

## **Criminal Law Guidebook Second Edition – Chapter 7: Murder and Manslaughter**

The following are suggested solutions to the two problems on pages 176–178. They represent answers of an above average standard.

The ILAC approach to problem-solving as set out in the ‘How to Answer Questions’ section of the preliminary pages of the *Criminal Law Guidebook Second Edition* has been used in devising these solutions.

### **SCENARIO 1**

#### *Killing of Jenny*

The relevant homicide charges to consider in relation to the killing of Jenny are murder<sup>1</sup>, including constructive murder, and involuntary manslaughter<sup>2</sup>. Voluntary manslaughter does not arise for consideration as extraneous defences do not have to be discussed.

#### Actus reus: murder and manslaughter

The actus reus for both murder and involuntary manslaughter is that the death of a human being was caused by a voluntary act or omission of the accused.

Clearly the victim, Jenny, is a human being and she died almost immediately after being struck in the head by a ricocheting bullet which penetrated her brain.

This bullet which caused Jenny’s death was discharged from the pistol held by Mick. Mick’s act in discharging the bullet from the pistol must be voluntary. A voluntary act is willed, though the consequences may be unintended<sup>3</sup>. The person’s mind needs to be in control of their body. A series of voluntary acts prior to an accidental act may make that act legally voluntary<sup>4</sup>. It is clear that Mick pointed the semi automatic pistol at the cashier whilst stating ‘this grog is mine’, and demanding money. Thus, Mick had a loaded gun in close proximity to several human beings, which it can be inferred he had loaded, he had cocked the gun without the safety catch applied, and had his finger on the trigger when he was grabbed and shouted at by Len. These were all conscious acts by Mick. The prosecution would strongly argue that Mick’s act which caused Jenny’s death was voluntary.

On the other hand, the defence could argue that as Mick was grabbed by the shoulders, startled and ordered to drop the gun, his discharging of the pistol was not voluntary but rather a reflex involuntary movement resulting from Len’s

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<sup>1</sup> *Crimes Act 1900* (NSW) s 18(1)(a); *Crimes Act 1958* (Vic) s 3; *Criminal law Consolidation Act 1935* (SA) s 11.

<sup>2</sup> *Wilson v The Queen* (1992) 174 CLR 313; *Crimes Act 1900* (NSW) ss 18(1)(b), 24; *Crimes Act 1958* (Vic) s 5; *Criminal Law Consolidation Act 1935* (SA) s 13.

<sup>3</sup> *Ryan v The Queen* (1967) 121 CLR 205 per Barwick CJ at 213.

<sup>4</sup> *Ryan v The Queen* (1967) 121 CLR 205 per Barwick CJ at 218; *Pemble v The Queen* (1971) 124 CLR 107; *R v Butcher* (1985) 16 A Crim R 1, 13-17; and *Murray v The Queen* (2002) 211 CLR 193 per Gummow and Hayne JJ at 209-211.

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unexpected acts. Applying the reasoning from cases such as *Ryan* and *Pemble*, the series of preceding voluntary acts, which placed Mick with a loaded pistol without the safety catch on, his finger on the trigger pointed at the cashier and in extremely close proximity to other human beings, may well be sufficient to make the pressing of the trigger with his finger voluntary, even though Len startled Mick by grabbing his shoulders and shouting at him. The prosecution are likely to argue that the act was voluntary ‘in the setting of its circumstances’<sup>5</sup>, which included so many clearly voluntary acts. The pressing of the trigger should not be artificially separated from the surrounding complex of voluntary acts so that ‘there is no basis for concluding that the set of movements, *taken as a whole*, was not willed’<sup>6</sup>.

The strongest argument in applying the law to the given facts, is that Mick’s act of pressing the trigger of the pistol with his finger to discharge a bullet was a voluntary act.

There is no strong evidence of an intervening act<sup>7</sup> such as to break the chain of causation between the voluntary act of Mick and the death of Jenny. The defence may argue that Len’s act of grabbing Mick’s shoulders immediately before Mick pressed the trigger of the pistol, and the fact that the bullet hit the metal shelving before ricocheting into Jenny’s brain, are intervening acts breaking the chain of causation. The requirement is that an intervening act has to be so independent of the act of Mick that it should be regarded in law as the cause of Jenny’s death to the exclusion of the act of Mick<sup>8</sup>. The act of Mick must be a substantial and operating cause<sup>9</sup> of Jenny’s death. Mick had the loaded pistol pointed at the cashier in the act of a robbery<sup>10</sup> when he was grabbed by the shoulders from behind by Len, and as Mick turned around to face Len, his finger pressed the trigger and a bullet was discharged from the pistol. In this way, Mick had created a dangerous situation which cannot be excluded as a substantial and operating cause of Jenny’s death.

The actus reus elements of murder and involuntary manslaughter can be established beyond reasonable doubt against Mick.

### Mens rea: murder

Turning to proof of mens rea which must coincide with the actus reus<sup>11</sup>, there are three possible heads of mens rea for murder to be considered plus constructive

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<sup>5</sup> *Ryan v The Queen* (1967) 121 CLR 205 per Barwick CJ at 218.

<sup>6</sup> *Murray v The Queen* (2002) 211 CLR 193 per Gummow and Hayne JJ at [53].

<sup>7</sup> Also referred to as a ‘*novus actus interveniens*’.

<sup>8</sup> *R v Hallett* [1969] SASR 141; *R v Pagett* (1983) 76 Cr App R 279.

<sup>9</sup> *R v Smith* [1959] 2 QB 35; *R v Hallett* [1969] SASR 141, 150; *Arulthilakan v The Queen* (2003) 203 ALR 259, 268; *Mkoka v The Queen* [2003] HCA 74; *Dunkley-Price v The Queen* [2015] VSCA 310, [38] – [41].

<sup>10</sup> Discussed further below at pp 3-4 in relation to constructive murder.

<sup>11</sup> *Meyers v The Queen* (1997) 147 ALR 440.

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murder. First, to establish an intent to kill there is a subjective test that the accused acted in order to achieve a particular purpose, that is, to kill the victim. The accused's conduct and words may 'provide the most convincing evidence of his intention.'<sup>12</sup> Mick's actions in pressing the trigger of the gun as he turned around when grabbed and startled by Len shouting at him, together with the initial trajectory of the bullet being towards the metal shelving rather than directly at Jenny, who Mick greeted seemingly as a friend when he walked into the store, suggest that it would be extremely difficult to draw an inference of an intention to kill beyond reasonable doubt.

Second, an intention to do grievous bodily harm involves a subjective test of the accused setting out to cause really serious bodily harm<sup>13</sup> to another person. Again there is no evidence from the conduct of Mick that he had such an intention at the time of the act causing Jenny's death.

Third, Mick may be reckless in that the prosecution must prove beyond reasonable doubt that he committed the act knowing it was probable<sup>14</sup> that death or grievous bodily harm<sup>15</sup> would result. The test is subjective, involving the accused's foresight of a risk of the probability of death or really serious injury, and then taking that risk in the circumstances. The prosecution could argue that Mick was aware that if the pistol discharged in all the circumstances, he would probably cause the death of a person, or at least cause really serious injury to them, and he took that risk. It is a rational inference from the given facts that Mick owned the weapon, and had knowledge of its operation, as he had earlier retrieved it from its hiding place in his flat and he subsequently pointed the loaded pistol directly at the cashier. Overall, it is arguable that Mick was reckless, however, there may be some difficulties in proof, considering again the acts of Len in grabbing and startling Mick and his accidental discharge of the pistol. These facts may raise a reasonable doubt as to Mick's awareness of the probability of causing the death of, or really serious injury to, another person by the use of the pistol.

### Constructive murder

Given the difficulty of proving the mens rea for murder, it is important to consider constructive murder as an alternative basis for charging Mick with a homicide

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<sup>12</sup> *Stokes and Difford* (1990) 51 A Crim R 25, 29-30.

<sup>13</sup> *Crimes Act 1900* (NSW) s 4 includes 'any permanent or serious disfiguring of the person'. Also, see *DPP v Smith* [1960] 3 All ER 161, 171 and *Haoui v R* [2008] NSWCCA 209 as to the meaning of 'grievous bodily harm' at common law.

<sup>14</sup> *La Fontaine v The Queen* (1976) 136 CLR 62; *R v Crabbe* (1985) 156 CLR 464; *R v Annakin* (1988) 17 NSWLR 202; and *Royall v The Queen* (1991) 172 CLR 378.

<sup>15</sup> Under *Crimes Act 1900* (NSW) s 18 the words 'reckless indifference to human life' have been interpreted to mean that the accused must realise the probability of death and a realisation of the probability of 'grievous bodily harm' is not sufficient - *R v Solomon* [1980] 1 NSWLR 321.

Accordingly, the references to awareness of causing really serious injury as a form of recklessness in proof of murder apply only in the Victorian and South Australian jurisdictions.

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offence. In New South Wales, the death must occur 'during or immediately after the commission, by the accused ... of a crime punishable by imprisonment for life or for 25 years'<sup>16</sup>.

In Victoria the crime must include an element of violence such that the accused would be liable to life imprisonment or imprisonment for ten years or more<sup>17</sup>.

In South Australia there must be 'an intentional act of violence while acting in the course or furtherance of a major indictable offence punishable by imprisonment for ten years or more.'<sup>18</sup> In each jurisdiction the applicable crime would be a form of 'armed robbery'<sup>19</sup>, because Mick took the various bottles and cartons of alcoholic beverages by use of violence or force towards the cashier.

The mens rea for constructive murder is the mens required to commit the particular crime (in this case, armed robbery), which can be established through the conduct and words of Mick from the time he took his semi-automatic pistol from its hiding place in his flat, through to his placing the various liquor items in a trolley at Casey's Liquor Barn and then pointing the pistol at the cashier and demanding money. From this conduct it can be inferred that Mick dishonestly intended to take the liquor and to permanently deprive the owner of it. Evidence of Mick's financial problems through his unemployment, and the fact that he had no ready cash at the time, also support this dishonest intention.

The armed robbery was in progress when the pistol was fired and the bullet struck Jenny and killed her. Therefore the commission of the crime was the cause of Jenny's death as required by *Crimes Act 1958* (Vic) s 3A(1) and *Criminal Law Consolidation Act* (SA) s 12A. In New South Wales, the armed robbery only has to have a temporal link with the death not a causal link<sup>20</sup>, which can also be established on the facts. Even if death is "accidental" or an "unintended consequence" of the accused's voluntary acts, constructive murder can be established as proof of the mens rea for murder is not required<sup>21</sup>.

### Unlawful and dangerous act manslaughter

Alternatively, the prosecution could seek to establish that Mick is liable for Jenny's death on the basis of involuntary manslaughter. The facts raise the

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<sup>16</sup> *Crimes Act 1900* (NSW) s 18(1)(a).

<sup>17</sup> *Crimes Act 1958* (Vic) s 3A(1).

<sup>18</sup> *Criminal Law Consolidation Act 1935* (SA) s 12A.

<sup>19</sup> *Crimes Act 1958* (Vic) s 75A, *Criminal Law Consolidation Act 1935* (SA) ss 137 and 5AA(1)(b). In NSW the relevant offence would be aggravated armed robbery by being armed with a 'dangerous weapon' under *Crimes Act 1900* (NSW) s 97(2) as it carries a maximum penalty of 25 years imprisonment whereas armed robbery under *Crimes Act 1900* (NSW) s 97(1) has a maximum penalty of 20 years.

<sup>20</sup> *R v Munro* (1981) 4 A Crim R 67.

<sup>21</sup> *Ryan v The Queen* (1967) 121 CLR 205; *R v Munro* (1981) 4 A Crim R 67; *R v Bowden* (1981) 7 A Crim R 378.

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potential for both manslaughter by an unlawful and dangerous act, and criminal negligence manslaughter. First, the act of pointing a loaded gun at the cashier is unlawful in the sense of being a breach of the criminal law<sup>22</sup>. Second, dangerousness requires that ‘an appreciable risk of serious injury’ is created by the unlawful act<sup>23</sup>. This is an objective test as to whether a reasonable person in the position of the accused, not taking into account any of the accused’s idiosyncrasies<sup>24</sup>, would have realised that the unlawful conduct created ‘an appreciable risk of serious injury to the deceased’<sup>25</sup>. In the circumstances it is clearly arguable that Mick’s act of holding his finger on the trigger of a loaded gun and pointing it at a person in a retail outlet where there were a number of other people working and shopping, carried with it ‘an appreciable risk of serious injury’ to another person. If the gun was discharged there was clear potential for serious physical injury<sup>26</sup> to a person in the store.

### Manslaughter by criminal negligence

The prosecution may alternatively rely on criminal negligence as the legal basis to establish that Mick is guilty of manslaughter, although this is a weaker argument. To establish this category of involuntary manslaughter, the prosecution must prove that Mick had a duty of care to the victim and breached the standard of care imposed by that duty to such a degree that there was a high risk of death or grievous bodily harm to the victim that the accused’s conduct merited criminal punishment<sup>27</sup>.

This is an objective standard based on a test of the standard of care a reasonable person would have exercised in the same situation. In the given circumstances, the prosecution would rely on the general tortious duty not to cause harm to another person, so that Mick owes that duty to Jenny. It could then be argued that Mick’s brandishing of the gun while stealing liquor from the store breached that duty to such a high degree that it amounted to ‘gross’ or ‘wicked’ negligence meriting criminal punishment<sup>28</sup>.

There are some similarities between the facts of this case and those in *R v Manh Viet Do*<sup>29</sup>, where the accused was convicted of manslaughter by criminal negligence in circumstances involving ‘mucking around’ by moving the safety

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<sup>22</sup> *R v Pullman* (1991) 58 A Crim R 22. There is an offence in NSW of ‘Possessing a loaded firearm in any other place so as to endanger the life of any other person’ - *Crimes Act 1900* (NSW) s 93G(1)(a)(iii).

<sup>23</sup> *Wilson v The Queen* (1992) 174 CLR 313; *Director of Public Prosecutions (Vic) v Singleton* (2010) 29 VR 35.

<sup>24</sup> *R v Wills* [1983] 2 VR 201, 214.

<sup>25</sup> *Wilson v The Queen* (1992) 174 CLR 313 per Mason CJ, Toohey, Gaudron and McHugh JJ at 335; *R v Presley* (2015) 122 SASR 476, 489.

<sup>26</sup> *R v Dawson* (1985) 81 Cr App R 150.

<sup>27</sup> *Nydam v R* [1977] VR 430, 445.

<sup>28</sup> *R v Lavender* (2005) 222 CLR 67; *R v Moore* [2015] NSWCCA 316, [142] – [144].

<sup>29</sup> [2001] NSWCCA 19.

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catch on and off a pump action shotgun. In this case the danger of pointing a loaded weapon at someone, attempting to scare them by moving the safety catch on and off and pressing the trigger, amounted to a breach of a duty of care to the criminal standard. The distinction from the scenario provided is that Mick was not involved in a social interaction, but was committing a robbery, and did not apply a safety catch at all. Accordingly, Mick's pointing of the loaded weapon at the cashier would arguably be more readily characterised as an unlawful and dangerous act rather than a failure to take the care that was required in the circumstances.

Overall, there is sufficient evidence available to warrant the prosecution of Mick for the murder of Jenny on the basis of constructive murder with the killing committed during an armed robbery of the liquor store. The alternative charge of manslaughter would also be available in these circumstances and could be established beyond reasonable doubt on the basis of an unlawful and dangerous act in preference to criminal negligence.

### *Death of Len*

In relation to the death of Len it is appropriate to consider a charge of murder against Mick together with the alternative of involuntary manslaughter.

#### Actus reus: murder and manslaughter

The law relating to the elements of the actus reus of both of these offences is set out above<sup>30</sup>. There is no doubt that Len was a human being who is now dead.

There does not appear to be any doubt in these circumstances that the acts committed by Mick were voluntary. Mick still had the pistol after the death of Jenny, forced Len against his will to get into the trolley and sit on the cartons of beer and then proceeded down the ramp despite Len's warning, 'You'll never control the weight in this trolley going down the exit ramp.' Mick voluntarily wheeled the trolley towards the ramp and consciously made the decision to go down the ramp. Although Mick did not know that the cleaner had just completed washing the ramp with water and detergent, it is likely from the recency of this cleaning that the water would have been apparent on the ramp, and there may have been a warning sign. These were all voluntary acts on Mick's part, which resulted in him slipping over and letting go of the trolley with Len still inside on the cartons, and it eventually being struck by the delivery van in the carpark of Casey's Liquor Barn.

The direct cause of Len's death appears to be that he was struck by the delivery van, sustaining a fractured skull and brain injury, later suffering a heart attack in hospital and dying four hours later.

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<sup>30</sup> Above paragraph 2 under the heading *Killing of Jenny – Actus reus: murder and manslaughter*.

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The issue in relation to causation is whether the act of Mick, in forcing Len into the trolley as a shield to effect his escape from the store despite the warning as to there being too much weight, was a 'substantial and operating cause'<sup>31</sup> of Len's death, or whether there was a *novus actus interveniens*<sup>32</sup> which broke the chain of causation. The defence may argue that the detergent and water on the ramp, or the collision with the delivery van, or both, was an intervening act so overwhelming that it reduced the act of Mick to being 'merely the setting' in which the new causes operated<sup>33</sup>. Alternatively it could be argued that the slippery ramp and the collision were so independent of the act of Mick that they should be regarded in law as the cause of Len's death, to the exclusion of the act of Mick.

A parallel may be drawn with the case of *R v Pagett*<sup>34</sup>, where the police action in firing in self defence was held not to be a *novus actus interveniens*, but rather an involuntary act caused by the act of the accused in using his victim as a shield and firing at the police who were attempting to arrest him. Applying this reasoning to the case of Len, who was being used as a shield by an armed Mick to effect his escape, then the act of the delivery van in colliding with the out of control shopping trolley is arguably not a *novus actus interveniens*. Also, the slippery ramp would not be regarded as an overwhelming cause of Len's death, or so independent of the act of Mick to be a *novus actus interveniens*, as Len wouldn't have been on the trolley at the slippery ramp if Mick had not forced him into the trolley and wheeled it to the ramp.

Finally the defence may argue that the cause of Len's death was a heart attack<sup>35</sup>, given that he had just returned to work after suffering a heart attack three months beforehand. To counter this argument, the prosecution would point to the case of *R v Blaue* as authority for the principle that 'those who use violence on other people must take their victims as they find them'<sup>36</sup>. Mick can't argue that a healthy person would not have died in this incident and it was only because of Len's existing condition that he died. The prosecution would contend that the weight of authority is in favour of the argument that Mick's acts were a legal cause of Len's eventual death, with no sufficient intervening act to break the chain of causation.

### Mens rea for murder

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<sup>31</sup> *R v Smith* [1959] 2 QB 35; *R v Hallett* [1969] SASR 141; *R v Moffatt* (2000) 112 A Crim R 201; *Dunkley-Price v The Queen* [2015] VSCA 310, [38] – [41].

<sup>32</sup> *R v Pagett* (1983) 76 Cr App R 279, 288.

<sup>33</sup> *R v Hallett* [1969] SASR 141, 146.

<sup>34</sup> (1983) 76 Cr App R 279. See also *R v Aidid* (2010) 25 VR 593.

<sup>35</sup> The facts do not provide a precise cause of death following a post mortem examination of Len's body. It is arguable that the fractured skull and brain injury as well as the heart attack would all have been nominated as causes of Len's death but this would ultimately be a matter for expert evidence.

<sup>36</sup> [1975] 3 All ER 446, 450. See also *Director of Public Prosecutions (Vic) v Lawson* (2012) 226 A Crim R 138.

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There is no evidence that the purpose of Mick's acts was to kill Len, or to cause him grievous bodily harm. In ignoring Len's warning about the overloading of the trolley, it is possible that Mick was recklessly indifferent to human life or to really serious injury. However, it must be established that Mick foresaw the probability<sup>37</sup> that his acts in forcing Len into the trolley and proceeding down the ramp at gunpoint would result in death or really serious injury<sup>38</sup>, and yet he took that risk. This will be difficult to prove beyond reasonable doubt. In replying to Len's warning that the trolley was overloaded with his additional weight, Mick said 'I can steer this trolley. I used to wheel forty trolleys at a time up there'. This may suggest that Mick thought that there was no possibility of death or serious injury to Len.

The defence could argue that Mick believed that he could control the weight in the trolley and regarded the comment as an attempt to deter him from using Len as a shield. Alternatively, even if Mick did believe Len's comment, it is doubtful that Mick believed that there was a likelihood that death or serious injury would result from the trolley going out of control going down the incline of the exit ramp to the carpark. Mick may have known that some injury to Len was probable and was indifferent to that risk, but that level of foresight is not sufficient for proof of murder.

### Constructive murder

With the difficulties in proving a subjective mens rea for murder, the prosecution may consider constructive murder as the basis for charging Mick for the death of Len. Similar reasoning is involved here to the killing of Jenny discussed above<sup>39</sup>. However, Len's death occurred *after* the commission of the armed robbery. In New South Wales this is no barrier, as death can occur 'immediately after' the commission of the crime, and it is certainly arguable in all the circumstances of the case<sup>40</sup> that there is a temporal coincidence of the acts causing Len's death being committed 'immediately after' the armed robbery of the liquor store.

In South Australia and Victoria an intentional act of violence 'in furtherance' of a crime that causes the death of another<sup>41</sup> is sufficient to establish murder. On the facts, there is a clear argument that Mick's violent acts toward Len were committed 'in furtherance' of the armed robbery of the liquor store: they occurred in the process of Mick seeking to leave the scene of the crime with the proceeds. Alternatively, Mick's acts towards Len may amount to 'kidnapping' in that Mick detained Len without his consent with the intention of holding him as a hostage<sup>42</sup>

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<sup>37</sup> *R v Crabbe* (1985) 156 CLR 464, 467-468.

<sup>38</sup> See above n 15 as to the jurisdictional restrictions on foresight of really serious injury as a form of recklessness for murder.

<sup>39</sup> See above pp 3-4.

<sup>40</sup> *R v Elliott and Hitchins* (1983) 9 A Crim R 238.

<sup>41</sup> *Criminal Law Consolidation Act 1935* (SA) s 12A; *Crimes Act 1958* (Vic) s 3A(1).

<sup>42</sup> *Criminal Law Consolidation Act 1935* (SA) s 39. This is a major indictable offence punishable by 20 years imprisonment.



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or to gain an advantage<sup>43</sup>. The acts that ultimately caused Len's death would then be characterised as occurring in the course of the commission of the 'kidnapping' offence. It is strongly arguable that a charge of the murder of Len could be established beyond reasonable doubt on the basis of constructive murder, warranting Mick's prosecution for murder.

### Unlawful and dangerous act manslaughter

Alternatively, there is an argument that the effective 'kidnapping' of Len by Mick and the accompanying circumstances, amount to an 'unlawful and dangerous act' as a basis for a manslaughter charge against Mick.

Mick's act in forcing Len to sit atop the cartons of beer in the trolley at gunpoint was an unlawful act, being in breach of the criminal law<sup>44</sup>. It is also arguable that this was a dangerous act, in that a reasonable person would have realised that sitting an adult person on top of four cartons of beer in a shopping trolley and pushing it down a slippery ramp to a carpark, carried with it 'an appreciable risk of serious injury'<sup>45</sup>.

The defence may contend that from an objective viewpoint these acts do not carry such a risk. There may be a risk of injury but not of serious injury, which is the requirement for manslaughter.

### Manslaughter by criminal negligence

In these circumstances, the prosecution may prefer to base a manslaughter charge on 'criminal negligence', in that Mick took control of Len as a virtual prisoner. Mick owed Len a duty of care not to cause him harm. Arguably, by the acts of forcing Len at gunpoint to sit atop the cartons of beer in the trolley and pushing it down a slippery ramp to the carpark, Mick breached the standard of care imposed by that duty to such a degree that it merited criminal punishment<sup>46</sup>. On an objective test, it is clearly arguable that Mick's acts amount to 'wicked' negligence<sup>47</sup>.

Overall, there is sufficient evidence to warrant the prosecution of Mick for the murder of Len on the basis of constructive murder, with the killing committed immediately after, or in furtherance of, the armed robbery of the liquor store. The crime of 'kidnapping' is another option that could be used as the basis for constructive murder in South Australia and Victoria. The alternative charge of manslaughter would also be available, and could be established beyond

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<sup>43</sup> *Crimes Act 1958* (Vic) s 63A.

<sup>44</sup> See above n 22. There is also an offence of 'kidnapping' in New South Wales – see *Crimes Act 1900* (NSW) s 86(1).

<sup>45</sup> See above n 23.

<sup>46</sup> See above n 27.

<sup>47</sup> See above n 28.

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reasonable doubt on the basis of criminal negligence or unlawful and dangerous act, however, the former basis is arguably the strongest in all the circumstances.

### **SCENARIO 2**

#### *Death of Molly*

Reuben will probably face a charge of involuntary manslaughter in relation to the death of Molly. The prosecution are most likely to argue this on the basis of criminal negligence due to the omission of Reuben. There is a possible alternative argument on the basis of an unlawful and dangerous act.

In establishing the basis for criminal negligence manslaughter, the prosecution would focus on Reuben's actions in secluding the seriously injured Molly in the cabin and failing to seek medical assistance in a timely manner. The prosecution must prove the death of a human caused by a voluntary act or omission of Reuben by which he breached a duty of care owed to Molly and the breach was 'gross' or 'wicked'.<sup>48</sup>

It is apparent that Molly died after life support was removed and the post-mortem examination reveals an irreversible cessation of brain function.<sup>49</sup> As to the causal connection between Reuben's failure to secure medical assistance for Molly and her death, the prosecution would argue this omission by Reuben was a substantial and operating cause<sup>50</sup> of Molly's death and it could not be attributed to any intervening factor. The prosecution would rely heavily on the expert report suggesting that Molly may have survived if she had received medical treatment much closer to the time when she had slipped, fallen and struck her head. There are possible arguments that the inaction by the hospital staff by initially ignoring Reuben's intoxicated ramblings and delaying assistance for some hours before police arrived at the hospital on other business, or removing the life support after two days in hospital were *novus actus interveniens* by medical staff, which broke the chain of causation between Reuben's omission to act and Molly's death. The latter action in removing life support after the decision by Molly's next of kin is unlikely to be found to have broken the chain of causation from Reuben's omission.<sup>51</sup> Also, the inaction by the hospital emergency staff when Reuben first arrived and tried to explain his story is understandable given his level of intoxication. It does, however, appear that Reuben remained at the hospital for some hours before speaking to police and them ascertaining there had been an incident at the retreat. In these circumstances and given the expert opinion that Molly may have survived if she had received treatment earlier, without

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<sup>48</sup> *R v Lavender* (2005) 222 CLR 67; *Lane v R* [2013] NSWCCA 317; *R v Moore* [2015] NSWCCA 316, [142], [144].

<sup>49</sup> *Human Tissue Act 1983* (NSW) s 33; *Human Tissue Act 1982* (Vic) s 41; *Death (Definition) Act 1983* (SA) s 2.

<sup>50</sup> *Royall v The Queen* (1991) 172 CLR 378; *R v Moffatt* (2000) 112 A Crim R 201; *Krakouer* (2006) 161 A Crim R 347.

<sup>51</sup> *R v Malcharek*; *R v Steel* [1981] 2 All ER 422

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nominating a specific time, the argument for a break in the chain of causation at this stage is plausible. At the same time, it is apparent that Reuben took no further action in these hours to try to properly communicate with hospital staff in order to get more timely help for Molly when he suspected that she had suffered a serious head injury. Therefore, the stronger argument is that the failure by Reuben to act in a timely fashion after Molly's fall when she was still breathing but was suspected of suffering a serious head injury, remained a substantial and operating cause of her death. The prosecution would assert that Reuben's reaction of drinking a large amount of spirits to settle his nerves exacerbated his inaction in these circumstances. There is no evidence of negligent medical treatment once Molly was in hospital<sup>52</sup> so the prosecution will most likely be able to establish this element beyond reasonable doubt.

Turning to the duty of care owed by Reuben to Molly, the prosecution could take one of two potential approaches in all the circumstances. The marriage between Reuben and Molly of nine years standing is a status relationship giving rise to a legal duty to act.<sup>53</sup> Alternatively, this scenario has the hallmarks of a 'seclusion' case<sup>54</sup> where Reuben voluntarily assumed the care of Molly but by leaving her in the secluded bushland cabin at the isolated rural retreat he removed the possibility of others being able to provide assistance. A broad analogy can be drawn with the case of *Taktak*<sup>55</sup>; however, there are features, including the nine-year marital relationship and the control of the location by Reuben at the relevant time, which more strongly tend towards the existence of a duty of care than in the particular factual circumstances of *Taktak*. Essentially, while Reuben took responsibility to care for Molly by removing her from the public area, he prevented others from rendering aid or them seeking medical assistance for Molly. Overall, there is sufficient evidence available to the prosecution to establish a duty of care requiring action by Reuben in this instance.

Once the duty of care is established, the prosecution must prove that Reuben breached the duty he owed to Molly. The standard of care expected is that of the reasonable person,<sup>56</sup> who is of the same age, experience, knowledge and is placed in the same circumstances as the accused.<sup>57</sup> Having been married to Molly for nine years, Reuben is a mature adult whose knowledge included seeing Molly slip and fall down the stairs, taking her inside the cabin and laying her down on the bed suspecting that she had suffered a serious head injury. Reuben's subjective belief that no one would believe him that Molly's fall was an accident would not be attributed to the reasonable person. There is no evidence that Reuben had any medical experience or training, but his subsequent actions involving the initial panic, consuming spirits and then deciding to drive to the

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<sup>52</sup> *R v Jordan* (1956) 40 Cr App R 152; *R v Cheshire* [1991] 1 WLR 844.

<sup>53</sup> *R v Taktak* (1988) 14 NSWLR 226, 250-251.

<sup>54</sup> Category identified in the cases – see *R v Taktak* (1988) 14 NSWLR 226 and *Burns v The Queen* (2012) 246 CLR 334.

<sup>55</sup> *R v Taktak* (1988) 14 NSWLR 226.

<sup>56</sup> *Nydam v R* [1977] VR 430; *Patel v The Queen* (2012) 247 CLR 531.

<sup>57</sup> *R v Lavender* (2005) 222 CLR 67.

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nearby hospital to get help arguably support the contention that he had failed to seek medical treatment for Molly in a timely manner and thus breached his duty of care. The defence might argue that a reasonable person would have removed Molly from further danger, such as exposure to the weather, and taken time to assess Molly's condition themselves before seeking any medical assistance, which is what Reuben did in this instance. However, in circumstances where Molly was still breathing but otherwise unresponsive, and Reuben, having seen the slip and fall, suspected she had suffered a serious head injury, the stronger argument is that by not acting promptly to obtain medical assistance Reuben breached the duty of care he owed to Molly.

The prosecution must then prove that the breach is 'gross' or 'wicked' in that it involved 'such a great falling short of the standard of care which a reasonable man would have exercised and which involved such a high risk that death or grievous bodily harm would follow that the doing of the act merited criminal punishment'.<sup>58</sup> The prosecution would contend that the failure to seek prompt medical assistance for a person who had suffered a serious head injury along with the removal of any indication that they are present at the secluded location by turning off the lights and locking the cabin door before driving off, amounted to a great falling short of the relevant standard of care and there was high risk, given the serious nature of the injury, that death or grievous bodily harm would result. On the other hand the defence would likely argue that the breach was not gross drawing an analogy with *Taktak*, that is, Reuben's failure to act in a timely manner was explicable as his knowledge could not extend to the urgency of the need for medical assistance for Molly, so raising a reasonable doubt as to there being negligence to the degree required to establish criminal negligence. The prosecution would counter that argument by seeking to distinguish *Taktak* on the basis of the expert evidence that Molly may have survived if she had received treatment for her injury at an earlier time, which evidence was not available in *Taktak*. Overall, 'gross' negligence on the part of Reuben could be proved by the prosecution beyond reasonable doubt but it is ultimately a jury question which cannot be conclusively determined on the given facts.

The prosecution has a relatively strong case to prove manslaughter by criminal negligence against Reuben with the most significant stumbling block being whether his omission amounts to negligence of that very high degree to merit criminal punishment.<sup>59</sup> Reuben is likely to face a manslaughter charge on this basis in relation to the death of Molly.

Alternatively, the prosecution may also consider proceeding against Reuben for manslaughter on the basis of an unlawful and dangerous act.<sup>60</sup> The prosecution

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<sup>58</sup> *Nydam v R* [1977] VR 430, 445; *R v Lavender* (2005) 222 CLR 67; *R v Sood (Ruling No 3)* [2006] NSWSC 762; *R v Moore* [2015] NSWCCA 316, [142], [144].

<sup>59</sup> In South Australia, consideration would also be given to charging Reuben with the statutory offence of 'criminal neglect' under *Criminal Law Consolidation Act 1935* (SA) s 14.

<sup>60</sup> *Wilson v The Queen* (1992) 174 CLR 313.

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can present their case for manslaughter on multiple alternative bases using the same facts.<sup>61</sup> The focus for unlawful and dangerous act manslaughter would shift to Reuben's action in reaching out to touch Molly's arm, which caused her to jump away, slip and fall down the stairs. It is certainly arguable that Reuben's act caused Molly to fall and sustain a serious brain injury ultimately resulting in her death and that this act by Reuben was unlawful as an 'assault'. The defence could argue that in merely touching Molly's arm to get her attention, Reuben was not assaulting her but it was simply an ordinary interaction in the exigencies of everyday life particularly where Molly had just informed Reuben that their marriage was over after confronting him about the call she taken from a woman on his mobile phone. The major stumbling block for the prosecution would be in proving that Reuben's act was objectively dangerous in the sense that it created 'an appreciable risk of serious injury'.<sup>62</sup> The reasonable person in the position of Reuben would be aware of the wet tiles and the rather steep steps, however the action of simply reaching out and touching Molly's arm to get her attention in these circumstances would not create an appreciable risk of serious injury. It would be very difficult for the prosecution to prove this alternative basis for manslaughter beyond reasonable doubt so it is unlikely that Reuben would be charged on this basis.

### *Death of Linus*

If these events occurred in New South Wales, Reuben would likely face a charge of 'dangerous driving occasioning death' in relation to the death of Linus.<sup>63</sup> This is a strict liability offence, so the prosecution would only have to prove that Reuben drove a vehicle which was involved in an impact, the impact occasioned death and at the time of the impact Reuben was driving the vehicle under the influence of intoxicating liquor or a drug or at a speed or in a manner dangerous to another person. On the given facts there appears to be no issue that Reuben was driving his car<sup>64</sup> on the road between the retreat and the major road. This element is likely to be admitted. Also, there seems to be no issue that Linus died as a result of his vehicle impacting with a tree so that this element of the impact occasioning death might also be admitted.

As to an impact, Reuben was dazzled by the headlights of an oncoming vehicle but there is no evidence of a direct contact between the vehicles. Reuben assumed the vehicle had passed him without incident and a later examination of Reuben's vehicle showed no signs of any direct collision with another vehicle or object. In circumstances where scene of crime officers, after noticing tyre marks leading away from the road leading into the retreat, found that Linus's vehicle

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<sup>61</sup> *Burns v The Queen* (2012) 246 CLR 334, [7]; *Lane v R* [2013] NSWCCA 317, [51]-[66].

<sup>62</sup> *Wilson v The Queen* (1992) 174 CLR 313; *Director of Public Prosecutions (Vic) v Singleton* (2010) 29 VR 351; *R v Presley* (2015) 122 SASR 476, 489.

<sup>63</sup> *Crimes Act 1900* (NSW) s 52A(1). There are no relevant circumstances of aggravation on the given facts - *Crimes Act 1900* (NSW) s 52A(2) & (7).

<sup>64</sup> A car is a 'vehicle' within the definition set out in *Crimes Act 1900* (NSW) s 52A(9).

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had struck a tree consideration must be given to an indirect impact. This extends to a vehicle causing an impact between other vehicles or another vehicle and any object or causing another vehicle to overturn or leave a road resulting in a death.<sup>65</sup> There has obviously been an impact between the vehicle driven by Linus and the tree. In addition the prosecution would rely on evidence of the tyre marks veering off the track and leading to Linus's vehicle together with Reuben's recollection of being dazzled by the oncoming headlights on this track and his time of arrival at the hospital after 10pm to prove that the driving of Reuben caused Linus's vehicle to impact with the tree. The circumstantial evidence should be sufficient proof in these circumstances given the restricted width of the poorly maintained and unlit retreat road, it was raining at the time, and Reuben had not turned on the headlights of his vehicle.

The most contentious element of the offence is whether Reuben was driving in a manner dangerous to another person at the time of the impact. The prosecution would not rely on Reuben being 'under the influence of intoxicating liquor' as his blood alcohol concentration of 0.12 does not activate the conclusive presumption<sup>66</sup> nor is it clear that a sample of Reuben's blood was taken within 2 hours after the impact.<sup>67</sup> The element of dangerous driving requires the prosecution to prove that Reuben's driving was 'either intrinsically, or in all the circumstances, or because of the particular circumstances surrounding the driving, ... in a real sense potentially dangerous to a human being ... This concept ... requires some serious breach of the proper conduct of a vehicle upon the highway, so serious as to be in reality and not speculatively, potentially dangerous to others ...'.<sup>68</sup> There are several features of Reuben's driving that the prosecution could present in developing an argument that the driving was objectively dangerous. Reuben failed to activate his headlights while driving in the dark of night and this failure occurred on a poorly maintained narrow road in a rural area that was unlit when visibility was even further reduced by rain. Further, Reuben had just rounded a corner when he was dazzled by the headlights of an oncoming vehicle in these unfavourable conditions. The width of the road is a particularly important point as it created a real chance of a head-on collision where advance warning of an approaching vehicle, such as illuminating headlights, was not given. Further, the evidence that Reuben's blood alcohol concentration was 0.12, which is in the 'high-range', would go to showing that his ability to properly control the vehicle was adversely affected.<sup>69</sup> This would likely be another contributing factor to the dangerousness of Reuben's driving and using all features in combination<sup>70</sup> the prosecution has a plausible argument that Reuben's driving involved a serious breach of the proper conduct of a motor

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<sup>65</sup> *Crimes Act 1900* (NSW) s 52A(6).

<sup>66</sup> *Crimes Act 1900* (NSW) s 52AA(1).

<sup>67</sup> *Crimes Act 1900* (NSW) s 52AA(3).

<sup>68</sup> *McBride v The Queen* (1966) 115 CLR 44; *King v The Queen* (2012) 245 CLR 588.

<sup>69</sup> *R v McBride* [1962] 2 QB 167; *R v Thorpe* [1972] 56 Cr App R 93; *R v Owens* (1987) 30 A Crim R 59.

<sup>70</sup> *McBride v The Queen* (1966) 115 CLR 44; *R v Hain* (1966) 85 WN (Pt 1) (NSW) 7.

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vehicle and they could prove beyond reasonable doubt that he was driving in a manner dangerous to another person.

The lesser alternative charge of ‘negligent driving occasioning death’<sup>71</sup> could be charged if the prosecution considered there was a risk of a reasonable doubt as to whether Reuben was driving in a manner dangerous to another person. In relation to the control of motor vehicles, negligence is analogous to being careless or inattentive. Consideration is given to whether Reuben was exercising the degree of care and attention that a reasonable and prudent driver would exercise in the circumstances.<sup>72</sup> The factors analysed above in relation to dangerous driving show that in not illuminating his headlights on a narrow road when it was raining and driving immediately after consuming approximately 300 millilitres of various spirits, Reuben was at least driving negligently when he caused the vehicle driven by Linus to swerve off the road into a tree. This is a viable and likely alternative charge against Reuben.

A similar offence of dangerous driving causing death<sup>73</sup> could be established against Reuben if these events occurred in Victoria. This is a strict liability offence with similar elements to the New South Wales offence analysed above. One important difference is that the prosecution must prove that by driving the motor vehicle in a manner dangerous to the public, Reuben caused the death of Linus rather than simply causing the vehicle driven by Linus to impact with the tree. Similar reasoning would be used to establish the causal link between Reuben’s driving and the death of Linus as it is apparent that Linus died as a result of having to swerve off the road and into the tree to avoid Reuben’s vehicle, which he was driving in a dangerous manner, that is, without headlights illuminated in the unfavourable conditions set out above. It would be difficult to prove the more serious offence of ‘culpable driving causing death’<sup>74</sup> as there is insufficient evidence to establish that Reuben was driving recklessly or negligently as defined in the legislation.<sup>75</sup>

If these events occurred in South Australia then Reuben would likely be charged with the offence of ‘causing death by dangerous use of a vehicle’.<sup>76</sup> The relevant elements of this offence are directly comparable to the Victorian offence analysed above as reliance would be placed on Reuben driving in a manner dangerous to any person rather than recklessly or in a culpably negligent manner in all the circumstances.

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<sup>71</sup> *Road Transport Act 2013* (NSW) s 117(1)(a).

<sup>72</sup> *Taylor v Rodgers* (1960) 124 JP 217; *Geneff v Townshend* [1970] WAR 20; *DPP (NSW) v Yeo* (2008) 188 A Crim R 82.

<sup>73</sup> *Crimes Act 1958* (Vic) s 319.

<sup>74</sup> *Crimes Act 1958* (Vic) s 318.

<sup>75</sup> *Crimes Act 1958* (Vic) s 318(2)(a) and (b).

<sup>76</sup> *Criminal Law Consolidation Act 1935* (SA) s 19A(1). It is also likely that Reuben will be charged with the lesser alternative offence under s 19AB(1).