Facts	○ Fight between M and vic; M punched vic heavily in the face or head ○ Vic fell back and probably hit his head on the iron railing of a pedestrian fence before falling to the ground ○ Unknown to all (including vic) that he had an aneurysm in his brain which burst upon one of these impacts – probably result of the punch ○ Caused an immediate and severe brain hemorrhage; died after 3 days ○ Crown evidence relied on eye witness who was friends with vic; said M was aggressor at all times, had attacked vic from behind and during the course of the fight said ‘I will kill you’; after vic fell back M also stomped on his head about 6 times
Issues	1. Did M had the requisite intention for murder?
Decision	Held details of the witness’ evidence was inconsistent with the medical evidence – murder conviction quashed, new trial for manslaughter ordered.
Reasoning	‘The necessary intent the Crown sought to infer from the evidence was not an intention to kill, but rather an intention to inflict GBH... no evidence that the applicant ever admitted to having the necessary intent after the event, in his evidence he denied having any such intention.’ ‘The detail of that evidence [stomping on the head] was inconsistent with the medical evidence and almost certainly wrong... On that state of evidence, I am not persuaded beyond a reasonable doubt that the applicant had the necessary intent to kill or inflict GBH on the deceased.’

<i>R v Baden-Clay</i> (2016) <u>*Post-offence conduct can provide evidence accused intended to achieve a particular result</u>	
Facts	○ B charged with murder of his wife; body found under bridge on river bank; due to level of decomposition the cause of death was unknown ○ Crown’s case was circumstantial – B in sexual affair and told woman he would leave his wife; although killing not premeditated B was in altercation with his wife in which he killed her with the intention of doing so or of causing her GBH ○ Successfully appealed to CoA; Crown appealed to HC
Issues	1. Was the jury’s verdict unreasonable?
Decision	HC overturned CoA decision and held it <u>was reasonable</u> for the jury to infer, based on all available circumstantial evidence that B intended to kill his wife.
Reasoning	It was open to the jury to find that B’s post-offence concealments and lies, in particular the affair and the disposal of his wife’s body was not neutral but spoke to B’s intention to kill his wife.

<i>R v Solomon</i> [1980] <u>*Probable vs possible</u>	
Decision/ Reasoning	‘... where a direction of reckless indifference to human life is required by the facts, I think it would be far preferable to use the words indifference to human life alone...’ ‘I am of the opinion that there must be evidence which, on a practical basis, justified the jury being invited to consider murder based on ‘reckless indifference to human life’, not merely reckless indifference to whether serious harm might be caused.’ ‘s 18 departs from the common law in that it requires <u>foresight of the probability of death</u>; foresight of the probability of GBH is not enough.’

MENS REA 3 – RECKLESS INDIFFERENCE:

<i>Pemble v The Queen</i> (1971)	
Facts	○ P convicted of murder after shooting vic; claimed he did not know rifle was loaded and only intended to frighten vic ○ Pointed rifle in the air, then stumbled and it discharged, P says he had no intent to hurt the vic; defence went for manslaughter (not acquittal) ○ Judge instructed jury that ‘it is a matter for you to decide whether you think this accused is <u>guilty of murder</u>, or something less’
Issues	1. Was the jury properly directed in relation to ‘reckless indifference’?
Decision	Held that the direction to the jury was inadequate.
Reasoning	Did not make clear that before a killing with reckless indifference could constitute murder, the recklessness must involve a foresight of or advertence to the probability/possibility of death or GBH resulting. ‘The difference between murder and manslaughter is not to be found in the degree of carelessness exhibited; the critical difference relates to the state of mind with which the fatal act is done.’

<i>Crabbe v R</i> (1985)	
Facts	○ C drove a truck to Uluru; went drinking and got drunk, then ejected from crowded bar ○ C came back and drove his truck into the bar, killing 5 and injuring 1 ○ Judge directed jury: ‘he is guilty of murder if you’re satisfied BRD that he <u>foresaw the possibility</u> that there might be people in the bar, but didn’t take any step... to find out whether there were any people there or not, before he... drove the vehicle in’ ○ C argued that probability, <u>not possibility</u> is the test for recklessness
Issues	1. Should the test for reckless indifference be ‘ <u>probability</u> ’ or ‘ <u>possibility</u> ’?
Decision	Held there was no evidence C had deliberately refrained from finding out whether anyone was in the bar; and that foresight of ‘possibility’ was a material misdirection.

Reasoning	‘The conclusion that a person is guilty of murder if he commits a fatal act knowing it will <u>probably</u> cause death or GBH but is <u>not guilty of murder</u> if he knew his act might <u>possibly</u> cause death or GBH... is sound in principle.’ ‘... if no statutory provision affects the position, that a person who, without lawful justification or excuse, does an act knowing that it is <u>probable</u> that death or GBH will result, is guilty of murder... <u>it is not enough that he does the act knowing it is possible but not likely that death or GBH might result.</u>’
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CAUSATION:

<i>Royall v R (1991)</i> <u>*Causation – novus actus interveniens (act/omission of the deceased; self-preservation/ fright cases)</u>	
Facts	○ 3 different versions of the facts – R and vic got into fight, vic locked herself in the toilet, R forced his way in and vic fell out the window ○ Different accounts on whether she (1) jumped out in fear of her life, (2) was pushed out, or (3) fell out when getting up from an attack
Issues	1. Was the chain of causation broken? Can the conduct of R leading to the vic’s death make him criminally responsible for the final step taken by the vic?
Decision	Held no break in the chain of causation as the fear imparted in vic caused her to jump out the window, making R’s acts the operating and substantial cause of the death. Mens rea for murder also continued while he was trying to knock down the door, from the assault in the living room
Reasoning	ESTABLISHED 4 TESTS FOR CAUSATION: (1) Operating and substantial cause test (**preferred test) (2) Common sense test (3) Reasonable foreseeability test (not ideal test; try not to use) (4) Natural consequences test HC agreed that in fright/self-preservation cases: ○ Judges should avoid references to reasonable foresight when directing juries on causation; and ○ If the deceased’s response, or mode of escape, was <u>unreasonable</u>, the chain of causation <u>will be broken</u>

<i>R v Evans; Gardiner v R (1976)</i> <u>*Causation – novus actus interveniens (third parties)</u>	
Facts	○ Vic stabbed in the stomach by E and G whilst they were all prisoners ○ Operation performed successfully and vic resumed healthy life ○ A year later, vic suffers abdominal pain and vomiting; received medical treatment but died a week later ○ Autopsy showed cause of death was complication after operation; quite common and could have been rectified with further operation
Issues	1. Was it for the jury to decide whether the stabbing <u>caused</u> the death?
Decision	Held it <u>was</u> for the jury to decide whether the stabbing caused the death.
Reasoning	‘The issue of the cause of death in a trial for either murder or manslaughter is <u>one of fact for the jury to decide.</u> ’

<i>R v Cheshire</i> [1991] <u>* Causation – novus actus interveniens (third parties; medical negligence)</u>	
Facts	○ C shot vic during argument in a shop; taken to hospital and underwent surgery; developed respiratory problems; improved for a bit but then deteriorated and died; cause of death was narrowing near the scar ○ R charged with murder; R argued cause of death was failure by hospital to recognise reason for vic's breathlessness and the severe respiratory obstruction ○ R convicted of murder; R appealed decision
Issues	1. Had the chain of causation been broken?
Decision	Held chain of causation not broken; appeal dismissed.
Reasoning	'It is not the function of the jury to evaluate competing causes or to choose which is dominant provided they are <u>satisfied that the defendant's acts can fairly be said to have made a significant contribution to the victim's death.</u> '

<i>Hallett v R</i> [1969] <u>*Causation – novus actus interveniens (acts of nature)</u>	
Facts	○ Homophobic killing after sexual advances; occurred on the beach ○ Vic had been strangled by H but didn't actually die – was unconscious ○ H dragged vic away from tidal range but still drowned in shallow water while unconscious
Issues	1. Can series of acts consciously performed by H be so connected to the death that they must be regarded as having a sufficiently substantial causal effect, without interruption by some other event?
Decision	Held chain of causation <u>not</u> broken by the vic's drowning.
Reasoning	'... if at the time of death <u>the original wound was still an operating cause and a substantial cause the death could be said to be the result of this, even if some other cause, such as the action of the water, was still operating</u> and that only if it could be said that the original violence was merely the setting in which the action of the sea operated it could be said that the death did not result from that violence.' *Note: only <u>extraordinary acts of nature</u> can be considered a novus actus interveniens – e.g. an earthquake – normal operation of natural events such as weather patterns <u>cannot</u> be a novus actus interveniens

<i>R v Blaue</i> [1975] <u>*Causation – novus actus interveniens (act/omission of the deceased – refusing medical treatment)</u>	
Facts	○ B stabs 18 year old woman with knife, penetrating her lung ○ Taken to hospital and told she needs a blood transfusion and surgery to save her life; refused transfusion as she was Jehovah's witness ○ Died the next day due to bleeding into pleural cavity – would not have been fatal if she had accepted medical treatment when advised to ○ B convicted of manslaughter on grounds of diminished responsibility
Issues	1. Did refusal of blood transfusion break the chain of causation between the stabbing and the death?

Decision	Held <u>no</u> the chain of causation was not broken, as the loss of blood as a result of the stab wounds was the substantial cause of death.
Reasoning	The criminal law does not require the victim to mitigate her injuries, and since an assailant was not entitled to claim that the victim's refusal of medical treatment because of her religious beliefs was unreasonable, the jury were entitled to find that the stab wounds were an operative or substantial cause of the death.

<i>R v Singapore</i> [1975] <u>*Causation – novus actus interveniens (act/omission of the deceased – refusing medical treatment)</u>	
Facts	○ Brawl with several people including B; vic received injuries to the head and was treated at hospital ○ Vic left hospital after treatment against doctor advice; died next day from brain damage caused by his injuries ○ B and 2 others charged with murder; other 2 acquitted but B convicted ○ B appealed on grounds that vic leaving hospital broke the chain of causation, and that the death may have been avoided had he stayed
Issues	1. Did vic leaving the hospital break the chain of causation?
Decision	Held <u>no</u> , chain of causation had not been broken by vic's voluntary departure from the hospital as B's act causing the injuries did not cease to be the causative act.
Reasoning	Cited <i>Smith</i> : '...if at the time of death the original wound is still an operating cause and a substantial cause, then the death can properly be said to be the result of the wound, albeit that some other cause of death is also operating.'

<i>McAuliffe v R</i> (1995) <u>*Fright/Self-Preservation case</u>	
Decision/ Reasoning	'... to make it a <u>reasonable consequence</u> that the victim would seek to escape, then the fact that death occurs in the course of that escape does not break the chain of causation so long as the response of the victim is <u>reasonable or proportionate</u> having regard to the nature of the conduct of the accused or for which the accused is responsible, and the fear it is likely to have provoked.'

<i>Rik</i> [2004]	
Facts	○ After being threatened by R, vic jumps on railway platform and made way towards other side of the tracks ○ Despite warning horn from incoming train, vic continues to cross rather than going back; gets hit by train and dies ○ R convicted of manslaughter; appealed on grounds there were various alternate escape routes available to the vic
Issues	1. Were there alternative routes of escape, and did jumping on the tracks break the chain of causation?
Decision	Held chain of causation <u>not</u> broken; conviction upheld.
Reasoning	Using 'reasonable person' test – 'it was open to the jury to conclude that the deceased's response was reasonable, as a person in fear for his safety making a quick decision as to what to do.'

<i>R v Pagett (1983)</i>	
Facts	○ Third party killed by the police who are in pursuit of P ○ P charged with murder
Issues	1. Can P be held liable for the death? Was there adequate causation?
Decision	Held <u>yes</u> there was causation.
Reasoning	‘The basic proposition relating to causation in homicide is that an accused’s conduct, whether by act or omission, must contribute significantly to the death of the victim.’ ‘...if the accused’s conduct is a <u>substantial or significant cause of death</u>, that will be sufficient, given the requisite intent, to sustain a conviction for murder.

TEMPORAL CO-INCIDENCE RULE:

<i>Thabo Meli v R [1954]</i>	
Facts	○ Two men brought another into a hut and got him intoxicated, with the intent to kill him ○ Struck him over the head but didn’t kill him; threw him over a cliff to make it look like it was an accident, thinking he was already dead
Issues	1. Can the two acts be separated? – i.e. can they be guilty of murder where there has not been co-incidence between AR and MR?
Decision	Held <u>no</u> , it was not possible to separate the acts.
Reasoning	‘There is no doubt the accused set out to do all these acts in order to achieve their plan... it is much too refined a ground of judgment to say that because they were under a misapprehension at one stage and thought their guilty purpose had been achieved before it was, that they are to escape the penalties of law.’

<i>Meyers v R (1997)</i> <u>*If there is not co-incidence, murder is ruled out</u>	
Facts	○ Couple in dispute – domestic violence relationship; police arrive finding woman unresponsive ○ M claims he didn’t intend to cause her death, he just pushed her out of the way to get to the phone and then she died ○ But, he had previously been punching her and intending to cause harm ○ Held in trial that he had intention to cause GBH while punching her, but not when he pushed her away from the phone, meaning there is possibly a break in causation and thus no co-incidence
Issues	1. Was there co-incidence between mens rea, and the act causing death?
Decision	HC did not accept version of events, but held that if the jury had accepted M’s version of events, the defendant only would have been guilty of manslaughter, even if he had the mens rea for murder during his earlier assaults.
Reasoning	‘ <u>Act and intent must coincide</u> . If the circumstances of a fatal altercation are such that the prosecution can prove that some acts were done with the necessary intent <u>but cannot prove the acts were done with that intent</u> , <u>no conviction for murder can be returned, unless</u> there is evidence on which the jury can <u>reasonably find that the act which caused the death was one of those done with the necessary intent</u> .’

<i>Fagan v Commissioner of Police</i> [1969]	
Facts	○ F drove over police officer's foot by accident ○ Officer asked him to get off, but F refused
Issues	1. Was there co-incidence?
Decision	Held his refusal to get off became an <u>omission</u> , making him guilty of assault.
Reasoning	Actus reus was <i>stretched</i> here to get a conviction.

(2) Manslaughter under s 18 (1)(b) *Crimes Act*

Occurs where the accused does not have the necessary mens rea for murder under s 18

(1)(a). Categories of manslaughter outlined in *Lane v The Queen* (2013):

- (1) Manslaughter by unlawful and dangerous act [act only, omission not possible]
- (2) Manslaughter by criminal negligence [act or omission]

(a) Unlawful and Dangerous Act Manslaughter

ACTUS REUS 1 – 'UNLAWFUL ACT':

<i>Wilson</i> [1992]	
Facts	○ W hit deceased in the face; fell down and hit his head on the ground ○ W's accomplice then went through vic's pockets and 'smashed' his head on the concrete; vic died from brain damage ○ Crown argued W's punch was the most likely cause of death ○ W convicted of manslaughter, but accomplice acquitted; W appealed
Issues	1. Was W's act in punching the vic 'dangerous'? 2. Was W's act enough that it appreciated the risk of <u>some</u> injury to the vic, or did he need to appreciate the risk of <u>really serious injury</u>?
Decision	Held that must be appreciable risk of <u>serious injury</u> , a risk of some harm is not enough. Established test for UDAM, referring to <i>R v Holzer</i> . Majority also held that 'battery manslaughter' does <u>not</u> exist in Australia.
Reasoning	Dangerousness test from <i>Holzer</i>: whether a <u>reasonable person</u> in the accused's position knew they were creating a risk to the victim and others around. Characteristics of the '<u>reasonable person</u>' for UDAM: ○ Physical features of situation and physical actions of the def – 'when a reasonable person is placed in the position of the accused' (<i>R v Wills</i>), i.e. what did the accused <u>know</u> and what would the reasonable person have done with the <u>same knowledge in the same position</u> ○ Reasonable person taken to be the same age, for maturity reasons (<i>DPP v Ty</i>) ○ Reasonable person is sober (s 428F <i>Crimes Act</i>) '<u>Unlawfulness</u>' of the accused's act ○ Must be contrary to criminal law (<i>Franklin, Pullman, Lowe, Lane</i>) ○ Base offence must be established first (<i>Downes, Lamb, Pemble</i>) ○ <i>Lamb</i> says that 'unlawful' = a breach of criminal law