

Homicide: Murder or Manslaughter

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Disclaimer: The following paper is meant to educate tutors involved in teaching *SENG4921 Profession Issues and Ethics* course at the UNSW as to the differences between murder and manslaughter. The material presented here is not intended to cover exhaustively the legal definitions of murder or manslaughter nor does it claim to be the current law in NSW or Australia. The primary purpose for this material is to provide tutors with a greater appreciation of the subtleties between murder and manslaughter in order to facilitate a class discussion of Richard G Epstein's *The 'Killer Robot' story*.

1 Definitions

Homicide This is a non-prejudicial term that is used to describe a death of a human being without indicating whether it is murder and manslaughter.

Murder This is the killing of a human being in which the following elements **must** exist:

Actus Rea the act of killing a human being

Contemporaneity the mental element for murder must exist at the same time as the act/omission of the accused that causes death; or where there's a series of acts, the mental element must be present at one essential time during the series

Mens Rea the intent to kill or to cause grievous bodily harm (GBH); reckless indifference to human life (foresight of probability of death resulting); no need to prove *modus operandi* (ie no need to show the accused intended the precise way in which the victim died)

Constructive Murder Special category in which an act or omission results in death during an attempt to commit (during or immediately after the commission of) a crime (eg armed robbery); the prosecution need only prove the act causing death was voluntary and the accused or accomplice intended to commit a crime; there's no need for the prosecution to prove the accused intended to commit murder.

Manslaughter by Unlawful Act This is where death results as a direct consequence (*causation*) of an act that is *unlawful* and *objectively* dangerous (ie a reasonable person would realize that the act would expose others to an appreciable risk of serious injury); the Prosecution need prove that the accused intended to commit the relevant unlawful act (there is no need to prove that there's an intent to commit murder); it is irrelevant that the accused did not believe that the conduct was unlawful or dangerous.

Manslaughter by Criminal Negligence A death has occurred but the liability hinges on whether there was a **legal duty of care** owed by the accused to the victim; whether the *omission* was the cause of death; whether the omission was conscious and voluntary without any intention of causing death but in circumstances whereby there was such a great falling short of the standard of care that a *reasonable person* would have exercised and which involved such a high risk that death would follow and that the omission merits criminal punishment.

While not every moral obligation involves a legal duty to act, the Common Law recognizes the following categories in which there is a duty to act:

- where a statute imposes a duty of care;
- where there is special relationship, eg parent and child, employer and employee;
- where there is an assumed contractual duty;
- where a person voluntarily assumed the care of a helpless person to the exclusion of others.

These are categories in common law and will likely evolve as more cases come to trial.

Corporate Homicide Industrial manslaughter based on criminal negligence is now a recognized statutory offence in the ACT but not in NSW (not sure about the other States). In NSW, the *identification doctrine* is used to assess the moral culpability of a Corporation (this is a common law doctrine that attempts to identify the directing mind of the company). Much of this may now be covered under OH&S regulations.