PART II – A LAW OF HOMICIDE

I *Introduction*

A *History*

Homicide is the 'exemplary event' for the development of general principles of criminal law. However, the institutional context in which murder took and continues to take shape was (and is) also changing. Homicide and murder (which was originally the name for a particular common law penalty) have never meant the same thing throughout history.

1 *Pre-modern homicide*

In the 14th century, the law of homicide primarily operated to protect foreign nobles living in England. The law enabled killings of French (Norman) nobles by English natives to be prosecuted.

This prohibition was associated with a penalty called 'merdrum', which was a legal name for the fine that attached to a community that would not give up the name of the killer. In this way, significant financial pressure to report homicide was exercised over village communities.

As a consequence, murder referred to a secret – a penalty – for an act-based crime (killing). The focus was thus upon the act itself and the circumstance in which it took place (eg, day or night, blade or pitchfork). Murder was just *one* form of homicide, the word for which is derived from the Latin *homi* ('man') *cide* ('cutting').

2 *Modern homicide*

After Coke, the consequence (death) became the dominant focus. The requirement of malice aforethought was used as the primary distinguishing factor between murder and manslaughter (which arose out of a series of defences giving rise to a lesser crime). Murder was now a crime to which a mental state applies.

The concept/idea of murder as a secret thing is *still* prevalent in modern criminal practice. Though actions can be seen, the mental state of the accused cannot, and criminal liability *depends* upon this mental state. Determinations of guilt are thus still fundamentally secret.

The problem, then, is that although A's mental state is the primary determinant, it cannot be seen by the court.

3 *Secrecy*

In response, the law developed strategies – ways of addressing the inherent secrecy of A's mental state:

(a) *Definition of intent is kept separate to evidence of intent*

(b) *Intention and motive are different things*
- Note, however, that motive can help prove intent

(c) *Presumptions of intent and inferences of intent*
- Since intent is invisible, the court must engage in logical reasoning
- Both objective exercises

(d) *Division between judge (arbiter of law) and jury (finders of fact)*

- Today, a criminal appeal is usually predicated upon misdirection of the jury by the trial judge
- Can't appeal against decision of the jury
- Very rarely can appeal on a point of fact
- Can only really appeal on a point of law
- Judge's direction to the jury tells a story about the case; collates and presents stories told during the case

In the process of directing a jury, the judge might list the elements of a crime incorrectly, or explain intent or causation incorrectly. The appellant needs to persuade the appellate court that the misdirection caused a miscarriage of justice (and was not simply a minor technical error).

Deliberations of the jury are *secret*; an element of the pre-modern characteristic of 'merdrum' is retained, to the extent that the jury decides how the law (or legal arbiter) comes to know of the accused's conduct.

4 *Nineteenth century homicide*

The 19th century saw the development of new mental states:

Intention (subjective) + negligence (objective) = recklessness

This hybrid mental state was recently (in 1985) introduced as the default category of mens rea in all criminal offences.

In summary, the following paradigm shifts became apparent:

(a) *Focus*
Shifted from the act itself to the mental state with which it was performed

(b) *Onus of proof*
Shifted from the accused having to disprove the fact of killing to the prosecution being required to prove the fact thereof, in addition to malice aforethought

(c) *Jurisprudence*
Shifted from tradition and pedigree to the principled resolution of disputes and unification of outcomes by means of formal reasoning

These three changes chiefly characterise the development of the criminal law during the 19th and early 20th centuries.

5 *Pedigree*

Lord Sankey identifies the following sources of authority for criminal law:

- Textbooks of authority
- Judicial directions to juries

Dixon CJ, a highly respected High Court judge and last of the great black-letter lawyers, uses a historical approach to examine the origins of criminal law. He identifies a strong normative element to the attribution of criminal responsibility.

The mens rea of the accused is 'the very ground of punishment'.[1] The shift towards mens rea as the determinant of liability was characterised by a similar shift in the onus of proving criminal intent to the prosecution.

Older 'and less familiar doctrine' is increasingly being replaced by 'generali[s]ations from principles which appear applicable'.[2]

B *Statistics*

Some salient statistics related to contemporary homicide are listed below:

Gender and ethnicity	**Relationship between accused and victim**	**Location of murder**
• 7:1 (male-to-female) offender ratio • Domestic murders: male offender more likely, female offender/victim more likely • Link between *home* and *gender* • Indigenous/non-Australian born over-represented as accused and victim • People tend kill people of the same origin	• 85% of homicide involves people who know each other • Domestic homicide decreasing	• 65% residential (as distinct from recreational or street) • 25% recreational or street • Statistics suggest murder is a distinctly *private* affair

From these statistics, two dominant categories of offence emerge:

1 *Male->male*
2 *Male->female*

The categories of female->male and female->child are far less prominent.

[1] The Honourable Mr Justice Dixon, 'The Development of the Law of Homicide' [1935] 9 *Australian Law Journal* 64, 68.
[2] Ibid 68.

C *Types of homicide*

The type of homicide for which an accused is liable depends upon the consequence of their conduct and the mental state with which it was performed.

Mens rea		Actus reus	Name of crime	Determination of mental state
Purpose of killing	+	Causing death (the victim needs to die)	Intentional murder	Subjective (express malice/intent)
Purpose of causing grievous bodily harm	+		Intentional murder	
Foresight of killing	+		Reckless murder	
Foresight of grievous bodily harm	+		Reckless murder	
Killing in the course of committing a violent crime	+		Constructive murder by statute	N/A (no intent required)
Killing in the course of arrest	+		Constructive murder by common law	
Danger of killing	+		Unlawful and dangerous act causing manslaughter	Objectively dangerous
Careless of killing	+		Negligent manslaughter	Objective
Purpose of killing	+	Not causing death	Attempted murder	Subjective
Purpose of killing when provoked	+	Causing death	Manslaughter by provocation	

Explanatory notes:

- Reckless murder requires foresight of death
- Manslaughter does not require foresight of death
- Constructive murder does not require intent/malice]

Example: holding a gun at someone 'to scare them', but it goes off, fatally wounding them.

- Clear foresight of death implies reckless murder would be satisfied
- Unlikely to be intent to kill; intent to scare unlikely to qualify as intent to cause grievous bodily harm (so not intentional murder)
- If the gun was produced during a robbery or other violent crime, it could amount to constructive murder
- At the very least, pointing a gun at someone is negligent (and also objectively dangerous)
- If the gunshot wound didn't kill them (but only maimed or injured) liability for attempted murder may still be imposed (but only if there was intent to kill)
- Given that there is no intent to kill, a lesser offence (causing serious bodily harm) may be more appropriate in the event that the victim lives

II *Preliminary Elements*

A *Death*

Two questions need to be answered in the affirmative, though these are in all but the most exceptional cases obvious, and are rarely dealt with explicitly.

1 *Was the victim alive to begin with?*

Life and death are legal categories (eg, foetuses are not alive at law, since an entity needs an independent existence [ie, from its mother] in order to be considered alive, by law).

In order to be alive, the victim must be human. The test for humanness is whether the entity experiences a 'separate and independent existence'. Issues arising out of this legal categorisation of life include:

- Separation of conjoined twins where one must die in order to save the other
- Late-term abortion
- Termination of a foetus dependant upon a machine
- Unplugging a life support machine on which an adult is dependent

In analysing these scenarios, it is important to remember that issues of guilt can *only* be legally resolved by *legal* means; legal responsibility is inevitably informed by moral principles, and the above scenarios involve irreconcilable moral conflict. However, the framework in which attributions of guilt take place is (and, arguably, must be) fundamentally legal.

To combat problems associated with incompatible moral systems, judges appeal to one of the ideals of criminal law (in particular homicide): the sanctity of life (naturally, however, this appeal alone is insufficient, and inevitably a judge will further import his or her own moral values to deal with a novel situation).

2 *Is the victim legally dead?*

Personality is given a biological definition. Life is a legal definition. It is thus possible for a person to be biologically dead but legally alive.

Sophisticated medical technology shifts the meaning of 'life'. Legal problems arise when the image of the person (which liberal philosophy equates with autonomy and consciousness) is challenged by medical technology; for example, when an irreversibly brain-dead human is plugged into a life-support machine. The primary attribute of life (autonomy) is also problematic in the context of euthanasia.

Death is always caused because blood stops flowing and the brain stops functioning (due to lack of oxygen). It is considered biologically irreversible.

***Anthony Bland*:**

Facts:

- Soccer spectator rendered into vegetative state after a stadium stand collapses; entirely dependant on life support; family wish to terminate support
- No cognitive function – in a persistent vegetative state
- No possibility of recovery
- Artificially administered food and antibiotics (to combat secondary infections)

Issue:

- Is the victim dead or alive?
- If the victim is alive, would terminating life-support amount to murder?

Reasoning (per Lord Goff):

- Bland is alive, or 'an example of a living death'
- Fundamental moral principle of criminal law is the sanctity of life
- Because he is in a living death, and despite having to protect the sanctity of the 'living', this is not an absolute principle; it is limited by the principle of self-determination (autonomy, separate and independent existence)
- Lord Goff proposes two alternatives:
    - Act in such a way as to respect the wishes of the patient; or
    - Act in such a way as to act in the best interests of the patient
        - consider quality of life
        - as determined by doctors (or the relevant body of competent and professional opinion)
- Here, no wishes were expressed, and the patient has no interests
- The most that can be done is to *discontinue* life support; the law would not condone killing by overdose of drugs or other intervention; Bland's body must cease function because of starvation
    - Contra administration of morphine to terminally ill patients; administration of drugs often hastens or even results in death
- Doctors should act in the best interests of the patient, but because Bland partakes of a hybrid category of existence ('living death'), he has no interests, and can be allowed to die without being prosecuted for murder

If artificial feeding is withheld from a victim who is unable to live independently of the artificial device, and if, only by virtue of this abnormal dependency, the victim dies, then the accused will not be guilty of homicide because the victim was neither human nor legally 'alive'.

B *Age*

Children under the age of 10 are constitutionally incapable of committing a crime. Children between the ages of 10 and 14 are prima facie considered incapable, but this is rebuttable by the prosecution, who must show that the child had moral knowledge in relation to the wrongfulness of his or her action (*Veneballs & Thompson v Balurer*).

Adult courts are principally punitive, whereas children's courts adopt a rehabilitative regime.

C *Sanity*

Sanity is related to age, in that the insane (like children under 10) are incapable of being criminally responsible. The defence needs to show that, at the time of the killing, the accused was morally insane (psychopathy alleviates criminal responsibility).

Key points:

- Meaning of insanity is primarily legal
- Burden of proof rests upon the defendant to prove insanity *beyond reasonable doubt*
- This standard of proof is difficult to meet
- Proving insanity involves a special procedure, invoked by a plea of 'unfit to plea'

An accused who is acquitted on the basis of insanity will be confined to a psychiatric asylum.

D *Jurisdiction*

Jurisdiction expresses the authority of a court to arbitrate over the location at which a crime was committed.

The old common law saw jurisdiction as being primarily personal; subjects of the King were to be ruled over by the King's law courts. When a crime is inflicted upon a victim, the King's courts have rights of jurisdiction because a crime has, in effect, been committed against the King.

Today, jurisdiction is largely territorial. The 'locus' of the crime must take place in the state/territory in which the accused is being tried.

An arbitrary limit has been placed on the age of an accused, effectively limiting the Court's jurisdiction to those above the age of 10.

Ward v R:

Facts
- A homicide occurred by means of a gun fired across the Murray river such that the bullet was fired in Victoria and the victim was killed in New South Wales

Issue
- The accused was prosecuted in Victoria, and the question arose of whether the court had jurisdiction to determine the issue

Reasoning
- The crime is predicated upon the prohibited consequence (the death), so the place at which the consequence took place is the focus of the jurisdictional enquiry

Decision
- The prohibited consequence of the act of killing (the death) occurred in New South Wales, so a NSW court has jurisdiction to decide the case

To clarify ambiguities between state (and international) jurisdictions, s 9 of the *Crimes Act 1958* (Vic) contains provisions useful in resolving uncertainty. S 9 provides that where the act partially occurs in one jurisdiction, the accused can be prosecuted as though the prohibited outcome occurred entirely in that jurisdiction.

The practical effect of this provision is to render jurisdiction very rarely in dispute. It has been recently applied in a cross-jurisdictional stalking case where the victim was in Canada and was contacted via e-mails sent from Victoria (*DPP v Sutcliffe* [2001] VSC 43).

III *Voluntariness*

A *Formal Analysis*

The act which causes death must be proved by the prosecution to be a voluntary act.

Voluntariness is a concept – abstract and general. As such, its main features warrant definition.

1 *Nature of the act*

- Every act is voluntary; if it is not voluntary, then it is not an act at law
- The deed: every principle of legal liability is predicated by an act
  - Need to determine the identity of the act

2 *Distinction between voluntariness and intent*

- These concepts are not the same (per Barwick CJ in *Ryan*)
- "Bodily movement" (as in, *acts or attributes* of the body/muscles/nervous system) as distinct from the mental *states* (not attributes of the body – rather of the mind) which are *expressed* in the body
- Per Barwick CJ in *Ryan*:
  - A mental state of voluntariness is a will to act (pertains to actions)
  - Intention is the way a will to act is expressed (pertains to consequences)
- However, it has also been noted that this distinction is so fine as to disappear in some cases (*O'Connor*)

Intent relates to knowledge of a **consequence**, while voluntariness refers to the **bodily action** which happens to bring about the consequence. However, there is some overlap.

Thus, in order to prove intent, voluntariness generally needs to be proven.

3 *A formal definition*

Ryan, per Barwick CJ at RY 285-6 (emphasis added):

> *That a crime cannot be committed except by an act or omission of or by the accused is axiomatic. It is basic, in my opinion, that the 'act' of the accused, of which one or more of various elements of the crime of murder as defined must be predicated must be 'willed', a voluntary act which has caused the death charged.* ***It is the act which must be willed, though its consequences may not be intended****. In the ordinary run of cases the voluntary quality of the deed physically related to the accused is not in question … Consequently there has not been any frequent need to express with technically expressed precision the difference between that element of mens rea which relates the will to act to the deed in question and that element which relates to it the general intent with which that will is expressed.*

O'Connor, per Barwick CJ at RY 587:

> *In Ryan's case … I attempted a summary statement of the principle that in all crime, including statutory offences, the act charged must have been done involuntarily, i.e. accompanied by the will to do it. I find no need to qualify what I then wrote.*

O'Connor, per Barwick CJ at RY 586:

> *The distinction between an involuntary act and an unintended act may become fine: an, in some instances, fine perhaps to the point of disappearance. But the none the less, it must, it seems to me, be maintained*

O'Connor, per Barwick CJ at RY 583:

> *an accused in the state of intoxication which has rendered his acts involuntary or precluded the formation of a relevant intent and which has been brought about by the act of another could not be found guilty of any common law offence. What his body had done, he had not done, or what he had done had not been done with intent to do it.*

O'Connor, per Barwick CJ at RY 585:

> *In the present case, for example, the conviction is for unlawful wounding. But the physical act which supported it was the stabbing with a knife. Doubtless, such an act would be likely to wound. But in relation to intent, it is important, none the less, I think, to distinguish between an intent to use the knife and an intent to wound. In a sense, wounding [is] a result of the stabbing … I have taken a minimal position in relation to intent and say that at least an intent to do the physical act involved in the crime charged is indispensable to criminal responsibility.*

B *Factual Analysis*

The concept of voluntariness refers to willed acts of the accused. If their actions are willed, they are said to be voluntary; if they are unwilled, automatic, instinctive, accidental, then they are said to be involuntary.

As a corollary of this definition, issues of voluntariness arise in several factual scenarios. Barwick CJ in *Ryan* and *O'Connor* (cases that dealt with the legal meaning of voluntariness and the distinction between requirements of voluntariness and mens rea) noted some of these difficulties:

- The principle of voluntariness, like all criminal principles, is predicated upon a particular act
- It is necessary to identify the particular act which is the voluntary act of killing
- An act is a bodily movement; it does not involve the mind
  - The act merely consists of a particular set of muscular/bodily movements
  - The movement is provoked by a mental element (a will)
- Voluntariness therefore equals a 'will to act'
- However, will is <u>not a mental state</u>; it has nothing to do with mens rea (instead, it is concerned with consciousness)
  - Will is just concerned with a particular bodily movement
  - The principle of voluntariness links action to will
    - Cf intention: mental state which *expresses* the will
- However, the distinction between voluntariness and intention is a fine one; it can break down
  - Consequence = intention (consciousness, a **mental state**)
  - Act (of the body) = will (**this is voluntariness**)
- Where there is a disconnect between will and conduct, this is suggestive of involuntariness
  - "What his body had done, he had not done, or what he had done had not been done with intent to do it"

Voluntariness is not so much at the level of consciousness, but at the level of the body.

Ryan v R (1967) 121 CLR 205:

Facts
- T_1: Ryan enters service station
- T_2: Ryan loads and cocks gun
- T_3: Ryan points rifle at victim
- T_4: Ryan ties up the victim
- T_5: Victim struggles and turns
- T_6: Ryan steps back in surprise
- T_7: Gun discharges
- T_8: Bullet wounds victim
- T_9: Victim dies
- The accused was prosecuted for constructive murder, which does not require the prosecution to prove mens rea

Issue
- Was the act of the accused that caused the death of the victim a voluntary act?

Reasoning
- First element of criminal responsibility occurs at T_3 (pointing the weapon at the attendant)
    - This act is voluntary, and has some relevance (since the gun is directed at the victim), but there is no causation
- At T_6: there is causation, but the act (stepping backwards in surprise) is not voluntary
- At T_7 (pulling the trigger of a loaded gun without the presence a safety catch):
    - Barwick CJ: voluntary
    - Empirical evidence, however, suggests that it is involuntary (Barwick CJ rejects this analysis)
    - Windeyer J: treats T_3-T_7 as one complex of acts, which is both voluntary and causal of death
    - Current approach: look for a series or complex of acts – need to find a series of acts with causation and voluntariness as attributes (*Ugle*, *O'Connor*)
- There is thus no need to focus on one particular act
    - Characterise the facts – tell the story in such a way as to fit in with general principles

Decision
- Barwick CJ: act of accused was voluntary because the pointing and loading of the gun were willed acts
- Windeyer J: the act of pulling the trigger was voluntary because the sequence of acts leading up to it were voluntary

R v Butcher [1986] VR 83:

Facts
- T_1: Butcher enters milk bar
- T_2: Butcher holds knife in front
- T_3: Butcher pushes victim away
- T_4: Butcher still holds knife in front
- T_5: Victim rushes at Butcher

- T_6: Knife enters belly of victim
- T_7: Victim dies

***Murry & Ugle v R*:**

Reasoning

- A reflex action is not necessarily involuntary (eg, a trained marksman who 'without hesitation' pulls the trigger when a target is within his sights).
- Training evidences consciousness – response is conditioned (as opposed to innate)
    - Cf hitting on knee (no control over movement, unlike marksman)
    - Look for conceptual differences: concepts should be definitionally distinct

Decision

- Voluntariness does not require an element of consciousness
- Deliberation or consciousness goes towards establishing intent or recklessness, *not* voluntariness
- Voluntariness is only really problematic in constructive murder cases

IV *Causation*

A *General Approach*

Causation is crucial to crimes focused consequences. It enables law to link the act of the accused to the death of the victim. However, quite often this is problematic.

1 *Categories of case*

Most commonly, causation issues arise in the following circumstances:

- Domestic relationships
- Generic situations:
    - Medical treatment
    - Fright and self-preservation
    - Defenestration

2 *Determining causal relationships*

Causation is a question of 'commonsense' (though some would see this label as a euphemistic way of describing courts' tendency to rationalise a pre-conceived decision by other means):

- *Moffat* (NSWCA): causation is not a philosophical question
- *Blaue*: causation should not necessitate 'training in dialectic or moral theology'

Judges seem to conceive of causation under the following headings:

(a) Looking at facts – identifying causes
(b) Where there are multiple causation: using legal rules to determine the legal cause

(c) Appeal to policy (eg, don't evaluate medical competence)

However, in common law jurisdictions causation is not simply a matter of policy (unlike, eg, the United States).

3 *Attributing causal liability*

***White*:**

Facts
- A woman found dead on sofa
- A glass with nectar containing Potassium Cyanide is found, half empty, on the table
- The son of the deceased is charged with murder
- It is found, as a matter of fact, that White put the KCn in the glass and that he intended to kill his mother
- However, it is also found that the death is actually a result of a heart attack
- There is no evidence that she had drunk from the glass

Issue
- Is the son the legal cause of his mother's death?

Reasoning
- In determining whether the son's act is the legal cause of the death, the judges go through 2 stages of reasoning:
  - On the evidence, can it be said that 'this act objectively caused that death?' (need evidence)
  - If this person's act is at least a factual cause, is it a legal cause?

- The range of legal causes is narrowed down, and a set of tests and legal definitions is applied to the remaining possibilities (*Hallet*, *Evans*, *Royall*)

Decision
- As no forensic proof was presented to the court, there was insufficient evidence from which to establish factual causation
- The son's appeal is successful

In summary, the order of enquiry proceeds as follows:

1 *Commonsense*
  A Distinctively (purely?) legal
  B What is the *rationale* for decision?

2 *Identify relevant* facts *of causation*

3 *Identify and apply relevant* legal rules *of causation*

4 *Apply legal and social* policies *(if necessary)*

B *Subsequent Intervening Acts*

It may help to visualise legal causation as a line connecting the act of the accused and the death of the victim. If this line is broken, the accused will not be liable for the prohibited consequence of death.

1 *Possible intervening acts*

- Act of a third party (eg, a stranger rolling the victim into the ocean in *Hallett*; medical situations involving doctors)
    - It is necessary (but not sufficient) for the intervening act to be voluntary

- Nature, or exposure thereto
    - If the result which occurs is a normal or 'natural' consequence of the exposure, the act of nature will not break the chain
    - However, exceptional or 'freak acts' of nature (eg, a tidal wave or earthquake) will break the chain of causation
    - Assessment of what constitutes an 'exceptional' natural circumstance is objective – it does *not* depend on A's knowledge of the circumstances
    - Exceptional acts must be, by definition, exceptional, and cannot be ones that occur regularly or with some degree of normality

- Acts of the victim (eg, waking up, wandering in the water for a swim, and subsequently drowning)
    - The act must be performed voluntarily (ie, willingly) and with full consciousness (and not because of pressure or harm caused by the accused); cannot be only partially conscious (eg, slumbering half-unconscious into the water and drowning)
    - But note *Royall*: voluntary self-preservation in response to the reasonable danger posed by the conduct of the accused may not break the chain of causation
    - Note also *Blaue*: an exception to the voluntary requirement where the causal chain may not be severed by a seemingly voluntary choice made by the plaintiff not to undergo surgical treatment on account of 'idiosyncratic' religious beliefs

***Hallett*:**

Facts
- The act of the accused is characterised as the accused beating the victim unconscious in the ocean
    - For the purposes of assessing liability, the act of the accused is the beating in the water *not* his subsequent leaving of the victim at the water's edge
    - An omission (failing to care for the unconscious victim) is just a product of the originating act of beating (ie, the omission can be pat of a causal chain or can found a chain)

Issue
- Is the accused the legal cause of the victim's death?

Reasoning
- Voluntariness is a type of control, and relates to willed acts; however, it does not relate to intention; it is, rather, a lesser form of self-control
- Once it is determined that there are no novus actus interveniens, the questions are then asked:
    - Was the A's act an **operating and substantial** cause of V's death?

        - There can be more than one operating cause; only need to determine if A's conduct is substantial (*Moffat*)

- The court is only concerned with acts/omissions of the accused, so it does not matter if, eg, a doctor's negligence is a subsequent cause of V's death
    - Subsequent negligence/incompetence is completely irrelevant to issues of guilt and sentencing

- In order to determine whether a cause is 'operating', the but-for test is applied
- On the facts, foresight of the accused of any NIA (nature, 3rd party, etc) is *totally*, utterly, irrelevant (but note *Royall*)

Decision
- Because the drowning was a natural consequence of the ocean's tides, there is no intervening act and the accused is liable for the death of the victim

Jordan:

Facts
- V dies 1 week after being given a drug (to which he is obviously allergic) as part of his treatment for a stab wound occasioned by A
- The allergy was so obvious as to make the administration of the drug in question an instance of 'palpably bad' medical treatment

Reasoning
- If medical treatment is 'palpably bad' or 'abnormally wrong' it *will* break the chain
- Akin to gross negligence, this will only occur in the most *extreme* cases, and is very rare

Decision
- As the treatment was 'palpably bad', the causal chain between A's stabbing of V and V's death is severed and A is not liable for V's death
- This approach is affirmed in *Smith*

Evans & Gardiner applies and develops the 'operating and substantial cause' test of criminal causation:

Evans & Gardiner (No 2):

Facts
- The act is that of Gardiner stabbing the victim, aided by Evans, whilst imprisoned in a Victorian gaol
- Also noteworthy
    - Subsequent failure of doctors to diagnose and treat the patient
    - Subsequent failure of prison governor to see adequate medical treatment given to the prisoner
- Following the stabbing, G is becoming healthier, then dies due to complications arising out of a bowel blockage

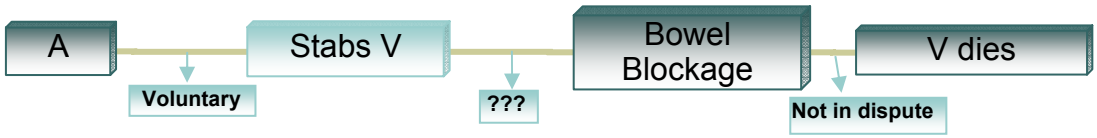
Issue
- Is G's stabbing the victim an 'operating and substantial' cause of V's death two years later?

Reasoning

- Applying the but-for test, the act is an operating cause (ie, the wound is still active, and but-for the wound, V would not have died)
- In considering whether the act is a substantial cause, consideration is given to whether the doctor's negligence break the causal chain
    - The focus of the enquiry is A's criminal responsibility
    - Though a subsequent cause may be 'so overwhelming' as to 'overtake' A's conduct as the legal cause of V's death, this does not involve assessing the conduct of the medical practitioners or other third parties under scrutiny

Decision

- The subsequent medical treatment did not interrupt the chain of causation
    - Evaluating the conduct of medical professionals is problematic
    - It is necessary to consider the 'operating and substantial cause' test
- There is a causal case for the jury
- Immediate cause of death is the blockage of the bowel
- Question is whether the blockage is due to the stab wound caused by the accused



- "However inept or unskilful", medical treatment is *not* the cause of death (negates *Jordan*, *Smith*)
- Because a substantial cause of death is still the stab wound caused by A, A is the legal cause of the victim's death

Blaue:

Facts

- V is raped by A, and sustains significant blood loss; she refuses a blood transfusion on account of her religious beliefs (she is a Jehovah's witness)
- V dies as a consequence
- She probably would not have died if she had, as per the doctors' advice, elected to have a transfusion

Issue

- Did V's refusal to undergo treatment constitute a *novus actus interveniens* and break the chain of causation between A's act and V's death?

Reasoning

- A's must take their victims as they find them; this includes religious beliefs or other 'idiosyncrasies'
- It would be paradoxical to expect V to stop being herself in order to save herself

Decision

- V's refusal to have the transfusion was not truly voluntary and thus cannot be regarded as a *novus actus interveniens*
- Therefore, A is criminally responsible for V's death

Padgett:

Facts

- Human shield case: accused fires at police whilst holding his girlfriend in front of him as protection
- Police retaliate, shooting (and killing) the girlfriend (shield)

Issue
- Is A causally responsible for the death of his girlfriend?

Reasoning
- In order for the actions of the police to constitute a *novus actus interveniens*, they must be voluntary
- However, they are not: to retaliate when fired upon is an instinctive and thus involuntary response to A's conduct

Decision
- There is no break in the causal chain by the acts of the third party police officers, and A is the cause of V's death

Royall:

Facts
- [See RY casebook]

Issue
- Is A causally responsible for V falling from the window and being killed?

Reasoning
- There are three possible causes for V falling from the window:
    - A pushed her
        - Causation obvious
    - V jumped out of fear/to escape A
        - Problematic
    - V retreats from A and falls
        - Causation established since retreating would not have been voluntary and A's conduct would have been an operating and substantial cause
    - (Because the jury found A guilty at trial, the option that V commits suicide [due to drug use or epileptic fit] must have been rejected, since it would not be consistent with their finding of causation)
- Because of the problems associated with cause two, that is the focus of the appeal
- A natural consequences test is formulated to determine whether V's jumping from the window is caused by an act of the accused:
    - The act needs to be intrinsically evident (or inherently unlawful – per Brennan J)
    - V's apprehension of the harm must be 'well-grounded' or 'reasonable' (per Mason J)
    - V's action or 'mode' of escape must be reasonable (ie, proportional) to the threat posed by A's conduct
- Natural consequences test:
    - Does not use the word foresight, but reasonable foresight of V's death is implicit in the test
    - Removes implicit dependence upon V's state of mind (by the use of objective qualifiers on 'reasonable' or 'proportionate' conduct)
    - Changes the language with which the test is formulated
- 'Reasonable' is determined by reference to the objective circumstances; however, it is *not* a reasonable man standard
    - Use logical deduction from the facts and consider possible modes of escape or reactions by V

- Inferences are drawn; however, the examination does not look at what everyone else would do; rather, whether what V did was reasonable in the circumstances

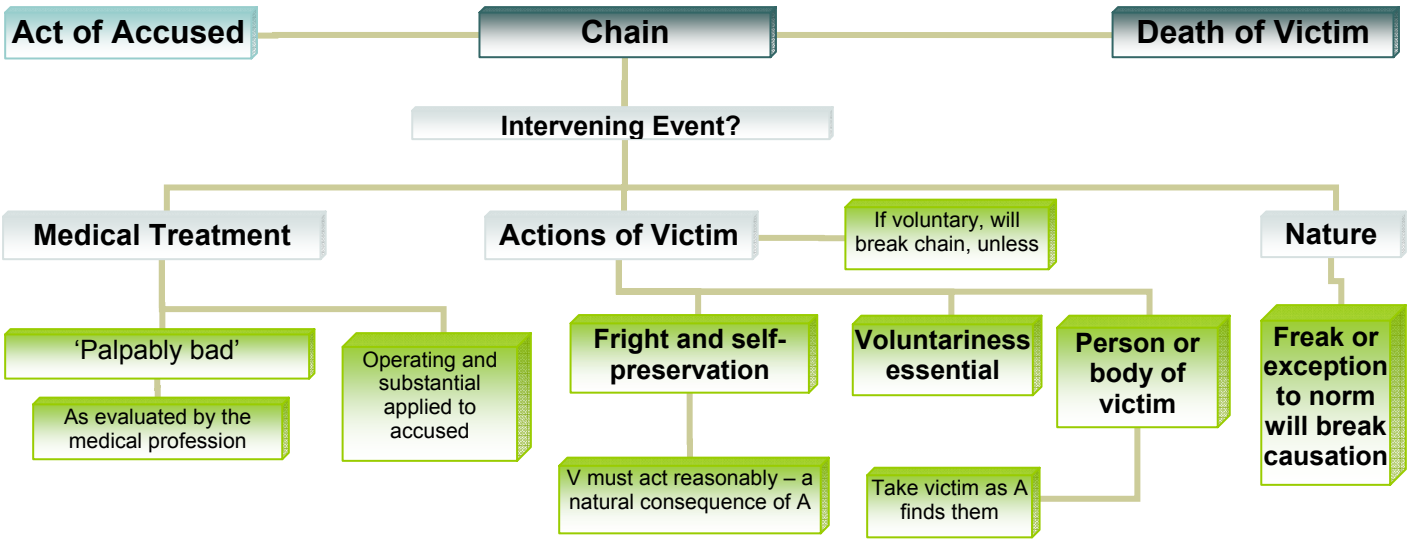
Decision

- V's apprehension of harm was reasonable:
  - V had been verbally and physically abused by A prior to going into the bathroom
  - Evidence suggested that:
    - A had hit V, possibly with an ashtray
    - A had been in the bathroom
    - A had been banging on the door
    - There was a history of domestic violence in the relationship
- V's response to the risk of harm was proportionate:
  - The windows was the only mode of escape (since A was approaching from the door)
  - However, it there were multiple modes, one might be less dangerous/unfounded than another
- Liability for death may be imposed even though it was not intended by the accused
- Foresight of death is not a test of causation, but foresight links recklessness and mens rea
- Because V's attempt to escape from A by jumping out the window was a proportional reaction in response to a well-grounded fear of harm, A is liable for V's death

C *Summary*

The normal test of causation is whether A's conduct is an operating and substantial cause of V's death. The courts only deviate from this approach in exceptional circumstances – in the vast majority of cases, satisfying this test will be sufficient.

In determining whether subsequent acts operate to relieve the accused of responsibility for V's death, the following factors are considered:



V *Mental state*

A *Overview*

Malice is a state of mind loosely described by the law of mens rea under the heading 'intent as to consequences'. Once it has been established that an accused acted voluntarily and was the legal cause of the victim's death, the prosecution – unless seeking to make out a case of constructive murder – needs to prove beyond reasonable doubt that the accused acted possessing one of the following mental states:

1 *Intent*

- Subjective: purpose or desire
- Difficult to prove: need confessions/admissions extracted by police

2 *Recklessness*

- The default mental state required in Victoria
- Subjective: foresight as to death or grievous bodily harm
- Less difficult to prove than intent, but burden still high: need to collate a set of behaviours/facts which give rise to a circumstantial inference of recklessness

3 *Negligence*

- If neither recklessness nor intent can be made out, the prosecution must 'drop back' to negligence, which reduces the charge to one of manslaughter
- Objective: risk of death needs to be that which is foreseeable by a reasonable person

B *Intent*

Intention is the mental state that attaches to an act done by the accused with the *purpose* of killing or causing grievous bodily harm. Synonyms include: purpose, desire, wanting to bring about.

Intention arises in situations where the accused acts with *knowledge* that at least the *virtually certain* result of that act is the death or grievous bodily harm of another human being. (*Hancock and Shankland*; *Woollin*)

Hancock and Shankland:

Facts

- During a strike by miners, the victim – a taxi driver escorting a miner, who was continuing to work at the mine, with the protection of a police convoy – was killed when a lump of concrete and a concrete post hit his taxi, having fallen from a bridge under which the police convoy was at that moment passing
- The prosecution claims that the concrete objects were either thrown or pushed over the parapet in the path of the taxi
- The defence claimed that the accused did not intend to hurt or kill anyone, but merely 'dropped' the concrete objects 'to frighten him' (the miner) – they meant for them to land in the lane beside the taxi; not that in which the taxi was travelling

Issue

- In order to intend the death of the victim, did the miners need to know that dropping

the blocks from the bridge would certainly cause death?
- What is the relationship between foresight of death and intent?
- Are the directions given in *Moloney*'s case satisfactory?

Reasoning
- The greater the probability of a consequence the more likely it is that the consequence was foreseen and that if that consequence was foreseen the greater the probability is that that that consequence was also intended
- Intention can be defined as ranging between a wilful desire to bring about death and an inference from foresight of death as a *virtually certain* consequence
- Recklessness is foresight of *probable* consequences and a willingness to run that probability

Decision
- The *Moloney* guidelines are defective; the laying down of general guidelines is problematic, and should be done sparingly
- Because Hancock thought he was pushing the block into the adjacent lane, he cannot foresee death as a *virtually certain* consequence of the dropping of the concrete block
- Consequently, under English law (note that the Australian law is different), intent is not established and the verdicts must be reduced to manslaughter
- The appeal is dismissed, and the verdicts of manslaughter remain

The English line of intention cases, beginning with *Smith* and culminating in *Hancock and Shankland*, is concerned with the distinction between intention to kill and foresight of death.

The decision in *Hancock and Shankland* turns on the fact that the English law of murder requires intention to prove murder; reckless indifference can only ground a charge of manslaughter. In Australia, however, recklessness of the kind in *Hancock and Shankland* could still attract a verdict of guilty of murder.

The effect of the case is to overrule the approach in *Moloney* – that intention requires a probability of death –in favour of an approach that requires 'virtual certainty' of death (*Hancock and Shankland*; *Woollen*)

C *Recklessness*

Recklessness attaches to an act willingly done by the accused with the *knowledge*/*foresight* that the *probable* result of that act is the death or grievous bodily harm of another.

The reckless element of the act is that the accused willingly runs the risk of death or grievous bodily harm eventuating, despite having foresight of the probability of these outcomes.

Unlike intention, recklessness merely requires knowledge of *probability* rather than knowledge of a *virtual certainty* of death or grievous bodily harm. However, unlike negligence, recklessness is predicated upon *subjective* knowledge of risk – as opposed to the objective knowledge of a reasonable person (*Crabbe*).

Pemble:

Facts
- Josie ('J') has recently ended a relationship with Pemble ('P')
- On the night in question, P sees J with her sister and father, and offers her a lift to the pub

- She declines, saying she is going home
- Later that evening, P arrives at the pub, where he notices J again
- P has a gun in his car, from which he saws off the end
- P takes the gun with him from his car 'to frighten her', and 'sneaks' up behind J with the gun cocked and his finger on the trigger
- P claims that he stumbles, crys out, the gun goes off, and J is shot in the back of her head, dying as a result
- P claims that he did not know the gun was loaded and had no intention of harming J

Issue
- What mental state is applicable to P's conduct?

Reasoning
- The lawyer assumes P's story is correct and true; if it is, intent and recklessness can probably be rules out
    - What MR are available, and to what verdicts would they give rise?
    - The plausibility of the story is to be assessed by the jury, who will evaluate the competing interpretations of the facts of the prosecution and defence counsel
- The prosecution argues P intentionally shoots J, does not stumble, and does not cry out (based on eye-witness accounts)
- Factors supporting recklessness (intent to frighten) as the applicable mens rea:
    - Sneaking up and yelling out name (implies wanting to scare)
    - Not knowing the gun was loaded (implies no intent to kill)
- Factors supporting intent as the applicable mens rea:
    - Finger is on the trigger
    - Gun is cocked
    - P sawed off the shotgun for the purpose of sneaking up behind J
- "Recklessness… involves foresight of or … advertence to, the consequences of the contemplated act and a willingness to run the risk of the likelihood, or even perhaps the possibility, of those consequences maturing into actuality" (per Barwick CJ)

Decision
- Because the summing up to the jury on the matter of reckless indifference was inadequate
- The conviction of murder should be set aside and a verdict of 'guilty of manslaughter' entered

Crabbe highlights the need to draw an inference from the facts as to the accused's state of mind. In applying subjective tests for mens rea, it needs to be determined whether the actual accused foresaw the probability of death.

So, eg, the accused in *Pemble* may need to have actual knowledge of the gun being loaded to foresee a probability of death. On the facts, this knowledge was expressly denied by the accused, but this statement is contradicted by the fact that he went geese hunting 1 week prior to the night in question, for which the gun must have been loaded.

- Recklessness: foresight of probability is very hard to prove. In Australia, Anything below is manslaughter (or constructive murder)
- Probability is not calculated statistically (eg, playing Russian roulette poses a probable risk of death, irrespective of the mathematical probability)

Faure provides another example of an application of the principles of reckless murder to a factual scenario.

Faure:

Facts
- Faure and the victim play Russian roulette using a six shot revolver
- They take turns in pulling the trigger
- There is a 1 in 6 probability that the current user will be killed

Issue
- Does Faure have foresight of a 'probability' of death?

Reasoning
- Firstly, it is necessary to check whether death/GBH as a consequence of A's actions is objectively probably
- Secondly, it is necessary to consider whether A foresaw that objective probability (subjective proof requiring inference as to A's state of mind from the factual circumstances)
- This inference is made by reference to the following elements:
    - Kind of weapon which was used by A and which brought about death (eg, a gun)
        - May have an intrinsic characteristic that makes it dangerous (eg, knives)
    - Circumstances in which instrument of death was applied
        - Sawn off (*Pemble*)?
        - Cocked (*Pemble*)?
        - Finger on trigger (*Pemble*)?
        - Loaded (*Pemble*)?
        - Pointed at V (*Moloney*)?
        - People in vicinity (*Crabbe*)?
        - Belief as to where block will fall (*Hancock*)?
    - Does A possess knowledge of these relevant circumstances?
- The extent of objectivity in recklessness is *simply* inferences drawn from facts; the objective probability of causing death must be *subjectively* in the contemplation of the *actual* accused

Decision
- The fact that the mathematical probability of the gun going off on a given shot was less than 0.5 is irrelevant
- Legal probability is not a mathematical concept
- Applying *Boughey*, Faure had knowledge of the probability of death or grievous bodily harm and is therefore guilty of murder

D *Negligence*

Manslaughter functions where no subjective knowledge as to death can be made out in relation to the accused.

The approach to criminal negligence is illustrated in the following cases:

- *Moloney* (look for intent, then drop down to recklessness, then manslaughter)
- *Mercies & Owen* (need to direct that it might not even be an assault, and an acquittal verdict could be handed down)

1 *Unlawful and dangerous acts*

- Don't become entangled in the 'numbers game' – probability is not defined statistically

- An 'appreciable risk' is defined as 1 in 212 (*Mutunari*'s case, in the context of assault)
- 'Appreciable risk' is less than 'probable'
- 'High risk' is greater to or equal than 'probable'
- Using a gun is a dangerous act

2 *Language*

- Synonyms for mental states are often causes for confusion or uncertainty
- Clear definitions are needed before the facts can be examined
- Facts must be selected and weighted relative to one another in terms of their relevance to the causation enquiry
- Mental states must be inferred from circumstantial evidence

E *Wilful Blindness*

Willful blindness is a term used to describe the accused 'shut[ting] their eyes to the circumstances in which they are acting'. This is a 'failure to make enquiries'.

Although a lack of actual knowledge of risk/certainty could be problematic to prosecutions for murder, willful blindness is not the same as intention or recklessness – it is merely another fact from which inferences as to the accused's mental state may be drawn:

> *Deliberate abstention from inquiry might, of course, be evidence of the actual knowledge or foresight of the accused.* (*Crabbe* at RY348)

In fact, because 'a person cannot … close their mind to a risk unless he first realises that there is a risk', evidence of wilful blindness may support an inference of foresight thereof (*Caldwell*).

F *Transferred Malice*

The definition of murder prohibits the killing of another human being; it does not prohibit the killing of a particular concrete individual but rather the taking of human life. As such, the mental state prohibited is the intention or recklessness as to death or grievous bodily harm of another human: if you shoot at a crowd of people, the legal institution will not permit you to claim innocence by saying that you intended to kill Bob and not Jack.

***Saunders & Archer v R* (1575) UK:**

Facts:
- Saunders ('S') intends to murder his wife
- S consults Archer ('A'), who suggests that S use a poisoned apple
- A obtains poison, which he provides to S
- In A's absence, S gives his wife the poisoned apple
- S' wife eats part of the apple, but then gives the remaining portion to their daughter
- S stood by and watched, but did not intervene, fearing detection
- S' daughter dies

Issue:
- Is S liable for the murder of his daughter, despite intending to murder his wife?

Decision:
- S is found guilty of murdering his daughter despite only intending to kill his wife

- A is not guilty as an accessory

Four views exist as to the effect of transferred malice on the criminal liability of the accused where he or she is a secondary to the principal offender.

1 *Direct Consequences (Lanham)*

The accused is liable for all direct consequences of the crime intended. That is, criminal liability attaches to all consequences irrespective of whether they are probable or not. This theory imposes strict liability for all consequences of criminal acts.

Plowden's principle: D is liable for all that follows from 'the same thing, but not a different thing'. The accused is thus responsible for all that follows from his act (as distinct from any other).

On this reading of *Saunders & Archer*, when the apple was given to the daughter of the accused, it was no longer 'the same thing' as being given to his wife and so not a direct consequence of A's provision of the poison to S.

The direct consequence view is applied in *Kennedy*, where it is held that if the crime committed 'flows directly' from the principal offender's attempt to commit the crime suggested by the accused (an accessory), he will be liable no matter how improbable this is. There, the victim was mistakenly shot after the accused and the principal conspired to murder a third party.

2 *Probable Consequences (Foster)*

The accused is liable only for probable consequences of the crime suggested. This theory makes the accused liable for his negligence (ie, if he ought to have foreseen the likelihood of the crime actually committed by the principal in the course of attempting the crime he suggests).

Lanham: the best explanation is that a deliberate departure from the plan breaks the causal link between what the indirect party contemplated and what the principal committed.

The *Criminal Code* of Tasmania, Queensland, and Western Australia adopt the probability principle. The Northern Territory code requires subjective foresight of possibility rather than objective probability. If *Saunders & Archer* were decided there today, Archer would only be liable if he foresaw the death of the child as a possible result of his advice as to how to murder his wife (Lanham).

3 *Recklessness*

Here, the accused is made liable only for the consequences he actually foresees as possible. This makes liability contingent upon recklessness (and adopts a 'possibility', as distinct from a 'probability' test of recklessness).

The accused is liable only if he actually foresees the possibility that the crime actually committed will occur. This is, in many respects, similar to the approach taken in *Johns* and *McAuliffe* to the doctrine of common purpose (and is in many ways analogous). In light of the High Court of Australia's formulation of *Johns*, it appears likely that recklessness is the most persuasive paradigm of secondary transferred malice.

4 *Express Authority*

The accused is liable only for the crime he expressly endorses (ie, the 'target' or intended crime). Effectively, this excludes transferred malice in relation to secondary parties.

G *Constructive murder*

Where there is a lack of intent or recklessness, it is still possible (in exceptional cases) to convict for murder. The instrument of such a conviction is the doctrine of constructive (or statutory) murder.

Constructive murder does not require a subjective mens rea. However, the death must occur in the course of the accused committing a 'violent crime'.

Crimes Act 1958 (Vic) s 3A places two limits on the kinds of crimes which may be upgraded to murder when death occurs:

1 *The crime must be an indictable offence punishable by 10 or more years imprisonment*
   (a) Indictable offences are crimes found in the *Crimes Act*
   (b) In order to secure a conviction for constructive murder, the elements of the original offence must still be proven

2 *Violence must be an 'essential part' of the definition*

Examples of indictable offences to which constructive murder is available:

- Aggravated burglary (theft involving the use of violence, such as the possession of a gun) – s77
- Armed robbery (as in *Butcher*, *Ryan*)
- Possession of firearm to resist arrest – s7

Importantly, voluntariness attaches to the act causing death, which may or may not be the same as the violence crime (eg, *Ryan*). Similarly, the violent crime does not have to cause death – death only has to occur during the commission of the violent crime.