

Criminal Law Notes

Law 1114

Contents

- **Page 2:** Sentencing
- **Page 5:** Elements of a crime
- **Page 9:** Non-Fatal, Non-sexual Offences against the person
- **Page 17:** Sexual offences
- **Page 27:** Homicide (murder and Manslaughter
- **Page 38:** Defences
- **Page 43:** Cases

TOPIC 4: ELEMENTS OF A CRIME

<p>1. AR The physical committing of the crime (i.e. the act)</p>	<p>Voluntariness: A voluntary act is a 'willed act of the conscious mind' (<i>Ugle</i>). The criminal law contains the evidentiary presumption that conduct is voluntary unless D can raise evidence to the contrary (<i>Falconer</i>).</p> <ul style="list-style-type: none"> • P will argue that the D's mind was in control of his body when [facts]. It is highly implausible that a person capable of complex conduct such [facts]. Therefore, it will be difficult for D to displace the presumption in <i>Falconer</i>. • This presumption is displaced calling voluntariness into question. D may counter this and argue that... • INVOLUNTARY → An act is <u>involuntary</u> if acted in a dissociative state or impaired consciousness (a spasm, reflex, sleep walking, extreme intoxication). However, a key issue is the lack of exercise of will, rather than the lack of consciousness or knowledge (<i>Ryan</i>). • If the presumption is displaced, P must prove voluntariness BRD. Therefore, P may argue... • INTOXICATION → P will also point out that whilst [] is intoxicated they do not exceed the high threshold of the <i>O'Connor</i> test. • Difference between voluntariness and intent is voluntariness is an Ar whereas Intent is MR. For example, culpable driving is a voluntary action (AR), however, they would not have the intention to kill (MR) <p>OTB, it is likely that voluntariness is [not] made out.</p> <p>Causation: Causation is a question of fact for the jury. The central test is the operating and substantial(A led to B) cause test (<i>Hallett</i> affirmed in <i>Royall</i>). P will argue that [act of the D] was a 'substantial and operating' cause of V's injuries which subsisted up until the [result of the crime] occurred without being sufficiently interrupted by some other act or event (<i>Hallett</i>).</p> <p><i>Novus Actus Interveniens</i> – Natural disaster that cannot be controlled.</p> <p>MULTIPLE CAUSES? → However, P will argue D's conduct does not need to be the only cause; rather D's conduct was the substantial and operating cause (<i>Hallett</i>) which subsisted up until [...].</p> <p>OTF, it is likely that causation will (not) be made out.</p>
<p>2. MR Establishes moral culpability of the offender.</p>	<p>Intent: D will be liable if P can prove that D subjectively intended to cause the SI/injury (<i>Westaway</i>). D may argue that they did not intend to cause the [SI/injury]. P will counter this and argue that, it does not matter the type of SI, just that D intended to cause SI of some kind (<i>Westaway</i>).</p> <p>Intent can be inferred from the range of injuries and their circumstances (<i>Meyers</i>).</p>

Recklessness:

P will attempt to argue that D was subjectively reckless as to causing [injury/serious injury] to V. D is subjectively reckless if they foresee the probable consequences of their actions and display indifference to whether or not those consequences will result (*Campbell*). Probable means 'real, substantial and not remote' chance (*Boughey*).

	<p>Negligence: D will be liable if P can prove that D's actions such a great falling short of the standard of care required of a reasonable person, which involved such a high risk that [injury/serious injury] would follow and requires criminal punishment (<i>Nydam</i>). This is an objective standard of reasonableness that does not hinge on what D subjectively intended or was aware of (<i>Nydam</i>).</p> <p>Can be considered when there is an act or omission</p>
Concurrence/ Contemporaneity	<p>The AR and MR elements must be contemporaneous, that is, they must occur at the same point in time (<i>Fagan; Thabo Meli</i>).</p> <p>TRICKY → D will hold no criminal liability unless P can prove that the AR was performed while D had the requisite MR (<i>Fagan; Thabo Meli</i>). If P is able to prove intention or recklessness (MR), P will be able to prove it at the time of the [act] (AR). If P can prove [act] was the substantial cause of death, proving contemporaneity will be straightforward; as the AR and MR coincide.</p> <p>The principle of Fagan which indicates that the issue of contemporaneity can be circumvented by expanding the entire act. Therefore, whilst D did not initially have the requisite MR at the time of their AR, because they developed the MR afterwards and were in a position to... then they should be held just as liable as someone who had...</p> <p>However, if [2nd act] is made out to be the substantial cause of death medically, P may not be able to prove that intent or recklessness was present at the time that D [...]. However,</p> <p>(1) Is there a preconceived plan that might bring [the action] into the rule set out in <i>Thabo Meli</i>?</p> <p>(2) Was it a continuing act, as in <i>Fagan</i>?</p> <p>The MR can be superimposed upon an existing act; it is not necessary that the MR be present at the inception of the AR (<i>Fagan</i>).</p> <p>(3) [the actions] were they part of the same transaction, the same sequence of events, under <i>Le Brun</i> (even without a preconceived plan).</p>
Non-MR offences	<p>Strict liability: No MR, P has to prove AR. D will be liable unless they have defence of honest/reasonable mistake of fact available.</p>
Act is <u>not inherently wrong</u> – used as <u>care</u> needed to avoid potentially greater harm.	<p>Absolute liability: No MR is required, only the AR is necessary to constitute a crime. If D is liable on the facts, they will have <u>no defences</u>.</p>

TOPIC 5: NON-FATAL, NON-SEXUAL OFFENCES

AGAINST THE PERSON

For the purposes of this exam, unless otherwise specified, all legislation referred to is from the *Crimes Act 1958* (Vic) (CA), JDA = *Jury Directions Act 2015* (Vic), the sentences are the maximum sentences, OTF = on the facts, CLA = common law assault, AR = *actus reus*, MR = *mens rea*, P = the prosecution, D = the defence, NAI = novus actus interveniens, OTB = on the balance, FV = family violence, GV = gross violence, GBH = grievous bodily harm, and SI = serious injury.

*P will attempt to charge the defendant, [name] (D), under numerous sections of the CA and for common law assault (CLA) [physical/non-physical kind]. P carries the burden of proof to prove all elements BRD. The AR and MR elements must occur contemporaneously (*Fagan; Thabo Meli*).*

s.15 Injury (actual bodily harm at CL) – not exhaustive

(a) physical injury; or

“**physical injury**” includes unconsciousness, disfigurement, substantial pain, infection with a disease and an impairment of bodily function.

(b) harm to mental health

“**harm to mental health**” includes psychological harm but does not include an emotional reaction such as distress, grief, fear or anger unless it results in psychological harm

s.15 Serious injury (SI) (grievous bodily harm at CL) – not exhaustive

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

(i) endangers life; or

(ii) is substantial and protracted; or

(b) the destruction, other than harm in the course of medical procedure, of the foetus of a pregnant woman, whether or not the woman suffers any other harm.

s.15A(2) Gross violence

(a) D planned in advance to engage in conduct and at the time of planning—

(i) D intended that the conduct would cause a serious injury; or

(ii) D was reckless as to whether the conduct would cause a serious injury; or

(iii) a reasonable person would have foreseen that the conduct would be likely to result in a serious injury;

(b) D in company with 2 or more other persons caused the serious injury;

(c) D entered into an agreement, arrangement or understanding with 2 or more other persons to cause a serious injury;

(d) D planned in advance to have with him or her and to use an offensive weapon, firearm or imitation firearm and in fact used the offensive weapon, firearm or imitation firearm to cause the serious injury;

(e) D continued to cause injury to the other person after the other person was incapacitated;

(f) D caused the serious injury to the other person while the other person was incapacitated.

Causing SI in circumstances of GV (s.15A and s.15B)	
D will be liable for either s.15A or s.15B if P can prove BRD that they committed a voluntary act which caused SI in circumstances of GV and they did so either intentionally (s.15A) or recklessly (s.15B).	
AR	
Voluntariness	
Causation	
SI (s.15)	
The level of injury needs to be considered to determine whether it constitutes a serious injury (s.15A(1)). P will argue that, V suffered from serious injury pursuant to s.15 as she [facts]. D may counter this and argue that [facts] did not satisfy the definition of serious injury in s.15 as [facts]. OTB, it is likely that SI is [not] made out. On the chance that SI is made out, P will then try to prove D's conduct occurred in circumstances of GV.	
Circumstances of GV (s.15A(2))	
P will argue that the circumstances are satisfied under the criteria that (see below for criteria)	
MR	
Intent to act as they did in circumstances of GV (s.15A)	
OTF this is likely to be made out as D's actions of [facts] strongly suggest that they intended to act as they did.	
Intent to cause SI	
D will argue that whilst D intended to [facts], he did not intend to cause the SI. P will counter this and argue that, it does not matter the type of SI, just that D intended to cause SI of some kind (<i>Westaway</i>). P will argue OTF that... strongly suggest that D intended to cause SI.	
OTB it is likely/unlikely that intent will be made out and D will be/not liable for level 3 imprisonment (20 years).	
Reckless to causing SI in circumstances of GV (s.15B)	
OTB, it is likely/unlikely that intent will be made out and D will be/not liable for level 4 imprisonment (15 years).	

Intentionally/recklessly causing SI (s.16 and s.17)
OTF, there is no gross violence as per s.15A(2), thus we can rule out ss.15A and 15B. D may be criminally liable for offences contrary to s.16 and s.17 if P can make out the following elements BRD.
AR
Voluntariness – Chose to do such action
Causation – Causing serious injury. Must prove Actus/Mens rea
Caused SI The level of injury needs to be considered to determine whether injury caused constitutes a serious injury under s.15. P will argue that, V suffered from serious injury pursuant to s.15 as she [facts]. D may counter this and argue that [facts] did not satisfy the definition of serious injury in s.15 as [facts]. OTB, it is likely that SI is/not made out.
MR
Intent to cause SI (s.16) OTB, it is likely/unlikely that intent will be made out and D will be/not liable for level 3 imprisonment (20 years). On the chance that it is not, P will proceed to prove that D was reckless as to causing SI.
Reckless as to causing SI (s.17) OTB it is likely/unlikely that recklessness will be made out and D will be/not liable for level 4 imprisonment (15 years). If P can prove SI, they will then attempt to prove that D caused injury under s.18.

Causing injury intentionally or recklessly (s.18)
D will be liable for causing injury intentionally or recklessly contrary to s.18 if P can make out the following elements BRD. – 10 year maximum for intentionally, 5 years for recklessly
AR
Voluntariness It is likely/unlikely that voluntariness will be made out. See above for s.16 and s.17.
Causation It is likely/unlikely that causation will be made out. See above for s.16 and s.17.
Caused injury The level of injury needs to be considered to determine whether it constitutes an injury (s.15). P will argue that, V suffered from serious injury pursuant to s.15 as she [facts]. D may counter this and argue that [facts] did not satisfy the definition of injury in s.15 as [facts]. OTB, it is likely that injury is [not] made out.
MR
Intent to cause injury OTB, it is likely/unlikely that intent will be made out and D will be/not liable for level 5 imprisonment (10 years). On the chance that it is not, P will then proceed to prove that D was reckless.
Reckless as to causing injury OTB it is likely/unlikely that recklessness will be made out and D will be/not liable for level 6 imprisonment (5 years).

Negligently causing SI (s. 24)

D will be liable for negligently causing SI contrary to s.24 if P can prove the following elements BRD.

AR

Duty of care

D has a common law duty to not harm others.

See gross negligent manslaughter (p. 33)

Only a legal duty of care can give rise to liability for negligently causing serious injury. Moral duties, such as the obligation to help a stranger in distress or inform emergency services about a fire, are not relevant for this offence (*R v Taktak*).

Voluntary act/omission

SI

Causation

MR

Breached standard of care by criminal negligence

P will argue that D's conduct of [facts] grossly fell below the standard of care a RP would have exercised (*Nydam*). P will draw OTF to strengthen their argument that D's conduct involved such a high risk of SI that it merits criminal punishment (*Nydam*). D may counter this and argue that and that it is disproportionate to punish someone with for simply ...

D may argue that their conduct was not 'wickedly negligent' (*Lavender*) because...

However, P may counter this and argue that the standard is of RP without physical and intellectual disabilities (*Stone and Dobinson*).

OTB, it is likely/unlikely that negligence will be made out and D will be/not liable for level 5 imprisonment (10 years).

Threat to kill (s.20)

D will be liable for threatening the V contrary to s.20 if P can prove BRD that he made a threat and the threat was to kill. P must also prove that D did so either intentionally (*Westaway*) or recklessly (*Campbell*).

AR

Made threat

P will argue that D's (spoken, written, conduct) (the combination (*R v Rich*) of...) constitutes a threat to kill. It is not necessary that D actually carries out the alleged threat. D will mitigate this by arguing that the alleged threat does not meet the requirement from s.21.

However, P may argue that the ambiguity of the threat that the V would [quote] implied a threatened injury that would be substantial and protracted.

OTB, it is uncertain whether D's alleged threat will meet the threshold of threatening SI.

MR

Intent to make the threat

P will argue on the circumstances of ... that [] intended to make the threat.

D will argue against this ... does not prove BRD that [] intended to make the threat.

OTB it likely that intent will/not be made out.

Intend/recklessness that V would fear that the threat would be carried out (s.20(a) and s.20(b))

As per *Alexander*, P will argue that (circumstances/relationship) suggest that D intended for D to fear the threat.

D may counter this by arguing...

If the jury sided with D, P would then attempt to prove that D was being subjectively reckless (*Campbell*). P would argue... OTB, it is likely that MR will/not be made out and D will/not be liable for level 5 imprisonment (10 years).

Threat to cause SI (s.21)
D will be liable for threatening V contrary to s.21 if P can prove BRD that he made a threat and the threat was to cause SI. P must also prove that D did so either intentionally (<i>Westaway</i>) or recklessly (<i>Campbell</i>).
AR
<p>Was there a threat to cause SI?</p> <p>P will argue that D's (spoken, written, conduct) (the combination (<i>R v Rich</i>) of...) constitutes a threat to serious injury. It is not necessary that D actually carries out the alleged threat.</p> <p>D will mitigate this by arguing that the alleged threat does not meet the requirement from s.20, and that the alleged threat was not a threat to inflict serious injury.</p> <p>However, P may argue that the ambiguity of the threat that the V would [quote] implied a threatened injury that would be substantial and protracted.</p>
MR
<p>Intent to make the threat</p> <p>P will argue on the circumstances of [...] that D intended to make the threat.</p> <p>D will argue against this [...] does not prove BRD that D intended to make the threat. OTB, it is likely that intent will/not be made out.</p>
<p>Intent/reckless that V would fear that the threat would be carried out (s.21(a) and s.21(b))</p> <p>As per <i>Alexander</i>, P will argue that (circumstances/relationship) suggest that D intended for D to fear the threat.</p> <p>D may counter this by arguing...</p> <p>If the jury sided with D, P would then attempt to prove that D was being subjectively reckless (<i>Campbell</i>). P would argue... OTB, it is likely that MR will/not be made out and D will/not be liable for level 6 imprisonment (5 years).</p>

Stalking (s.21A)
D will be liable for stalking contrary to s. 21A of the CA if P can make out the following elements BRD.
AR
<p>Engaged in a prescribed course of conduct?</p> <p>P will argue that D's actions of [facts] illustrate a course of conduct that shows a 'continuity of purpose' (<i>Berlyn v Brouskos</i>). P will point to s.21A(2)(...) to show that this conduct by D constitutes a prescribed course of conduct. OTB, this is likely to be made out.</p>
MR
<p>Intent</p> <p>P will argue that D had the subjective intention to cause [physical/mental harm] in the form of [self-harm/arousing an apprehension of fear in V for their safety] (s.21A(2)). D will counter this and argue that D was only joking and had no intention to cause actual harm. P will counter this with an argument of imputed intention (s.21A(3)). P will argue that D subjectively knew their conduct would probably result in harm (s.21(3)(a)) because...</p> <p>Even if this argument was unsuccessful P would also argue that a RP in the circumstances would have understood that their course of conduct would be like to (cause such harm/arouse such apprehension of fear) (s.21(3)(b)). OTB, it is likely/unlikely that MR will be made out and D will be liable for level 5 imprisonment (10 years).</p>
Defences in s.21A(4), 21A(4A) (ONLY APPLY IF ACTING W/O MALICE)