NOTES ON THE LAW RELATING TO SUICIDE

1. The textbook references are to the South African Criminal Law and Procedure by P M A Hunt - Volume 2.

2. At page 334:

"There have been cases in America in which Y, having been injured by X, has committed suicide. It is submitted that provided X's conduct had not mentally incapacitated Y at the time of suicide, Y's act must be regarded as a novus actus, just as would be regarded the conduct of an independent third person who shot Y through the heart after Y had been injured by X."

The question of novus actus is then discussed in R v Peverett 1940 AD 213. Where Y sat freely and passively in a car into which X introduced exhaust fumes, it was held that Y's passivity did not constitute a novus actus. Also in R v Gordon 1962(4) SA 727, where Y ate sleeping pills provided by X, it was held that Y's voluntary conduct broke the causal chain.

"The link between Peverett and Gordon may be fine, but it seems sufficiently significant to justify the distinction."

See generally the discussion at pages 334 and 335. See also page 346 of the book and particularly the quotation from the Rhodesian case of R v Chenjere.
See the case of R v Nbakwe 1956(2) SA 557 at 559
where the High Court of Southern Rhodesia found:

"The accused did not actually kill the
decceased himself, but if his acts could be
construed as an attempt to do so, he could
legally be convicted of attempted murder,
since on an indictment for murder a verdict
of attempted murder is a competent one. ....
In my view the acts of the accused on this
occasion do not go far enough to constitute
an attempt. They go no further than what are
commonly called acts of preparation. The
accused provided a means for causing death
and he persuaded the woman to kill herself,
but the actual act which caused the death of
the woman was the act of the woman herself.
There was, to use a common expression, a
novus actus interveniens between the action
of the accused and the death of the deceased
which in my view broke the chain of causation
between the act of the accused and the death
of the deceased."
(iii) On the basis of *R. v. Loubscher* and *S. v. Taylor* (but contrary to *Rooi* and *Mubila*), the rule may be the same even where the wound is 'intrinsically dangerous', but not if the wound is so dangerous that it is 'mortal': likely to cause death even if available medical treatment is obtained. The following example makes it clear that this should be the case: X inflicts a dangerous wound on Y who, though an educated man living in a civilized community, refuses (for religious or malicious reasons) to undergo a blood transfusion which would certainly save him, and dies. Y's refusal ought to be treated as a *novus actus* just as much as if he were to commit suicide. If abnormality is a dominant criterion, it cannot necessarily be predicated upon a non-dangerous wound. The conjunction of circumstances may be so startling, even in the case of a dangerous wound, that that conjunction should be labelled 'abnormal'.

(2) Suicide and 'suicide pacts'. There have been cases in America in which Y, having been injured by X, has committed suicide. It is submitted that provided X's conduct had not mentally incapacitated Y at the time of suicide, Y's act must be regarded as a *novus actus*, just as would be regarded the conduct of an independent third person who shot Y through the heart after Y had been injured by X.

The South African cases have concerned the situation in which X and Y make a 'suicide pact' or in which without such a pact X, without directly injuring Y, encourages the latter to commit suicide. It has been held that suicide—and, consequently, incitement to commit suicide—is not a crime. Whether X can be convicted of murder (the person who committed suicide) depends on whether Y's own actions can be construed as a *novus actus* which breaks the chain started by X's activities. In *R. v. Peverett*, where Y sat freely and passively in a car into which X introduced exhaust fumes, it was held that Y's passivity did not constitute a *novus actus*. Likewise it was held in *S. v. Robinson* that it is murder for X to shoot Y at the latter's request. But in *R. v. Nbakwa*, where Y voluntarily hanged herself with materials provided and prepared by X, *R. v. Gordon*, where Y ate sleeping-pills provided by X, and *S. v. Grotjohn*, where Y shot herself with a gun handed to her by X who knew of her purpose, it was held that Y's voluntary conduct broke the causal chain. The line between *Peverett* and *Gordon* may be fine, but it seems sufficiently significant to justify

152 *Aliter* if the abnormal circumstances were foreseen or planned by X; see above, p. 330. In *S. v. Taylor*, Y's negligent departure from hospital apparently had no causal potency; also the wound was a 'mortal' one.


154 As was apparently the case in *S. v. Taylor* (supra).


156 The cases of *Angelina* and *Lewis* (supra), in which opposite conclusions were reached.

157 See *Hart and Honoré*, pp. 294, 302. This may be the explanation of *S. v. Stephenson*, (1932) 205 Ind. 141 (on which see *Hart and Honoré*, p. 294) in which a girl who had been brutally raped and injured took poison. The rapist was held to have caused her death.


160 1940 A.D. 213.

161 1968 (1) S.A. 666 (A.D.).

162 1964 (2) S.A. 727 (N).

the distinction.\footnote{166}

However, the Appellate Division\footnote{166} has now in effect overruled \textit{S. v. Gordon} and \textit{S. v. Grotjohn} in answering questions of law put to it by the Minister of Justice. It must therefore now be accepted that if \textit{X} incites \textit{Y} to commit suicide or provides \textit{Y} with the facilities foreseeing that \textit{Y} will use them, and \textit{Y} does commit suicide, \textit{X} is guilty of murder. \textit{Y}’s positive, voluntary act is not a \textit{novus actus} because \textit{X} foresaw or planned it.

(3) \textit{Endeavours to escape}. If \textit{Y} is killed trying to escape from \textit{X} \textit{Y}’s conduct cannot be regarded as voluntary and the fatal accident will not be considered a \textit{novus actus}.

\textit{Aliter}, however, if, allowing for the agony of the moment, \textit{Y}’s conduct is sufficiently ‘unreasonable’. This was the conclusion in \textit{R. v. McEnery}\footnote{168} in which \textit{X}, a drunken and unarmed European soldier, entered a moving railway coach at night and began assaulting the Bantu occupants with the result that one of them, \textit{Y}, jumped out and was killed.\footnote{169}

\begin{itemize}
\item[(B)] \textit{Subsequent conduct on the part of \textit{X}}
\end{itemize}

Obviously if \textit{X} performs a subsequent innocent or even negligent act which is completely independent (in conception and execution) of his original conduct, and which causes death, it must be regarded as a \textit{novus actus}. A repentant \textit{X} may, for instance, cause \textit{Y}’s death when, while subsequently visiting him in hospital, he infects him with a disease\footnote{170} or when, while driving him to a doctor, his car is involved in a collision.\footnote{171} In both cases \textit{X}’s original murder attempt is a \textit{sine qua non} of \textit{Y}’s death at that time, but that is not enough.

Problems have arisen under this heading in five South African cases, in each of which the decisive fatal act was committed by \textit{X} in order to avoid detection for what he erroneously thought to be a completed murder. In \textit{R. v. Shorty}\footnote{172} \textit{X} violently assaulted \textit{Y} with a large stone. Mistakenly believing \textit{Y} to be dead, \textit{X} put him down a sewer, where he drowned. The Southern Rhodesian Court held that the immersion in the sewer was ‘a new, intervening act, and it was not immediately connected with the assault; and it was this immersion in the sewer which was the cause of death’.\footnote{173} Consequently \textit{X}’s first act had not caused death while his second had been committed without intent to kill (as \textit{X} then thought he was dealing with a corpse), and \textit{X} could be convicted only of attempted


\footnote{168} \textit{Ex parte Die Minister van Justisie: In re S. v. Grotjohn}, 1970 (2) \textit{S.A.} 355 (A.D.) at 364–5. See further, below, pp. 351–351A.


\footnote{170} There are a number of culpable homicide cases—particularly driving cases—in which the courts have had to consider whether \textit{Y}’s negligence is a \textit{novus actus}. See, further, chap. 18, pp. 387–8.

\footnote{171} \textit{Smith and Hogan}, p. 189. Cf. \textit{Bush v. Commonwealth} (1880) 78 Ky. 268, where \textit{Y} contracted the disease in hospital, but not from \textit{X}. Whether \textit{X} or someone else is the source of the disease cannot make any difference.

\footnote{172} \textit{1950 S.R.} 280.

\footnote{173} At 281.
The classic example is of the drowning man whom X can rescue but whom the law does not require him to save.

However, in certain circumstances X is sufficiently connected with the events for the law to abandon its attitude of *laissez faire* and impose a duty on him to act in order to protect Y from bodily harm. It is impossible precisely to define these circumstances, but the following are some of the main categories (which to some extent overlap):

1. **Protective relationship.** Briggs F.J. said (obiter) in *R. v. Chenjere*:

   "To cause death by inaction may be criminal if there is a positive duty to preserve the life of the person in question. The duty arises where the potential victim is helpless through infancy, senility or illness and the potential killer stands, either naturally or through a deliberate acceptance of responsibility, in a protective relationship to the victim. There was no natural relationship between the appellant and the deceased, but I think that, by taking the mother and a child of that age [2-3] from the protection of the natural guardian, husband and father, with the apparent intention of forming a new “family” relationship—of a permanent, or at least prolonged nature, the appellant had deliberately assumed a protective relationship towards both of them."

Likewise, section 130 of the Transkeian Penal Code makes X responsible for the death of Y if X has 'charge' of Y, 'by reason of detention, age, sickness, insanity, or any other reason', and X omits to supply Y with 'the necessities of life' with the result that Y dies.

2. **Statute.** Statutes may create positive duties to act in order to protect the bodily security of other persons. Sections 130-3 of the Transkeian Penal Code fall into this category. Social legislation, such as that regulating conditions in factories, also provides examples, though it is perhaps improbable that breach of a duty, for instance to fence dangerous machinery, would ever be proved to accompany intent to kill.

3. **Public and quasi-public office.** The incumbent may be under a duty to care for someone in his charge, for instance, a gaoler who, with intent to kill, starved a prisoner to death, would obviously be guilty of murder.

4. **Control of dangerous property.** If X has control of a dangerous thing or animal which may cause harm unless precautions are taken, X is under a duty to take those precautions. It is conceivable, for instance, that X, owning a very vicious dog, might deliberately leave Y to a fatal encounter with it.

5. **Contract or other undertaking.** If X undertakes, gratuitously or otherwise, expressly or impliedly, "to do any act, the omission to do which may be dangerous to life", he will be under a duty to do that act. For instance, X may undertake to control apparatus which determines the water-level or the gases present in a mine. It is murder if he intentionally breaches this duty foreseeing that—as in

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*See* R. v. De Bruyn, 1953 (4) S.A. 206 (S.W.A.) at 211.

*See R. v. De Brown, 1953 (4) S.A. 206 (S.W.A.) at 211.*


*See* D.9.2.29.7; sec. 130 of the Transkeian Penal Code; *Mzati v. Minister of Justice*, 1958 (1) S.A. 221 (A.D.).

*See* D.9.2.27.9; 44.1; sec. 132 of Transkei Code; *R. v. Puttock*, 1968 (1) P.H., H. 78 (R.A.D.); *S.A.R. v. Estate Saunders*, 1931 A.D. 276.

*Sec. 133 of the Transkeian Penal Code.*
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fact happens—his omission may lead to the death of persons within the mine. Likewise a doctor would be responsible for causing Y's death if he had undertaken to operate on or otherwise treat Y, and because of his failure to perform his duty Y received no treatment and consequently died.

(6) Prior conduct. Where 'by some positive act [X] has created a potentially dangerous state of things which would otherwise not have existed,' X has a duty to guard against the foreseeable danger. If X lights a bonfire next door to a munitions factory he obviously bears a duty to prevent it spreading. One might also say that he is in control of a dangerous thing or situation, but there may be other examples (such, perhaps, as the case of a person who creates a hazard on a public path) which do not fit comfortably into any of the above categories and which are best placed under this rather general rubric.

(b) Infanticide

It is clear in South African law (Natal excepted) that infanticide is merely a form of murder. It is not a substantive crime and is usually charged under the name 'murder'. In fact the only point worthy of note regarding this species of murder is that in terms of section 330 of the Criminal Procedure Act a woman who is convicted of the murder of her 'newly born' child need not—even in the absence of extenuating circumstances—be sentenced to death. In R. v. Belliana Mackinini, a ten-day-old baby was considered 'newly born', but the opposite conclusion was reached in R. v. Adams, where the child was three to four weeks old.

The position in Natal is governed by section 9 of Act No. 10 of 1910 (N), which provides that

'The unlawful killing of a child within one week after its birth shall be a crime under the name of infanticide. The crime of infanticide shall be punishable by imprisonment with or without hard labour for a term not exceeding five years, but nothing in this section shall be deemed to repeal or affect the law relating to the murder of a child: Provided that a conviction or acquittal upon a charge of infanticide shall bar any subsequent charge of murder or culpable homicide of the same child.'

This provision is considerably more lenient than comparable foreign statutes which all seem to restrict infanticide to the child's mentally or emotionally disturbed mother, but of course the prosecutor does have a discretion to indict for murder. It is submitted that mens rea is an element of the offence.

(c) Exposing an Infant

A parent who, with intent to kill, abandons an infant can be charged with murder if death results, or with attempted murder, if it does not. Negligent

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275 Cf. Inst. 4.3.6; D.9.2.8pr., 27.33; sec. 131 of the Transkeian Penal Code.
276 McKerron, p. 12.
277 Cf. D.9.2.30.3.
278 For an historical and jurisprudential treatment of infanticide, see Glanville Williams, Sanctuary of Life, pp. 25-42, who also deals with the English Infanticide Act of 1938 (on which see, too, Smith and Hogen, pp. 240-1). De Wet and Swanepoel, pp. 209-10, mentions various Continental enactments. All infanticide statutes seem to restrict the crime to the conduct of an emotionally or mentally-disturbed mother. If a third person kills a newly-born child, the crime is murder.
279 The Roman-Dutch writers did not clearly distinguish murder (and infanticide) from abortion, and this led the Transvaal Court in S. v. A.P. (1895) 2 Off. Rep. 103, to convict for infanticide where what was killed was only a foetus. It is now trite that the terms 'infanticide' and 'murder' apply to the killing only of 'human beings born alive' (see below, p. 352).
280 1931 W.L.D. 20.
281 1929 C.P.D. 452.
282 See n. 278, above.