- Most compelling arguments of both sides…
- Because of ABC, the jury is likely to find…
    - Although the jury might consider…but this is not decisive

Preliminary

Presumption of Innocence

The accused is presumed innocent and must prove nothing.

- At common law, a person charged with a criminal offence has the right to be presumed innocent until proved guilty according to law (Woolmington v DPP [1935] AC 462; Howe v R (1980) 32 ALR 478).
- The presumption is not that the accused is not guilty. It is that the accused is innocent (R v Palmer (1992) 64 A Crim R 1).

Onus of Proof

Offences

The burden to prove each element of the offence rests entirely on the prosecution.

- Except for limited statutory exceptions, in criminal trials the onus of proving the accused's guilt always lies on the prosecution. Accused people do not need to prove their innocence (Woolmington v DPP [1935] AC 462; He Kaw Teh v R (1985) 157 CLR 523; Chugg v Pacific Dunlop Ltd (1990) 170 CLR 249).
- If a statute is silent as to who bears the onus of proving an offence, it is presumed that it will be the prosecution (Chugg v Pacific Dunlop Ltd (1990) 170 CLR 249; Stingel v R (1990) 171 CLR 312; Czerwinski v Hayes (1987) 47 SASR 44)

Defences

- Unless the onus is placed on the accused by statute, the prosecution will also bear the onus of disproving any defences that arise as issues in a trial (R v Youssef (1990) 59 A Crim R 1; Zecevic v DPP (1987) 162 CLR 645).
- The prosecution only needs to disprove a defence if there is evidence, or other relevant material, which gives rise to that defence (R v Lobell [1957] 1 QB 547; Bullard v R [1957] AC 635; R v Howe (1958) 100 CLR 448; Bratty v AG for Northern Ireland [1963] AC 386; Spautz v Williams [1983] 2 NSWLR 506).

Standard of Proof

- If the onus of proof is on the prosecution, the court is not to find the prosecution case proved unless it is satisfied that it has been proved beyond reasonable doubt (Evidence Act 2008 s 141(1)).
    - The prosecution must prove all of the elements of the offence beyond reasonable doubt (Thomas v R (1960) 102 CLR 584; La Fontaine v R (1976) 136 CLR 62; Van Leeuwen v R (1981) 55 ALJR 726; Chamberlain v R (No 2) (1984) 153 CLR 521; Hoch v R (1988) 165 CLR 292; R v Falconer (1990) 171 CLR 30).
    - The prosecution must also disprove beyond reasonable doubt any defences that are raised as issues in a trial (R v Youssef (1990) 59 A Crim R 1; Zecevic v DPP (1987) 162 CLR 645).
    - "Beyond reasonable doubt" is a composite expression, not intended to be broken into its component parts or analysed. It is designed to convey an accurate impression of the high standard of proof that the prosecution

must satisfy. It is not possible to define each of the three words separately, because the phrase means more than the mere sum of its parts (R v Pahuja (1987) 49 SASR 191 (Cox J); R v Chatzidimitriou (2000) 1 VR 493 (Callaway JA)).
    - The jury itself has the task of determining what a reasonable doubt is, according to standards which the jurors adopt (R v Chatzidimitriou (2000) 1 VR 493).
    - A reasonable doubt is one that a jury which is properly aware of its responsibilities (i.e. which heeds the judge's directions, carefully considers the evidence, and eschews fanciful or unreal possibilities) is prepared to entertain at the end of its deliberations. The jury has the task of determining what is reasonable in the circumstances (Green v R (1971) 126 CLR 28; R v Pahuja (1987) 49 SASR 191; R v Neilan [1992] 1 VR 57; R v Chatzidimitriou (2000) 1 VR 493).
    - Although in England the term "beyond reasonable doubt" is seen to be synonymous with the term "sure" (see, e.g. R v Hepworth and Fearnley [1955] 2 QB 600; R v Onufrejczyk [1955] 1 QB 388), this is not the case in Australia (Thomas v R (1960) 102 CLR 584; Dawson v R (1961) 106 CLR 1; R v Punj [2002] QCA 333; R v Cavkic (No 2) (2009) 28 VR 341; Benbrika v R (2010) 29 VR 593).
    - Proof "beyond reasonable doubt" cannot be expressed mathematically (e.g. as a 99% certainty). Such an approach incorrectly implies that the jury should disregard any doubts that exist once the arbitrarily fixed percentage or rate is reached (R v Cavkic (2005) 12 VR 136).
- If the onus of proof is on the accused, the court is to find the case of an accused proved if it is satisfied that the case has been proved on the balance of probabilities (Evidence Act 2008 s 141(2)).
- Section 141 preserves the position at common law (see, e.g. Woolmington v DPP [1935] AC 462; Thomas v R (1960) 102 CLR 584; La Fontaine v R (1976) 136 CLR 625; Chamberlain v R (No 2) (1984) 153 CLR 521; Hoch v R (1988) 165 CLR 292; R v Falconer (1990) 171 CLR 30).

Legal Elements of an Offence

Voluntariness (Evidentiary presumption)

- The existence of a voluntary act or omission is an essential element of a crime. The accused must not be convicted for an act or omission which was independent of his or her will (Ryan v R (1967) 121 CLR 205; R v O'Connor (1979) 146 CLR 64; R v Falconer (1990) 171 CLR 30; R v Marijancevic (2009) 22 VR 576).
    - The evidentiary presumption of voluntariness reflects the ordinary and universal experience that a person's will ordinarily accompanies his or her actions (R v Falconer (1990) 171 CLR 30; [1990] HCA 49).
    - Where the relevant fault element is negligence, the negligent act or omission must have been committed voluntarily (R v Martin (1983) 9 A Crim R 376; R v Tajber (1986) 13 FCR 524).
    - Thus, if the evidentiary presumption of voluntariness is displaced, the prosecution must prove, beyond reasonable doubt, that the relevant act or omission was voluntary (Ryan v R (1967) 121 CLR 205; R v O'Connor (1979)

146 CLR 64; R v Falconer (1990) 171 CLR 30; R v Marijancevic (2009) 22 VR 576).

Act

- An act is committed voluntarily if it is subject to the control and direction of the accused's will (Ryan v R (1967) 121 CLR 205; R v O'Connor (1979) 146 CLR 64; R v Falconer (1990) 171 CLR 30).
- For an act to be voluntary, the accused does not need to have intended to attain the result caused by doing that act. It is sufficient that he or she was conscious of the nature of the act committed, and chose to do an act of that nature (R v Falconer (1990) 171 CLR 30; R v Williamson (1996) 67 SASR 428).
- A person who is not conscious or aware of what he or she is doing acts involuntarily. However, the key issue is the lack of the exercise of will, not the lack of consciousness or knowledge (Ryan v R (1967) 121 CLR 205 (Barwick CJ). See also R v Schaeffer (2005) 13 VR 337).
- The accused does not need to have appreciated the wrongfulness of his or her conduct for it to have been voluntary. However, the level of the accused's awareness and understanding of his or her actions is a factor to be taken into account in determining whether he or she acted voluntarily (R v Morrison (2007) 171 A Crim R 361).
- The mere fact that the accused has made a credible assertion of a lack of memory is not sufficient to displace the presumption (R v O'Connor (1980) 146 CLR 64 (Barwick CJ)).
    - The fact that a person's thought processes were affected by a mental illness does not mean that he or she acted involuntarily. There is a distinction between an unwilled act and a willed act that is the product of a diseased mind (Ryan v R (1967) 121 CLR 205 (Barwick CJ); R v Falconer (1990) 171 CLR 30. See also R v Harm (1975) 13 SASR 84).
    - Acts that may raise issues of voluntariness: Involuntary muscular movements, such as spasms, convulsions and reflex actions; Acts performed whilst asleep; Accidental actions; Acts performed in a state of automatism; Acts performed in a state of gross intoxication.
- Where an offence requires proof that the accused's actions caused a particular result, it is the causal act that must be voluntary (Ryan v R (1967) 121 CLR 205; Kolian v R (1968) 119 CLR 47; R v Katarzynski [2005] NSWCCA 72).

Knowledge of Circumstances

- In most cases, an act may be voluntary even if the accused is unaware of fundamental facts that will determine his or her culpability. Knowledge of the circumstances in which an act is committed is generally a component of intention not volition (R v O'Connor (1979) 146 CLR 64).
- However, some acts require a certain level of knowledge. For example, if it is held that the act that must have been voluntary in a particular case was stabbing the victim, this requirement will only be met if the accused knew there was a knife in his or her hand (R v Williamson (1996) 67 SASR 428; R v Winter [2006] VSCA 144. See also Kolian v R (1968) 119 CLR 47; Duffy v R (1981) WAR 72).

Omission

- Although it is often stated that a person can only be held criminally responsible for voluntary omissions (see, e.g. Ryan v R (1967) 121 CLR 205; R v Falconer (1990)

171 CLR 30), it is not clear when an omission should be considered to be involuntary.

Actus Reus

- The actus reus element will be made out. This because the accused [insert relevant bad action out]'. Identify the relevant action.

Mens Rea

- Means a number of quite different things in relation to different crimes (Brennan J in He Kaw Teh v R)
- **Subjective**
    - **Intention**
        - Must prove that the accused (1) actually intended to bring about the outcome that they did or (2) actually had knowledge that something would certainly occur
        - Motive irrelevant
    - **Recklessness**
        - In Victoria, an accused is said to have been reckless if they acted in the knowledge that a particular harmful consequence would probably result from their conduct, but they decided to continue their actions regardless of that consequence (DPP Reference No 1 of 2019 [2021] HCA 26; DPP Reference No 1 of 2019 [2020] VSCA 181; R v Campbell [1997] 2 VR 585).
        - Recklessness requires foresight on the part of the accused (of the probable consequences of his or her actions) and indifference as to whether or not those consequences occur (R v Nuri [1990] VR 641).
        - The word "probable" means likely to happen (R v Crabbe (1985) 156 CLR 464).
- **Objective: Criminal Negligence**
    - Must prove that the accused fell so short of the standard of care a reasonable person would have exercised, in circumstances where there was such a high risk of harm occurring, that their conduct warrants criminal punishment (Nydam v R)

Causation

- For an accused's conduct to have "caused" a result, it must have "contributed significantly" to that result, or been a "substantial and operating cause" of it (Royall v R (1991) 172 CLR 378; R v Rudebeck [1999] VSCA 155; R v Stein (2007) 18 VR 376; R v Withers [2009] VSCA 306; R v Aidid (2010) 25 VR 593).
- The act must be one that an ordinary person would hold, as a matter of common sense, to be a cause of the result. The mere fact that the accused's conduct contributed causally to a result, or was a necessary cause of the result, is not sufficient (Royall v R (1991) 172 CLR 378).
- The accused may be liable for "causing" a result even if his or her conduct was not the direct or immediate cause of that result (Royall v R (1991) 172 CLR 378; R v Withers [2009] VSCA 306; R v Aidid (2010) 25 VR 593).

- The accused does not need to be the sole cause of the result. A person can be criminally liable for something that has multiple causes, even if he or she is not responsible for all of those causes (Royall v R (1991) 172 CLR 378; R v Stein (2007) 18 VR 376; R v Withers [2009] VSCA 306; R v Aidid (2010) 25 VR 593).
- The accused can "cause" a result by act or omission (Royall v R (1991) 172 CLR 378).
- Where there are several possibly causal acts in close succession, and it may not be possible to determine which act caused the relevant result, it is appropriate that the prosecution be required to prove that all potential causal acts were voluntary, accompanied by the relevant intention and in the absence of any relevant defences (R v Shumski (Rulings 1-3) [2024] VSC 828, [37]–[41]).

Without any Legal Excuse/defence

Non-fatal/non-sexual offences

- **No 'act'/'circumstance' element to these offences**
- **Proof of an assault is not required, only causing an injury**

Crimes Act 1958 Maximum Sentence

	Serious Injury in circumstances of Gross Violence	**Serious Injury**	**Injury**
Intentionally	S 15A (20 years)	S 16 (20 years)	S 18 (5 years)
Recklessly	S 15B (15 years)	S 17 (15 years)	S 18 (5 years)
Negligently		S 24 (10 years)	

To secure a conviction, the Prosecution must prove four to five elements beyond reasonable doubt

1. Consequences: The complainant suffered a serious injury/injury
2. Willed Act/Causation: The accused caused the complainant's serious injury/injury
3. Mens Rea:
    - The accused was reckless / intentional /negligent about causing serious injury;
4. Circumstances (ONLY ss 15A, 15B): The injury was caused in circumstances of 'gross violence'
5. Defences: The accused acted without lawful justification or excuse

Voluntariness/Contemporaneity

Voluntariness: See above

Contemporaneity

- To constitute a crime, the actus reus and mens rea must exist at the same time.
- They might exist simultaneously from the beginning of the conduct, or the accused may develop the relevant mens rea while doing a continuing act (Thabo Meli; Fagan).

Consequence

Serious Injury: ss 15A, 15B, 16, 17

Serious injury is (s 15):

(a) an injury (including the cumulative effect of more than one injury) that—

- **(i) endangers life; or (ii) is substantial and protracted; or**
- **Endanger life**
    - Not the actual consequence for the victim, but assess the nature of injury 'at the time sustained' (Sarjeant)
        - An injury that endangers life directs attention to the danger created by the injury at the time it is sustained; it is the character of the injury and its capacity to endanger life which must be considered.
    - The fact that medical treatment may ameliorate the consequences cannot deny or undo the seriousness of the injury (Sarjeant; Garratt)
        - Sarjeant: scalp bleeding, ambulance comes & stops bleeding & he recovers → w/o medical help he would've died → serious
- **Substantial and protected**
    - Needs enough time to have lapsed, ongoing

(b) 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;

- [eg, when a person punches a pregnant woman and this damages the foetus]

Injury: s 18

- Injury is an ordinary word and is a matter for the jury to decide.

Injury: physical injury or harm to mental health (s 15)

- **Physical**: 'unconsciousness, disfigurement, **substantial pain**, infection with a disease and an impairment of bodily function' (s 15)
    - Includes infection with a disease
    - Explanatory Notes: minor injuries, abrasions qualify
    - Not just: fleeting disorientation, just crying out in pain
- **Harm to mental health**
    - Defined to include 'psychological harm'
    - But NOT: but does not include an emotional reaction such as distress, grief, fear or anger unless it results in psychological harm
        - R V Chan-Fook: victim felt 'abused' 'humiliated'

Causation: See above

- The injury does not need to have been caused by the accused personally assaulting the complainant. This element will be satisfied even if s/he caused the injury indirectly (R v Salisbury [1976] VR 452).

Mens Rea (Intention/Reckless)

- Take the victim as they are found (egg-shell skull principle from torts) (R v Blaue)
    - R v Blaue: accused stabbed victim who died partly due to her refusal or life-saving blood transfusion on spiritual grounds.
- Medical intervention does take away from something being a serious injury (Garratt; Sergeant)