

APPENDIX I – HOMICIDE CHECKLIST

I Introduction

A Overview

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	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 standard
Purpose of killing	+	Not causing death	Attempted murder	Subjective
Purpose of killing when provoked	+	Causing death	Manslaughter by provocation	

B Preliminary Elements

1 Was the victim alive to begin with?

In order to be alive, the victim must be human. The test for humanness is whether the entity experiences a 'separate and independent existence'.

2 Is the victim legally dead?

Life is a legal definition. It is possible for a person to be biologically dead but legally alive. If support withheld from a V who is unable to live independently of that support, and if, only by virtue of this abnormal dependency, the victim dies, A will not be guilty of homicide because the victim was neither human nor legally 'alive' (*Anthony Bland*)

- 3 *Is the accused above the age of 10/14? (Veneballs & Thompson v Balurer)*
- 4 *Was the accused was morally sane at the time of the act causing death?*
- 5 *Did death take place in the state/territory in which the accused is being tried? (Ward v R)*
 - a) *If not, then did the prohibited consequence partially occur in the jurisdiction in which the accused is being tried? (Crimes Act 1958 (Vic) s9; see DPP v Sutcliffe)*

II **Voluntariness**

A *The Act*

It is first necessary to identify the particular act which is the voluntary act of killing. The choice of this act may significantly influence the accused's liability (*Hallett; Ryan*).

B *Will to Act*

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

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.

- 1 *Was there a will to do the act (which causes death)?*
 - Voluntariness is not the same as intent (per Barwick CJ in *Ryan*)
 - o A mental state of *voluntariness* is a will to act (pertains to **actions**)
 - o *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*)
 - The consequences of an act need not be intended
 - Every act is voluntary; if it is not voluntary, then it is not an act at law
 - Involuntariness: '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)
 - o Where there is a disconnect between will and conduct, this is suggestive of involuntariness

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

- Reflex actions
 - o Not necessarily involuntary (eg, if training involved to develop the reflex, since training evidence consciousness), but are often (eg, hitting on knee)
 - o However, voluntariness does not require an element of consciousness (*Murry; Ugle*)

IV Causation

A Operating and Substantial Cause Test

The normal test of causation is whether A's conduct is an operating and substantial cause of V's death (*Hallett; Royall; Evans & Gardiner (No 2)*). The courts only deviate from this approach in exceptional circumstances – in the vast majority of cases, satisfying this test will be sufficient.

- ❑ In order to determine whether a cause is 'operating', the but-for test is applied (*Hallett; Evans & Gardiner (No 2)*)
- ❑ There can be more than one operating cause; only need to determine if A's conduct is substantial (*Moffa*)
- ❑ In considering whether the act is a substantial cause, consideration is given to intervening factors (*Evans & Gardiner (No 2)*)
 - 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

B General Approach

Causation is a question of 'commonsense':

- ❖ *Moffa*: causation is not a philosophical question
- ❖ *Blaue*: causation should not necessitate 'training in dialectic or moral theology'

The order of enquiry proceeds as follows:

- 1 *Commonsense*
 - A Distinctively (if not purely) legal
 - B What is the *rationale* for decision?
- 2 *Identify relevant facts of causation* (*White*)
- 3 *Identify and apply relevant legal rules of causation to determine the legal cause from many*
- 4 *Apply legal and social policies (if necessary)*

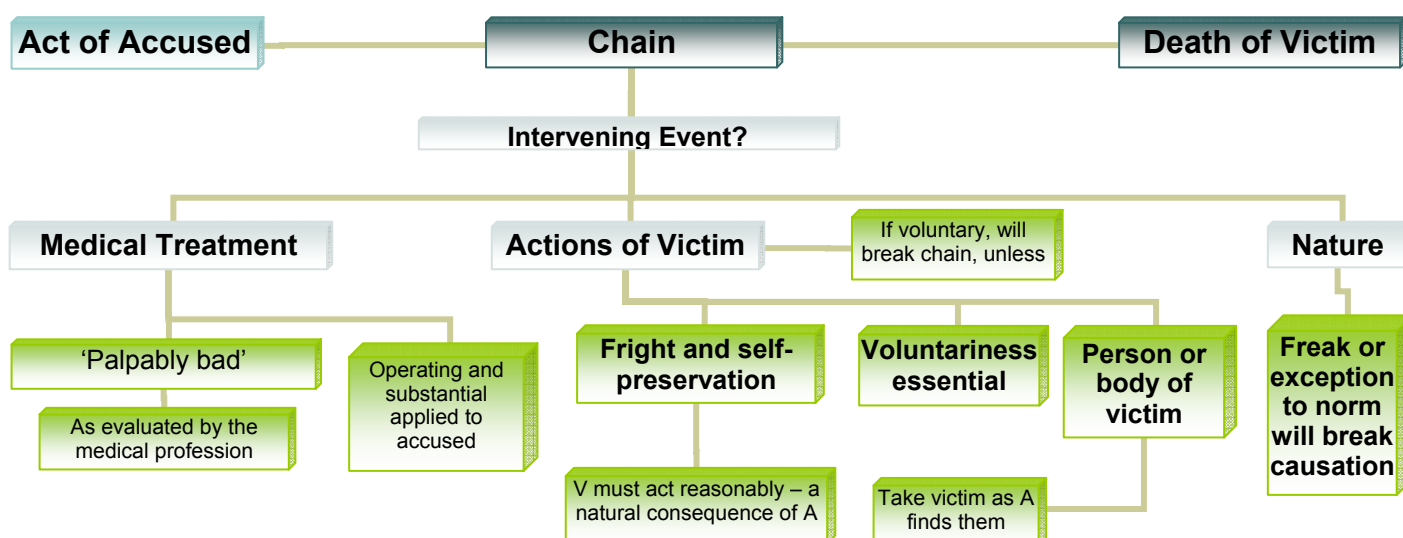
C Subsequent Intervening Acts

1 Possible intervening acts

- ❑ Act of a third party
 - It is necessary (but not sufficient) for the intervening act to be voluntary (*Padgett*)
 - Medical negligence:
 - Concern is with acts/omissions of the accused; subsequent negligence (or foresight thereof) is completely irrelevant (*Hallett*)
 - But note *Jordan; Smith*: 'palpably bad' treatment may break causal chain

- But note *Evans & Gardiner* (No 2): ‘However inept or unskilful’, medical treatment is *not* the cause of death (negates *Jordan, Smith*)
- 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 (*Hallett*)
 - 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
 - The act must be performed voluntarily (ie, willingly) and with full consciousness (and not because of pressure or harm caused by the accused)
 - *Royal*: voluntary self-preservation in response to the reasonable danger posed by the conduct of the accused may not break the chain of causation
 - Natural consequences test evaluates whether V’s conduct is reasonable; if so, does not break causal chain
 - A’s 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
 - *Blaue*: 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
 - 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
- ‘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



V *Mental state*

A *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.

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:

- 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

B *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*).

People per Barwick CJ:

- “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)

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.

- 1 *Objectively speaking, is death/GBH a probable consequence of A’s actions?*
- 2 *Did 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

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

C *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*).

E *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/gbh 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 and Archer* [1575] (accused convicted of murdering his son, who dies as a result of eating a poisoned apple given by the accused to his wife with the intention of killing her; she then gives the apple to the child, who dies)

F *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'.

Wrongs Act 1958 (Vic) s3A 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.