

# 1 Introduction

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## **Introduction**

This module guide is designed to help you to learn, understand, apply and evaluate those aspects of the criminal law which form the syllabus of the University of London International Programmes Criminal law module. It is intended to be read in conjunction with your textbook and has been designed to fit together with it. In each chapter of the module guide you will be directed to parts of the textbook, the virtual learning environment (VLE) or cases to be found in the Online Library, with a view to answering questions about the subject. In this way your knowledge and understanding of the subject is enhanced. Reading without thinking cannot achieve this.

## 1.1 The lawyer's method

Students new to law often think that being a lawyer is all about knowing a lot of law and 'learning the cases'. Strangely this is not true. The most law you will ever know will probably be around examination time when you have committed a lot of material to memory. As you move from student to practising lawyer, much of this law will be forgotten. But you will have an understanding of the basic principles of each of the subjects you have studied, and you will have internalised the skills and competencies which are so valuable to lawyers' clients.

Proficiency in criminal law involves a number of different skills and competencies, including:

- ▶ a knowledge of the rules and principles governing criminal offences
- ▶ an ability to use books, libraries and the internet to discover these rules
- ▶ a basic understanding of the rules of evidence and procedure
- ▶ an ability to identify the rule(s) applicable to a fact situation and to apply them logically and coherently.

Attaining these latter competencies is necessary to discharge effectively the day-to-day tasks of a criminal lawyer – whether student, solicitor, advocate or judge. However, true mastery requires something further. It requires also a critical and evaluative attitude. The criminal law in action is not just a matter of doctrine. The purpose of criminal law doctrine is the delivery of criminal justice and criminal justice is a contingent outcome in which rule, process and context all play their part.

Understanding criminal law requires, therefore, an appreciation of the day-to-day workings of the criminal justice system. Moreover, it requires an understanding of the resources of the criminal law to produce substantive justice. The criminal law is not just a set of rules. It is underpinned by ethical and political principles designed to ensure both justice to the individual and protection to the community the individual inhabits. If the mechanical application of a given rule to a fact situation acquits a dangerous or wicked person, or convicts someone neither dangerous nor blameworthy according to ordinary standards, something has gone wrong. Students should therefore be prepared to subject the rules to critical scrutiny. Lawyers do this all the time, not least in court when their job is to fight their client's cause. Sometimes, they will be saying, in effect, 'This is bad law and should not be followed' or 'This law was not intended to cover this situation', and so on.

Throughout this module guide we shall be posing the question 'Do you agree with this decision?' Take these questions seriously! Here is an example.

In a leading case called *Ireland*, which we will be looking at in Chapter 9, a man made a woman's life a misery by making a succession of telephone calls, usually silent ones. Eventually she had a breakdown, suffering clinical depression. Obviously this man had done something very wrong but the criminal law has no authority to punish him unless the thing he has done is a **criminal offence** (the principle of legality). Is it? What offence had he committed? Ireland was charged and convicted of assault occasioning actual bodily harm. This requires proof of an assault, which means acts causing the victim to fear immediate personal violence. Did those calls cause the victim to fear **immediate violence**? It requires proof of actual bodily harm. Is depression 'bodily' harm? The House of Lords upheld his conviction. If I were to ask you now 'Do you agree with this decision?' you might say something like this. 'Well the decision is right from the point of morality – what he did was unforgiveable – but it is possibly not right from the point of view of the principle of legality (that people should not be punished unless their action is prohibited by the criminal law). He had not assaulted her. He had frightened her but that is not the same thing. And he had not caused her actual bodily harm. Depression is mental harm not bodily harm.' This is the kind of critical thinking which you should be deploying.

## 1.2 What does criminal law comprise?

Crimes are distinguished from other acts or omissions which may give rise to legal proceedings by the prospect of punishment. It is this prospect which separates the criminal law from the law of contract and tort and other aspects of the civil law. The formal threshold at which the criminal law intervenes is when the conduct in question has a sufficiently serious social impact to justify the state, rather than (in the case of breach of contract or trespass) the individual affected, taking on the case of the injured party.

The American Model Penal Code provides a good restatement of the proper purposes of the criminal law, namely:

1. to forbid and prevent conduct that unjustifiably and inexcusably inflicts or threatens substantial harm to individual or public interests
2. to subject to public control persons whose conduct indicates that they are disposed to commit crimes
3. to safeguard conduct that is without fault from condemnation as criminal
4. to give fair warning of the nature of the conduct declared to be an offence
5. to differentiate on reasonable grounds between serious and minor offences.

Which of these propositions were contradicted in *Ireland*?

## 1.3 Procedure

The criminal law's purposes are discharged by law enforcement and the machinery of criminal justice generally. Law enforcement includes preventing crime, typically by policing and also by bringing offenders to justice. The procedures vary according to the nature of the offence committed. Criminal offences are classified according to whether they are arrestable or non-arrestable. The former, which includes more serious crimes, allows a suspect to be arrested without an arrest warrant.

The Crown Prosecution Service (CPS) has the overall responsibility for bringing proceedings. It is their job to assess the weight of evidence, and decide, in the light of the evidence and the public interest, whether a prosecution should proceed. Discretion, as much as the rules of criminal law, is influential. So, for example, the CPS had the job of deciding whether to proceed in the case of *Ireland*. It would have been a difficult decision to make.

It should be understood that, although official charging standards govern the exercise of the CPS's discretion over which offence to charge, there is no necessary connection between the offence actually committed and that charged. Thus a person who has committed robbery may be charged only with theft; a person who has committed a wounding may be charged only with assault; a person who has committed murder may be charged only with manslaughter. Undercharging carries a number of benefits. First, it may have evidential advantages. It is easier to prove theft than robbery. Second, it may encourage a guilty plea. Third, it may enable the case to be heard summarily rather than on indictment. The advantage for the prosecution of summary trial is that it is less costly and more efficient. It is also thought to increase the chances of conviction.

Offences are triable:

1. summarily – that is, before magistrates
2. on indictment – that is, in Crown Court before a judge and jury
3. either way – that is, either summarily or on indictment.

All defendants have a right to jury trial in respect of offences triable either way. In practice, the vast majority of offences are heard by magistrates. Whether heard summarily or on indictment, the conduct of the trial in each case is dictated to a greater or lesser extent by the rules of evidence and procedure.

The formal accusation made against a defendant is in the form of an indictment or, where the matter is tried summarily before magistrates, an information. This contains a statement of the offence and particulars of the offence charged. Thus the indictment in the case of *Ireland* would have been in the following form.

John Ireland is charged as follows:

**Statement of Offence:** assault occasioning actual bodily harm

**Particulars:** John Ireland, between the dates of September 1998 and May 2004, assaulted Vicky Henderson, causing her actual bodily harm.

Judge and jury have separate roles in the conduct of the trial. The judge takes care of the law. In *Ireland*, for example, counsel for defence queried whether causing someone psychiatric injury was covered by the offence of assault occasioning actual bodily harm. The trial judge ruled that it was. As a result, Ireland pleaded guilty and so the jury were not called upon to give a verdict. When the judge gives such a ruling on a matter of law it is always open to the defence to appeal the ruling. Appeals are made from Crown Court to the Court of Appeal (and then the Supreme Court). This is what the defence did in *Ireland*, unsuccessfully as it turned out.

The jury are the judges of fact. This means that it is for them ultimately to decide how much weight to ascribe to the various pieces of evidence adduced by prosecution and defence. They will not do this unsupervised. In the course of the trial, the judge will ensure that no evidence is taken into account which is either irrelevant to the proof of guilt of the defendant or, if relevant, less probative than prejudicial. After prosecution and then defence have presented their cases, the judge will sum up and will review the facts for the jury. The judge will then explain to the jury what the law is and the facts they have to find to sustain a conviction. The judge will also tell the jury that the burden of proof is at all times on the prosecution and that the standard of proof is 'beyond reasonable doubt'. These instructions to the jury are known as jury directions. If the judge makes a mistake in directing the jury this can be appealed on the ground of misdirection.

## 1.4 The sources of criminal law

The criminal law is a creature of the common law, that is, judge made law. Some of the most important crimes have their source in the common law. Murder and manslaughter are obvious examples. However, the majority of criminal offences are now statute based. Such offences may either have originated in statute or are common law offences whose elements have been incorporated into statute, such as theft and most crimes of violence. In the latter case, such statutes will not always define the full common law offence. This will leave the common law with a significant role still to fulfil. In *Ireland*, for example, the offence charged was a statutory offence but the full scope of the offence is a matter of judicial decision.

European Law and the European Convention on Human Rights are other key sources of criminal law. It is important in particular to understand the Convention and its impact. Rarely a month goes past without some aspect of domestic law being challenged for being inconsistent with the Convention. Prime examples in the criminal field include *Dudgeon v UK*, in which the court held that a legislative provision criminalising homosexual activity between consenting adults in private in Northern Ireland was a breach of Article 8. And in *A v UK* the court ruled that a common law defence of reasonable chastisement which had led to the acquittal of a man who had beaten his step-child with a garden cane did not provide adequate protection for the latter's Article 3 rights. In both cases Parliament acted quickly to eradicate the inconsistency.

## 1.5 Study materials

The core textbook for this subject is:

- **Wilson, W. *Criminal law*. (Harlow: Pearson, 2014) fifth edition [ISBN 9781292001944]. This product is the book alone, and does not come with access to MyLawChamber.**

Or

- **Wilson, W. *Criminal law*. (Harlow: Pearson, 2014) fifth edition [ISBN 9781292002019]. This comes with access to the eText and MyLawChamber.**

Throughout this guide, this textbook will be referred to as 'Wilson'. Often, section references will be given to direct your reading. For example: 'Wilson, Section 11.4.'

Please note that all references to Wilson in this module guide are to the fifth edition (2014). You will find guidance in each chapter of this module guide as to which sections of the textbook you should read for any particular topic. This textbook is essential for examination success. This module guide has been specifically designed to dovetail with it, through the activities which appear in each chapter, so that the extra pieces of information and understanding which you will require to pass your examinations will be easily available. Reading the module guide alone will not be enough. You will see why if you look at last year's *Examiners' report* (available on the VLE)!

This textbook comes in two versions. Hard copy only and hard copy plus electronic support in the form of MyLawChamber – a web-based set of materials including source materials, updates, multiple choice questions, sample examination questions and skeleton answers. I strongly recommend you buy this version rather than the hard copy only version. It is more expensive but it has a great deal of value added. In particular it contains multiple choice questions which will help you in the multiple choice questions in the examination paper. You can access MyLawChamber from this address [www.mylawchamber.co.uk](http://www.mylawchamber.co.uk) Full log in details are found in the core textbook. You are also advised to read a criminal law casebook of your choice. Gobert, Dine and Wilson *Cases and materials on criminal law* most closely ties in with the textbook but there are a number of others on the market which are equally useful (see below). You will also need an up-to-date criminal law statute book. You will be able to take an unannotated copy into the examination.

You are encouraged to read widely and you will find it useful to refer to other textbooks on occasion. Here are some of the most useful for **Criminal law**.

- **Ormerod, D. *Smith and Hogan's criminal law*. (Oxford: Oxford University Press, 2015) 14th edition [ISBN 9780198702313].**
- **Ashworth, A. and J. Horder *Principles of criminal law*. (Oxford: Oxford University Press, 2016) eighth edition [ISBN 9780198753070].**
- **Keating, H.M., S.R. Kyd Cunningham, T. Elliott and M.A. Walters *Clarkson and Keating: criminal law: texts and materials*. (London: Sweet & Maxwell, 2014) eighth edition [ISBN 9780414032972]**
- **Herring, J. *Criminal law: text, cases and materials*. (Oxford: Oxford University Press, 2016) seventh edition [ISBN 9780198753049].**
- **Herring, J. *Great debates in criminal law*. (Basingstoke: Palgrave Macmillan, 2015) third edition [ISBN 9781137475916]. You will find this book both helpful and enjoyable for that part of the module and examination which requires you to analyse and evaluate areas of criminal doctrine.**

Please ensure that you use the latest edition of any textbook or casebook you choose.

## 1.6 Online resources

In addition to the hard copy materials, there are numerous online resources to help you with your studies. You can access these through the VLE. The Online Library contains everything you would find in a well-stocked law library and you should use it regularly, particularly for the purpose of reading key cases. Such reading gives valuable understanding about how lawyers reason their way through to conclusions and often contains little nuggets of information and understanding which you can deploy to good purpose in your essays.

**Criminal law** has its own section of the VLE which contains lots of important materials, including the complete module guide and feedback to activities, computer-marked assessments, newsletters, recent developments, updates, links to the Online Library and other useful websites, a discussion board, past examination papers and Examiners' reports.

There are also a full set of criminal law presentations on the VLE, including audio lectures and accompanying slides. These presentations introduce you to each topic covered on the syllabus and in the module guide and dovetail with both. A good way of learning is, therefore, to listen to the lecture and then turn to the matching part of the module guide. It can also usefully be referred to as a consolidation and revision aid.

## 1.7 Preparing for the examination

At the end of the module you will need to pass the examination in order to progress. The module guide and its activities, the textbook and audio presentations have been designed to ensure that you will have covered everything necessary for success, and in sufficient detail. Please ensure you approach your studies systematically, chapter by chapter, working through **all** the questions and activities, and making reference to the textbook and other materials as you do so. The feedback to activities in this guide is available on the VLE. Doing the activities properly is crucial. This enables you to develop the legal skills which full time students get from the small group tutorial classes when doing their law degree at the University. Reading and remembering is not enough. You are being examined on your skills as a lawyer! At the end of each chapter, ensure you have tackled all the 'Am I ready to move on?' questions which have been posed.

Advice and guidance on how to answer essay and problem questions appears at intervals in the module guide. Further guidance and illustrations are to be found on MyLawChamber. More information about the examination will be made available on the VLE along with sample examination questions. You must ensure that you are up to date with the format of the examination and any changes from previous years which will be detailed on the VLE.

## 1.8 Getting started

If you are new to law, you may find the subject a bit daunting at first, particularly if you come from a non-English jurisdiction. But, in time, you will find it is just like any other academic subject. Criminal law is full of interesting cases and ideas and we hope that as you read through the module guide and textbook you begin to find it enjoyable as well as interesting. When you get to that stage you will know you are well on track for success.

Good luck!

**NOTES**



## 2 The building blocks of criminal liability

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## Introduction

This chapter introduces you to some of the key terms and principles in criminal law.

### ESSENTIAL READING

- Wilson, Chapter 4 'Actus reus', Sections 4.1 'Introduction', 4.2 'Elements of liability' and 4.3 'Interrelationships of *actus reus*, *mens rea* and defences'.

## 2.1 General principles

If you decide to bake a cake but have never done so before, you will probably wish to consult a recipe. The recipe will contain ingredients general to all cakes. There are three such elements, namely a shortening agent such as fat or oil, a raising agent such as eggs or baking soda, and finally some form of farine such as flour. In addition, the recipe will contain ingredients which are specific to the cake you wish to make. There is an unlimited variety of such ingredients; for example a fruit cake contains dried fruit, sugar, spices and molasses.

The constituents of every human-made product can be approached in this way. Thus a residential house also contains three essential ingredients, namely foundations, structure and a roof. Again, the specifics of the house may vary enormously. The structure may be made of wood, bricks, concrete, metal, plastic or glass, while the roof may be made of stone, pottery, wood or dried vegetation.

The criminal law, as a human-made product – like cakes and houses – also contains these general elements or building blocks. The basic elements of a cake or house are designed primarily to make the product fit for purpose, and the essential elements of a crime are similarly designed. The purpose they are fitted for is to provide clear rules of conduct and a secure and fair basis for punishment.

In criminal law these basic elements are **prohibited conduct** (the external element), and an accompanying **mental element** (the internal element). Again, the specifics of a crime may vary enormously. The prohibited conduct may consist of snatching someone's handbag, hacking into their computer, poisoning their dog or even killing them. The mental element may be intention, recklessness, wilfulness or knowledge. As a student of criminal law, your job when analysing a case is **always** to ask the following questions in the following order.

- ▶ Has the accused performed a prohibited act?
- ▶ Was that act accompanied by a specified state of mind or mental element?

These elements can be reduced to an equation:

**prohibited conduct + mental element = criminal liability**

The Latin maxim *actus non facit reum nisi mens sit rea* is a traditionally used shorthand for this equation. Its usual translation is 'an act is not criminal in the absence of a guilty mind'; or, more analytically, 'criminal liability requires D to have done something criminally wrong (*actus reus*) with an accompanying blameworthy state of mind (*mens rea*)'.

When reading textbooks and cases you will find different words and phrases used to describe the conduct and mental elements in crime. There is no magic in any of these words or phrases, and so at the outset you may find this short glossary of synonyms helpful.

- ▶ The **prohibited conduct element** in crime is also known as the 'external element', the *actus reus* or the 'wrongdoing' component.
- ▶ The **mental element** is also known as the 'internal element', the *mens rea*, the 'guilty mind' or the 'fault element'.

Use any of these as you see fit. I shall use all of them in this module guide but I shall tend to use *actus reus* and *mens rea* most often.

The *actus reus* and *mens rea* of a crime is to be found embedded in its definition. So assume you are asked to decide whether it is murder where A has killed B, his wife, by poisoning her drink with cyanide in revenge for cheating on him with C. Your task is to work out whether A has committed the *actus reus* of murder, and whether he did so with the *mens rea* for murder.

In Section 4.2 of Wilson, murder is defined as 'an unlawful killing with malice aforethought'. We can then separate the *actus reus* from the *mens rea*. The *actus reus* is the prohibited act; that is, 'an unlawful killing'. The *mens rea* is the accompanying

mental element which renders that prohibited act punishable, which is 'malice aforethought'. At Section 4.2 you will also discover that 'malice aforethought' means 'an intention to kill or cause serious injury'.

To analyse the problem you therefore ask the following questions.

- ▶ Has A unlawfully killed a human being? Answer, yes.
- ▶ Did he do so intending to kill or cause serious injury to B? Answer, also yes.

When we look deeper into the criminal law we will discover that there is in fact a third element in criminal liability, namely the absence of any defence. The third question to ask, therefore, is:

- ▶ Does A have a defence for the killing? The answer to this question is no. Revenge is not a defence and so A is guilty of murder.

You should always follow this method when analysing a problem, whichever crime you are considering.

## 2.2 The three basic elements in crime

### 2.2.1 *Actus reus*

The *actus reus* of a crime is the package of behaviour which the law prohibits. This package may prohibit simply acting in a particular way, as in the offence of careless driving, or it may prohibit bringing about a particular result, as in murder or manslaughter. It may also prohibit doing something, or bringing about something in particular circumstances, such as, in the crime of rape, having intercourse with another **without their consent**. This can be represented as follows:

The *actus reus* of a crime comprises conduct, with or without a designated result, including the presence of any circumstances necessary for that conduct to be criminalised.

### 2.2.2 *Mens rea*

Liability for serious crimes requires proof that the accused was blameworthy in doing what they did. This is because it is a fundamental ethical principle underpinning the criminal law that the state has moral authority to punish its citizens only if they **deserve** it. This moral principle – that justice in punishment requires punishment to be deserved – is known as the principle of retribution. This principle reflects how we go about things in everyday life. In the home, for example, children who break vases, ornaments or windows tend not to be punished if the breakage was accidental, since punishment would be unfair. In the criminal law the blameworthy states of mind most commonly used to justify punishment are:

- ▶ intention
- ▶ recklessness
- ▶ dishonesty
- ▶ knowledge
- ▶ belief.

What you should notice about **all these forms** of *mens rea* is that they are **states of mind**. In other words they reflect a conscious attitude of the accused to what they are doing: put simply, they are aware of what they are doing. Having such an attitude is what makes them deserving of punishment, since they are **consciously defying** a standard of conduct binding on them. So a person who intentionally kills another, recklessly damages their property, dishonestly takes their property or knowingly buys and sells their stolen property is not only doing wrong: they also **know** they are doing wrong but do it nevertheless. Hence they deserve to be condemned and punished.

Note: This is not the only possible justification for punishment. Another is prevention. Utilitarian theorists believe that punishment can never be deserved because it involves harming people and 'two wrongs do not make a right'. The utilitarian justification for punishment is to reduce the incidence of anti-social and dangerous conduct through punishment's deterrent or preventive function. The contemporary view, which favours retribution, is that for stigmatic crimes such as are dealt with in this module guide, prevention is not a moral justification for punishment as punishment for these crimes requires the defendant to be conscious of their wrongdoing. One area where there is less unanimity is the law of criminal attempts (see Chapter 14). Where prevention comes into its own is with respect to those offences which have harm prevention rather than moral wrongdoing as their primary focus.

Such offences often have a fault element which requires no conscious awareness of doing wrong: careless driving and gross negligence manslaughter are examples of these. Other crimes need no fault element at all. These are known as crimes of strict liability: most driving offences are of this nature. Such offences are justified as being not contrary to principle because they do not tend to involve social stigma or carry imprisonment as a potential punishment.

### 2.2.3 Defences

The third element in criminal liability is that of criminal defences. Defences block criminal liability although the elements of the offence (*actus reus* and *mens rea*) are present. Some of the more common defences are self-defence, insanity, consent, duress and necessity.

Defences involve one of two moral claims to avoid liability.

- ▶ The first is that it would be unfair to punish the accused, although their act was wrongful, because they were, in the words of H.L.A. Hart, deprived of 'the capacity or a fair opportunity to conform' to the prohibition (*Punishment and responsibility*, 1968). Such defences, of which duress and insanity are examples, are known as excuses.
- ▶ The second is that although the definition of the offence is satisfied the act of the accused was not wrongful because of special circumstances. Such defences are known as justifications. An example is self-defence.

The fact that defences operate outside the boundaries of the offence definition has one very significant consequence. If an element of the offence definition is not present but the accused does not know this when they are acting, they still escape liability. For example, if A has intercourse with B believing that she is **not** consenting when in fact she is consenting, A is not guilty of rape, since one of the basic elements of the offence (*actus reus*) is absent. This is not the case with defences. To rely on a defence there must not only be a good reason for the accused acting as they do, but also the accused **must act for that reason**.

#### ACTIVITY 2.1

Read Wilson, Section 4.3 'Interrelationships of *actus reus*, *mens rea* and defences' and consider whether the court was right to convict Dadson of malicious wounding and what problems the case provokes.

## 2.3 Proving the elements of the offence

### 2.3.1 Burden of proof

Suppose A shoots B dead in broad daylight with 100 witnesses to the killing. She is charged with murder. A admits what she did but claims it was an accident. In other words A is making a claim about her *mens rea*. She is saying that because the killing was an accident this means that she did not intend to kill or cause grievous bodily harm to B.

In *Woolmington v DPP* [1935] AC 462 the House of Lords had to consider whether the fact that the *actus reus* was satisfied meant that the burden was placed on A to prove that the killing was an accident. The famous conclusion it reached was that the burden of proof did not pass to A, **and never would**. People are assumed innocent until proven guilty. This means that in respect of **all the elements of all offences** the burden of proof is on the prosecution. So with respect to the *actus reus* the **prosecution must do the proving**, and it must prove every bit of the *actus reus*. For example, the *actus reus* of the crime of rape is having intercourse with a person without their consent. This means that the prosecution must prove to the satisfaction of the jury **both** that sexual intercourse between the two parties took place **and** that the intercourse was non-consensual.

Again, with respect to the *mens rea*, the prosecution must do all the proving. For example, in a case of theft of a wallet, the prosecution must prove that D took V's wallet intending never to return it; or in a case of handling stolen goods, that D knew or believed the goods she was handling were stolen goods.

Finally, with respect to defences, again the **prosecution must do the disproving**. For example, it must prove that D was not acting in self-defence or was not acting under duress. Here, however, a slight qualification is needed. The prosecution does not bear this burden with respect to defences **unless** the defence first adduces some credible evidence that D may have been acting in self-defence or under duress. In other words, the prosecution does not have to counter every defence the accused may possibly raise, but only those which are worthy of being taken seriously. This evidential burden on the defence is not heavy, however; it is simply designed to ensure precious court time is not wasted proving the obvious.

### 2.3.2 Standard of proof

Consonant with the principle that a person is considered innocent until proven guilty, the prosecution must prove each and every element of the offence 'beyond reasonable doubt'. This means that the jury or magistrates must not convict unless the **prosecution** has made them sure that all the elements of the offence are present. If, therefore, the jury is convinced that A took a handbag belonging to V (*actus reus*) and that the taking was dishonest (*mens rea*) and think that it is probable, but without being **sure**, that it was A's intention to keep the handbag permanently (*mens rea*), it must acquit of theft.

## Am I ready to move on?

Are you ready to move on to the next chapter? You are if – without referring to the module guide or Wilson – you can answer the following questions.

1. What are the three elements which make up criminal liability?
2. What does *actus reus* mean?
3. What does *mens rea* mean?
4. What are crimes called where the prosecution does not have to prove *mens rea*?
5. If D confesses to having committed a crime but claims he did so under duress, does D have to prove the duress?
6. There are two types of defences. Explain what they are and give examples of each.
7. Dadson shot an escaped convict. It was at that time lawful to shoot an escaped convict. Why then was he found guilty of unlawful wounding?

You can test your knowledge of this chapter through the online multiple choice questions available at [www.mylawchamber.co.uk](http://www.mylawchamber.co.uk)

# 3 *Actus reus*: conduct and circumstances

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## Introduction

The criminal law has no business punishing us for our thoughts, only for our actions or deeds. Even a criminal attempt requires the defendant to have acted upon their decision to kill someone, injure them or steal their property. Until then, they are free to plan the crime, obtain the poison and reconnoitre the place contemplated for the commission of the crime. **It is only when they put their plan into action that the criminal law can get involved.**



### 3.1 What does the *actus reus* consist of?

The *actus reus* in crime comprises:

- ▶ conduct (always)
- ▶ any circumstances necessary to render that conduct wrongful (if any are required)
- ▶ result (if any is required).

In this chapter we will concentrate on the **conduct** and **circumstances** elements of *actus reus*.

#### 3.1.1 Conduct: the act requirement

The core element of criminal liability is some form of prohibited conduct. Usually this prohibited conduct will involve a **wrongful act**. Identifying an act is therefore a key task for the prosecution. Although there are exceptions, generally if the defendant has not acted there can be no liability. This principle is known as the 'act requirement'.

#### 3.1.2 What is an act?

There are two components to acts. The first is a 'bodily movement' (American Model Penal Code). The second is that the bodily movement be 'voluntary'.

##### A bodily movement

The conduct element in murder consists of any act which causes the death of a human being. There is no need for an act of violence; any act which causes death will do. Poisoning the victim's drink is an act. Cutting the brake cables of the victim's car is an act. In *Hayward* (1908) 21 Cox CC 692 it was sufficient that the accused threatened and chased his victim, who consequently died of a heart attack.

The corollary of this is that if A's contribution to the occurrence of a criminal harm can be described only as 'doing nothing' or 'not lifting a finger', she cannot be held criminally accountable for that harm.

##### ILLUSTRATION 3.1

**Noor sees Parveen, a blind woman whom she does not like, about to step out into a road, unaware that a lorry is approaching at great speed. Noor does nothing to warn Parveen, who dies in the resulting crash.**

**Here there can be no criminal liability in respect of Noor. Parveen did not die as a result of any bodily movement on the part of Noor. Doing nothing is not an act.**

##### The bodily movement must be voluntary

The second component of the act requirement is that the bodily movement is voluntary. In *Bratty v A-G for Northern Ireland* [1961] 3 All ER 523 HL, Lord Denning explained this as follows:

No act is punishable if it is done involuntarily: and an involuntary act in this context... means an act which is done by the muscles without any control by the mind, such as a spasm, a reflex action or a convulsion; or an act done by a person who is not conscious of what he is doing, such as an act done whilst suffering from concussion or whilst sleepwalking...

##### ILLUSTRATION 3.2

**Yasmin is waiting at the kerbside waiting to cross a busy road. Aisha trips over a brick and stumbles into Yasmin, thus propelling her on to the road. Yasmin is injured in the resulting collision with a car.**

**Aisha cannot be criminally liable because her act is involuntary. She was not in control of the actions which led to Yasmin's injury.**

Where a defendant has no control over what they are doing they are said to be acting in a state of automatism. Like insanity, its close cousin, automatism is a defence to criminal liability: both will be looked at in detail in Chapter 10 of this module guide.

### 3.1.3 Am I able to identify the act component in an *actus reus*?

To decide whether D has committed the *actus reus* of a crime you need to:

- ▶ find the definition of the crime
- ▶ distil from that definition the *actus reus*
- ▶ identify from that *actus reus* the act of the defendant which you are to rely on in establishing that *actus reus*.

#### ACTIVITY 3.1

Let's see if you can do this in relation to theft. Read Wilson, Section 14.2.A.1 'The appropriation', Sections (a) 'Assuming rights of ownership', (b) 'Insubstantial appropriations' and (c) 'The relevance of consent or authority' and answer the following questions.

- a. What is the *actus reus* of theft?
- b. What does the *actus reus* component of theft known as 'appropriation' in theft mean?
- c. If V lends D his book and a week later D decides to keep and sell the book, does D need to sell the book to satisfy the act component of the *actus reus*?

#### ACTIVITY 3.2

Consider the following cases and answer the question below.

- a. Aftab has an infectious respiratory disease. He kisses Miah. Miah catches Aftab's disease and suffers serious illness.
- b. John has a heart attack while driving his car. He loses consciousness and crashes into Margaret, injuring her.
- c. Vikram pushes Chen. Chen falls onto Isobel who falls over and breaks her leg.
- d. Peter is driving a car with Bella, his dog, in the back seat. Bella unexpectedly jumps on to Peter's lap, causing him to lose control of the car and go through a red traffic light.
- e. Imran, a practical joker, explodes a paper bag behind Adele's back. Adele falls over in fright, bangs her head and loses consciousness.
- f. Suki, Afzal's teacher, tells Afzal that he has failed his final year examinations. In despair, Afzal commits suicide.
- g. George overhears Hui tell Wen that he intends to kill Ming. George makes a note of this but does not tell the police. The next day Hui kills Ming.

Consider in relation to each of the above cases whether, assuming the various parties are charged with a criminal offence, the act requirement is satisfied. In each case you will need to identify what the act is, if any, whose act it is and if the act is voluntary. You are not being asked whether a criminal offence has been committed. This depends upon other matters such as the presence of *mens rea*, causation and defences. If you find the answers to any of these questions difficult, read Wilson, Sections 4.1–4.4 again. Do not move on until you are satisfied with your answers and your level of understanding. If you have a study partner, why not talk about the questions with them?

### 3.1.4 Exceptions to the act requirement

There are three exceptions to the usual rule that criminal wrongdoing (*actus reus*) requires an act. Certain crimes do not require any act at all. These include what are termed situational crimes, crimes of possession and crimes of omission.

### Situational crimes, crimes of possession and crimes of omission

Although the conduct element in crimes generally is an act, there are some exceptions. Criminal liability is often based upon a failure to act as the law requires, as in failing to wear a seatbelt, failing to tax one's car, failing to submit a tax return or failing to display a licence plate. Such offences are typically statutory strict liability offences designed for regulatory rather than retributive purposes. They are known as statutory crimes of omission.

Criminal liability may also on occasion be based upon being in possession of a prohibited article; for example controlled drugs, extreme pornography, offensive weapons or articles for use in terrorist offences. These again are statutory crimes and are known as crimes of possession.

The final exception is what is termed 'situational liability'. The prohibition for these offences is not some form of act but, similar to the other two exceptions, simply being in a prohibited situation. For example, it is a crime to be drunk in a public place, or to be drunk in charge of a vehicle, or to be the owner of certain types of dogs (such as a pit bull terrier) or to allow a dog to be dangerously out of control in a public place.

The problem posed by both possession offences and situational liability is that criminal liability does not depend upon the defendant having chosen to be in possession or be in the prohibited situation. In other words no **wrongdoing** is required. The offence in the case of owning a pit bull terrier is constituted although the dog was by way of an unsolicited gift and although the defendant believed the dog to be of another breed. The offence in the case of the out-of-control dog is constituted although the defendant performed no act and took reasonable steps to keep the dog under control (see *Elvin* [1994] 1 WLR 1057). In relation to crimes of possession, a person can be guilty of being in possession of a dangerous weapon when they believed the article in their possession was, for example, a torch and not, as it subsequently transpired, a taser (*Deyemi* [2008] 1 Cr App R 25).

### ACTIVITY 3.3

Read Wilson, Section 4.5.A 'Situational liability' and B 'Possession offences' and answer the following questions.

Why do commentators object to the decisions in *Winzar* (1983) and *Larsonneur* (1933)? Do you agree that they were objectionable?

Is the decision in *Robinson-Pierre* consistent with *Elvin*? Is it a good decision?

### Omissions and commissions

We have seen how a failure to act may serve as the *actus reus* of an offence where the defendant is placed under a statutory duty to act as the statute requires. These are known as crimes of omission. This is an exception to the act requirement in criminal law. However, since the behaviour demanded by the statute is clearly specified and is not onerous in its demands, it is not contrary to principle.

A more controversial exception to the act requirement concerns crimes of commission. Can these be committed by omission? Crimes of commission are those crimes whose definition includes an *actus reus* which satisfies the act requirement, but whose result component can be caused by **doing nothing**. For example, the *actus reus* of murder is 'an unlawful killing'. Dictionaries define 'kill' as 'an act of killing', but also define it simply as 'causing death'. An act of killing involves some affirmative action such as a stabbing, a shooting, a beating, a poisoning, a suffocating and so on. But it is possible to 'cause death' by doing nothing. For example, it is a perfectly correct use of language to say that a parent who gives her baby no food so that it dies causes the death of the child – and indeed 'kills' the child. The controversy concerns how far this principle should stretch. Only one person can pull a trigger, but every passerby who sees a baby drowning in a puddle but does nothing to help can be said to 'cause' the baby's death. Are they all to be charged with murder? How do we ensure that only the truly deserving suffer conviction and punishment?

### Key requirements for criminal liability

To ensure the net of criminal responsibility is not spread too far, there are certain key restrictions on criminal liability in cases of harm caused by omission.

1. The conduct element of the crime in question must be capable of commission by omission.
2. The circumstances must be such as to create a legal duty to act.
3. The defendant's failure to act must be in breach of that duty.
4. The defendant's failure to act must be voluntary.
5. The harm must be caused by the omission.

#### 1. The conduct element of the crime in question must be capable of commission by omission

Most result crimes can be committed by omission. This includes theft, murder, criminal damage, fraud and most forms of manslaughter. Some, however, cannot. The definitions of some offences specify or imply that only acts are sufficient. Assault is one. So in *R v Dunn* [2015] EWCA Crim 724 D was charged with indecent assault. What he had done was to cause a 15-year-old girl to masturbate him. The Court of Appeal held that the offence was not made out. Indecent assault requires there to be an assault. An assault requires some form of act on D's part. Here the act was the girl's, not his. D had committed an offence but not this one. This offence was causing a child to engage in sexual activity (s.10 Sexual Offences Act 2003).

### ACTIVITY 3.4

Read Wilson, Section 4.5.D.2 'Omissions: the common law approach' and find and note down for later reference some other crimes which cannot be committed by omission.

#### 2. The circumstances must be such as to create a legal duty to act

Assuming the offence is capable of being committed by omission a successful prosecution can occur only if the defendant's omission was **in breach of a legal duty to act**. This is why parents may be guilty of homicide for failing to feed their children, or for neglecting them. They are guilty because parents owe a statutory duty of care to their children. The number of duty situations are limited. They can be found in Wilson, Section 4.5.D.3 'Circumstances giving rise to a duty to act: duty situations' and need to be learned.

### ACTIVITY 3.5

Read Wilson, Section 4.5.D.3 'Circumstances giving rise to a duty to act: duty situations' and consider which, if any, of the following cases place A under a duty to act and, if a duty does exist, what is the source of that duty. When you have done this, consider whether, on the basis of your answers, the range of duty situations is either too narrow or too broad. Write down your conclusions and the reasons for them.

- a. A is a swimming pool attendant. He sees V, a swimmer, struggling out of her depth in the pool.
- b. A is the sister of V. She sees V struggling out of her depth in the pool.
- c. A is the mother of V. She sees V struggling out of her depth in the pool.
- d. A is the son of V. He sees V struggling out of her depth in the pool.
- e. A is the owner of the swimming pool. She sees V struggling out of her depth in the pool.
- f. A is the mother of T (aged 10) who has invited V, his friend (also aged 10), to go swimming with him at the local pool. A sees V struggling out of his depth in the pool.

- g. **A and V are an unmarried couple who live together. A sees V struggling out of his depth in the pool.**
- h. **A, who is supervising her child at a swimming pool, drops an ice cream accidentally at the poolside. V (a child) slips on the ice cream and falls into the pool. A sees V struggling out of her depth in the pool.**

In the absence of such a duty of intervention or rescue an omission, however reprehensible, cannot form the basis of a criminal prosecution. In the famous example of Sir James Fitzjames Stephen:

A sees B drowning and is able to save him by holding out his hand. A abstains from doing so in order that B may be drowned, and B is drowned. A has committed no offence.

(*A digest of the criminal law*, 1887)

This makes it important to know whether the conduct of the accused is an act or an omission because a person's criminal liability depends upon it. For example, if in a variation of the above example, A holds out his hand for B to grasp and then removes his hand from B's grip when realising B is his deadly enemy, is this a case of omission or commission? If it is the latter then A is guilty of murder: if the former then it is nothing.

So much hangs on a simple question of definition. The usual definition of an act, as we know, is 'a bodily movement'. Since A has moved his body then, assuming death would have been prevented by maintaining his grip, A **seems** to be guilty of murder. Simple in theory, but not so simple in practice. To understand why you will need to read Wilson.

### ACTIVITY 3.6

Read Wilson, Section 4.5.D.1 'Acts and omissions: what's the difference?' and answer the following questions.

- Why were the doctors in *Airedale NHS Trust v Bland* (1993) not guilty of murder for switching off the machine keeping Anthony Bland alive?
- Do you think this is the right decision?
- If Anthony Bland's parents had switched off the machine out of compassion for his position would they have been guilty of murder?

### 3. The defendant's failure to act must be in breach of that duty

D's failure to act does not necessarily mean that D is in breach of duty. For example, in cases where D has a duty of rescue but failed to rescue someone, D is not liable for a failure to rescue if:

- ▶ they did as much as could be expected in the circumstances
- ▶ performance of the duty was impossible
- ▶ the failure to act was justified.

### ACTIVITY 3.7

Read Wilson, Section 4.5.D.4 'Circumstances governing the scope of the duty' and note down examples of how a person can or has avoided liability for omitting to act on the basis of the above three situations. Retain these notes for future reference.

### 4. The defendant's failure to act must be voluntary

If D's failure to act was due to his being unconscious or being restrained, the failure is involuntary and cannot form the subject matter of a criminal offence even though D was under a duty of intervention.

### 5. The harm must be caused by the omission

The prosecution must be able to prove that the defendant's breach of duty **caused** the harm. In *Morby* (1882) 8 QBD 571 a parent failed to call for medical support for his ailing child. The child subsequently died of smallpox. The parent was convicted of

manslaughter at first instance, but the Court for Crown Cases Reserved allowed the appeal, since the prosecution could not prove that prompt medical attention would have saved the child. Put another way, the prosecution could not prove that the defendant's failure to perform his duty had caused the infant's death since the child might have died anyway.

### ACTIVITY 3.8

Can you remember what you have learned so far? Let's see. Read Wilson, Section 4.5.D 'Omissions and crimes of commission' and then complete the following.

- a. Name three crimes which cannot be committed by omission.
- b. For result crimes, how does the criminal law ensure that liability for failing to prevent a result does not criminalise too many people?
- c. Under what circumstances is a person placed under a duty to act to prevent harm?
- d. Does a sibling owe a duty to other siblings?
- e. Do offspring owe duties to parents?
- f. Do live-in partners owe a duty to each other?
- g. Do mountain climbers owe a duty to each other?
- h. Assault is one of those few result crimes which cannot be committed by omission. Why then was the defendant in *Fagan v MPC* (1969) (Wilson, Section 8.1.A 'Temporal coincidence') found guilty of assault when he refused to remove his car which had been inadvertently parked on a policeman's foot? It might be helpful to read the case report in the Online Library.
- i. Read Wilson, Section 4.5.D.3(d) 'The duty to avert a dangerous situation caused by the defendant' and (e) '*Miller and beyond*'. How does the case of *Evans* (2009) extend the principle in *Miller* (1983)?
- j. What reason did the House of Lords give for deciding that if doctors turned off Anthony Bland's life support machine this would be an omission, not an act?
- k. Consider the case of *Morby* (1882). Is it ever possible for the prosecution to prove, beyond reasonable doubt, that V would not have died when he did if D had sought prompt medical care? Does this put an undue burden on the prosecution?

## 3.2 Circumstances

As was outlined in Chapter 2 of this module guide, the definition of certain crimes requires proof that certain circumstances existed which convert what would otherwise be an innocuous act into a criminal act. Obvious examples include rape and assault, both of which can be committed **only** where the victim does not consent. Absence of consent, for these crimes, is therefore a circumstance which can convert an ordinarily quite lawful act (sexual intercourse or a simple touching) into the *actus reus* of a crime.

### ACTIVITY 3.9

Look at the definitions of theft and a firearms offence and answer the questions below.

- '(1) A person is guilty of theft if he dishonestly appropriates property belonging to another with the intention of permanently depriving the other of it; and "thief" and "steal" shall be construed accordingly.' (s.1, Theft Act 1968)
- '(1) Subject to any exemption under this Act, it is an offence for a person –
- (a) to have in his possession, or to purchase or acquire, a firearm to which this section applies without holding a firearm certificate in force at the time, or otherwise than as authorised by such a certificate.' (s.1, Firearms Act 1968)

In each case state:

- a. the prohibited conduct
- b. the prohibited circumstances.

### SAMPLE EXAMINATION QUESTION

One very good way of learning and understanding an area of law is to answer an examination question. This will focus your reading, thus helping you to understand and remember what you are reading. If you just read, this will not be so helpful.

**Consider the arguments, both for and against, for expanding the range of duty situations which ground liability for omissions. Should there be a general duty of easy rescue?**

### ADVICE FOR ANSWERING THE QUESTION

First analyse what the question requires of you. This question involves two parts. The first part asks you to consider changes to the present law involving the possible creation of new duty situations. The second asks you to consider whether we should stop limiting liability for omissions to a small range of duty situations and create a general duty to intervene whenever we are in a position to prevent harm.

Using Wilson, Section 4.5.D 'Omissions and crimes of commission' write a one-page skeleton answer to this question which highlights at least three reasons why criminal liability for omitting to prevent harm is thought a bad idea (or why the current range of duty situations are sufficient) and three responses to those objections. Also suggest at least three examples of duty situations which should or could be added to the present list, together with arguments against. Finally consider the arguments, for and against, for giving everybody a general responsibility to help others in peril.

## Am I ready to move on?

In Chapter 4 of this module guide we shall look at the other ingredients of the *actus reus*, namely consequences and causation. Are you ready to move on to the next chapter? You are if – without referring to the module guide or Wilson – you can answer the following questions.

1. What is the 'act requirement'?
2. What are the three exceptions to the act requirement?
3. What are the conditions of liability for a crime of commission in respect of an omission to act?
4. Under what circumstances will a duty to act arise?
5. What is the difference between an act and an omission? Why does it matter?
6. Why is criminal liability for omissions controversial?

You can test your knowledge of this chapter through the online multiple choice questions available at [www.mylawchamber.co.uk](http://www.mylawchamber.co.uk)

**NOTES**



# 4 *Actus reus*: consequences and their causes

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## Introduction

Most of the crimes we examine in **Criminal law** require proof that D caused a particular harm, for example injury or death to the victim or damage to their property. So how do the prosecution go about proving that D (or rather D's act) was the cause? For example, if A threatens B with death if he does not punch C, and B does punch C, is it A or B who causes C's injury? Or if A stabs V and V is killed in a car crash on the way to hospital is it A or the car crash which causes V's death? The principles governing causation are the subject of this chapter.

### ESSENTIAL READING

- Wilson, Chapter 5 'Causation'.

## 4.1 Result crimes

The third element in *actus reus* concerns result crimes only. You will remember that some crimes do not require proof of harm. These are known as conduct crimes. They require proof only of some form of wrongful conduct. An example is dangerous driving; a person can be convicted of dangerous driving if, for example, they drive too fast or aggressively, ignore traffic lights or road signs, or overtake while driving round a blind corner. A conviction does not require anybody to be hurt or for there to be an accident.

Result crimes, however, require **both** wrongful conduct **and** harm. So the crime of causing death by dangerous driving requires **both** dangerous driving **and** a death. Crucially, however, the prosecution must also prove causation. In other words, it must prove that the victim met their death **as a result** of the defendant driving dangerously.

For all result crimes, therefore, the prosecution bears the burden of proving that the defendant's conduct caused the prohibited result. In murder or manslaughter this will be the death; in criminal damage it will be the damage done to the property; in malicious wounding it will be the wound, and so on. In this chapter we consider what the prosecution has to show if it is to discharge its burden of proving causation.

In the vast majority of cases this will be straightforward. For example, if A shoots B with a gun and B dies, it should not be too difficult for the prosecution to show that A's act caused B's death. Similarly, if A sets light to B's house or stabs B, it should not be too difficult for the prosecution to show that A's act caused the criminal damage or the wound, as the case may be.

The prosecution's task becomes harder, however, when more than one event or act contributes to the result. In such circumstances questions as to whether D's act or omission was the cause of the harm demand the application of legal principles. So what are the principles governing causation in the criminal law? Before we investigate further, consider the following cases in which such principles will need to be deployed.

### ACTIVITY 4.1

Review the following cases. When you have done so answer the questions at the end.

- a. D, as a joke, places a wet bar of soap on the floor of V's bathroom, hoping that V will slip on the soap. V does slip on the soap, hits her head on the floor and is knocked unconscious. Does D cause V's injury?
- b. As above except that V dies because her skull was unusually thin. Does D cause V's death?
- c. D rapes V. So distressed is V that she commits suicide. Does D cause V's death?
- d. D rapes V. When V's father finds out he kills V due to the dishonour caused to the family by V's loss of virginity. Does D cause V's death?
- e. D stabs V. An ambulance is called to take V to hospital. On the journey to hospital the ambulance is involved in an accident which kills the driver, X, and V. Does D cause V's death?
- f. D is the lifeguard on a beach. She sees V struggling in the water and dives in to save him. Unfortunately D is not a good swimmer and is unable to rescue V in time. Does D cause V's death?
- g. D stabs V. An ambulance is called to take V to hospital. The ambulance crew are on their lunch break and refuse to come until it has ended. By the time they arrive, V has died of blood loss. Does D cause V's death?
- h. D and V attend a party together. D gives V an ecstasy pill which V takes. Unknown to both D and V the pill has unusual strength. V falls unconscious and dies almost immediately. Does D cause V's death?

**In each of the above cases the defendant (D) may wish to claim that although they did wrong they should not be held accountable for the harm that transpired because it is too far removed from D's initial act or omission. In which of the above cases do you agree that D should not be held accountable and in which do you think D should? Is there any pattern to your conclusions which could form the basis for general principles of application?**

## 4.2 Accountability: basic guidelines

A basic rule of thumb is that where a person's **voluntary act** initiates a causal sequence which ends in harm, that person will normally be held accountable unless an act or event later transpires which renders a finding of accountability inappropriate. If we examine case (a) in Activity 4.1 above, this produces the following analysis.

- ▶ D's act is voluntary in the sense of being under the physical and mental control of D.
- ▶ D's act is the first link in a chain of events (chain of causation) which results in V's injury.
- ▶ D is therefore accountable for that injury unless a later act or event occurs which renders a finding of accountability inappropriate.

The later act or event is V slipping over and banging her head. Does this act or event render it inappropriate to hold D to account for V's injury? This is the big question. We need to have a basis for saying either that D should be held accountable or that D should not. It is this basis which, in an ideal criminal justice system, will form the central principles governing accountability or causation in the criminal law. What conclusion did you reach and what was your reasoning?

Assuming you concluded that D did cause V's injury, here are some possible basic principles which you might have adopted to explain your conclusion.

- ▶ D is accountable for all the consequences of their wrongful act.
- ▶ D is accountable for all the foreseeable consequences of their wrongful act.
- ▶ D is accountable for all the foreseen consequences of their wrongful act.

Now consider the Draft Criminal Code Bill 1989, clause 17 of which is intended to be a restatement of the common law position. Clause 17 reads:

1. ...a person causes a result which is an element of an offence when –
  - a. he does an act which makes a more than negligible contribution to its occurrence;
  - or
  - b. he omits to do an act which might prevent its occurrence and which he is under a duty to do according to the law relating to the offence.
2. A person does not cause a result where, after he does such an act or makes such an omission, an act or event occurs –
  - a. which is the immediate and sufficient cause of the result;
  - b. which he did not foresee, and
  - c. which could not in the circumstances reasonably have been foreseen.

This is a clear and generally a pretty accurate restatement of the common law position. It renders D accountable for V's injury in case (a). D did an act (placed soap on the floor) which made a more than merely negligible contribution to the result (V's loss of consciousness) and everything that happened after putting the soap on the floor (V slipping over and banging her head) could 'in the circumstances reasonably have been foreseen'. So D is accountable for the result.

There are, however, certain aspects of causation doctrine which part company with this restatement. For example, the courts will sometimes treat a later voluntary act of a third party or the victim as breaking the chain of causation between act and result if it was sufficient cause of the result, even if it was perfectly foreseeable or

indeed foreseen. Case (h) in Activity 4.1 is an example. In law, D is not the cause of V's death because although D began the chain and V's taking the pill was foreseen and foreseeable, V's voluntary taking of the pill breaks the chain of causation. It is now V's act rather than D's which causes V's death.

Now we shall look more closely at the case law and the principles of causation which derive from it.

### 4.3 Principles governing causation

As Clause 17 of the Draft Criminal Code Bill 1989 indicates, causation involves a two-part inquiry. The first part concerns how causal sequences begin, while the second part concerns how, once begun, a causal sequence may come to an end. In short, to be held accountable for a consequence involves being **both** the factual cause and also the legal cause of that consequence.

#### 4.3.1 Factual cause

Hart and Honoré describe a factual cause as:

an event or act which 'makes the difference' between something happening and something not happening.

(*Causation and the law*. (1959))

The common way of representing this is:

- ▶ an act is the factual cause if the consequence would not have happened but for that act
- ▶ an omission is the factual cause if the consequence would not have happened but for the defendant's failure to act as they should have done.

Put another way, if the consequence would have happened just as it did irrespective of the defendant's act (*White* [1910] 2 KB 124) or omission (see *Morby* (1882), Chapter 3) it is not caused by the defendant. So *White* was not accountable for the death of his mother, whose drink he had poisoned, when she died of a heart attack before taking the poison. Nor would *White* be accountable had his mother swallowed the poison but died of a heart attack before the poison began to work. However, it would have been different if, in the latter case, the heart attack was prompted by the initial effects of the poison. In this latter case the **but for** principle operates because the heart attack is not **independent** of the initial act of the defendant and so forms the final link in the causal chain.

To be the factual cause of a criminal harm, D does not have to start the process leading to the consequence; it is enough that D accelerates it. So in *Dyson* [1908] 2 KB 454 a child was admitted to hospital with injuries suffered after his father had beaten him severely. At the time of his hospitalisation the child was suffering from meningitis. The child died of his injuries. Medical evidence was adduced to show that he would have died of meningitis before long. D was charged and convicted of manslaughter. He appealed on the ground that he was not a but for (factual) cause of V's death since the child would have soon died of meningitis anyway. The court said that it was not necessary to show that D was the sole cause of death so long as his action accelerated the time when death would otherwise occur.

#### ACTIVITY 4.2

**This question of how much acceleration needs to be established is a particular problem attached to cases of euthanasia. There have been a number of high-profile cases in which doctors have been prosecuted for murder where they have 'eased the passing' of a terminally ill patient. Examples are *Adams* [1957] Crim LR 365 and *Moor*. For interesting commentaries see Arlidge, A. 'The trial of Dr David Moor' (2000) *Crim LR* 31, Smith, J.C. 'A comment on Moor's Case' (2000) *Crim LR* 41 and Goss, J. 'A postscript to the trial of Dr David Moor' (2000) *Crim LR* 568.**

**Now read Wilson, Section 5.5.B.1 'The general framework for imputing cause' and explain why Dr Adams was not thought to have caused the death of his patient and what change in the facts of the case would have been necessary for the court to have reached a contrary conclusion.**

To be the factual cause of a criminal harm, the causal connection does not have to be direct. In *Mitchell* [1983] 2 All ER 427 the accused punched a man who had accused him of queue-jumping in a post office. The man fell on top of an 89-year-old woman, which initially broke her leg and consequently caused her death from a pulmonary embolism. The accused's conviction for manslaughter was upheld on appeal. He was a but for cause. In the words of the Draft Criminal Code, he did an act which made 'a more than negligible contribution' to the consequence's occurrence.

### 4.3.2 Legal cause

The factual cause of a consequence will also be the legal cause of that consequence, unless the factual cause is too insubstantial or remote to render it inappropriate to attribute the consequence to the act. In the words of the Draft Criminal Code a factual cause will be too remote if, subsequent to it, another act or event occurs which also contributed to the result which was not foreseen by the defendant, and could not in the circumstances reasonably have been foreseen.

The most important thing to remember here is that the judgment made by the court is not a scientific judgement, as it is with the factual cause. It is a moral judgement. The court is being asked to consider whether it is appropriate to hold the defendant to account for what has transpired. Sometimes a person can be the factual cause of a criminal harm and yet it does not seem appropriate to hold them accountable. You may well have reached this conclusion in relation to case (d) in Activity 4.1 above. If anybody is to be held accountable for V's death (as opposed to the rape) it is surely V's father, not D.

In this section we will consider when a factual cause of a consequence is too insignificant to be treated as the legal cause, and when it is too remote.

#### Principles of application

To be the legal cause of a criminal harm, the consequence must be the consequence not merely of the defendant's act but of their **wrongful** act. So if A is charged with causing B's death by dangerous driving and A does kill B by running him over in her car, while driving dangerously, this does not necessarily mean that A is guilty of causing death by dangerous driving. The crime is causing death **by** dangerous driving not causing death **while** driving dangerously.

#### ACTIVITY 4.3

**Read Wilson, Section 5.5.B 'Legal cause'. Why was the defendant in *Dalloway* (1847) not guilty of manslaughter, although he was driving his cart very dangerously when it ran over the child?**

**A points a gun at B and threatens to kill B. C sees this. C, in trying to disarm A, causes the gun to fire and injure V, a bystander. Is C the legal cause of V's harm?**

To be a legal cause, the defendant's contribution to the result must be substantial, although it need not be the sole cause. Even if a result would not have occurred but for D's acts, it is appropriate to ask to what extent D's acts significantly contributed to the result. The criminal law ignores trivial causes. For example, in *Adams* (1957) a doctor gave his terminally ill patient a dose of painkillers so strong that it killed the patient. Devlin J ruled that if the dose were given for pain relief in accordance with the doctor's duty it would not be the doctor but the disease which was the real cause of death. The doctor's contribution could be ignored as negligible.

Compare *Benge* (1865) 4 F & F 504 in which D, a foreman platelayer on a railway, failed to check the train timetable to ensure the men working for him were safe on the line. A train killed one of the workmen. D claimed that he was not the legal cause since the driver of the train could have prevented the deaths if he had kept a proper

lookout. It was held that D's contribution was substantial enough to justify attributing responsibility for the death to him; his contribution was too substantial to be ignored.

### 4.3.3 Problem cases

The court is most likely to be taxed in deciding whether D is the legal cause of a consequence when something unusual happens following D's unlawful act. In *McKechnie* (1992) 94 Cr App R 51, for example, D beat up an elderly man, V, who suffered very serious head injuries and remained unconscious for weeks. Doctors discovered that V had a duodenal ulcer but decided that it would be too dangerous to operate because he was still unconscious from his beating. V died as a result of the ulcer bursting. D was convicted and appealed *inter alia* on the direction as to causation. The Court of Appeal, upholding his conviction, ruled that D was still the cause of V's death since the doctors' decision not to operate was due to the effects of the initial beating.

Two key points emerge from this case. The first, reflecting *Benge*, is that where more than one cause operates, as it did here, the initial wrongful act of D is still the legal cause if it is still a substantial and operative cause; in other words, if it is still strongly influential on the outcome. The second is that a later causal contribution will not prevent the initial cause being still operative **unless it is independent of the initial act**. Here the doctors' decision was not independent of the initial beating as it was influenced by that beating. If the doctors had mistakenly given the victim poison which caused the ulcer to rupture this would have been independent of the initial act, and so D would not have been the legal cause of V's death.

Sections 4.3.6–4.3.8 below present some other problem cases where the courts have to choose whether the legal cause of a criminal harm is D's wrongful act or some other act or event.

### 4.3.4 Death precipitated by the victim's vulnerable physical or mental condition

Occasionally the victim's death is triggered by a combination of the defendant's unlawful act and their own physical or mental vulnerability. For example, in *Hayward* (1908) 21 Cox CC 692 D chased the victim, D's wife, and threatened her with death. Unknown to him V had a weak heart and died of a heart attack. D remained accountable for the death. This principle, which is known as the 'Eggshell Skull Rule' is of general application. Simply put, D's causal responsibility for resultant harm is not deflected if V has a condition (such as a skull as fragile as an eggshell), which renders them especially likely to suffer injury or die.

#### ACTIVITY 4.4

Read *Wilson*, Section 5.6.A 'Subsisting conditions' and answer the following questions.

- a. Why was Blaue the cause of V's death when V could have easily prevented it by agreeing to a blood transfusion?
- b. Eve asks Adam, her husband, to shoot her because she is terminally ill and wishes to die. Adam does so out of compassion and respect for her wishes. However, his shot fails to kill her but causes massive internal bleeding. Adam then realises that he does not want to be responsible for Eve's death so he takes her to hospital. The hospital tells Eve that she needs a blood transfusion and that she will die without it. Eve refuses, as she still wants to die – which she does. Is Adam the legal cause of her death? Please note here that there is no right answer. Questions about whether the factual cause of a criminal harm is also the cause recognised by the law is a matter of moral and common-sense judgement – so exercise yours!

### 4.3.5 Supervening acts of third parties

Acts of third parties can, on occasions, break the chain of causation linking a **but for** cause to a consequence. However, these occasions are rare, as we shall now see.

### Acts of third parties exacerbating the harm

If a third party contributes to the harmful result, this will not break the chain of causation if D's original act was still a substantial and operative cause of the harm. In *Smith* [1959] 2 QB 35 the victim died of a stab wound to the lung, but not before he had been dropped twice before reaching medical attention and had received artificial respiration – which is not a good idea for someone with a punctured lung! Smith was still the legal cause of V's death. Although the intervening acts contributed to the death, Smith's acts were still a substantial cause of the harm and were still operative at the time of death.

**Hint:** Consider what the autopsy report would have said to be the cause of death.

The following statement of principle given in *Smith* is a very useful summary of the general legal position governing causation.

if at the time of death the original wound is still an operating cause and a substantial cause, then the death [is] the result of the wound, albeit that some other cause is also operating. Only if it can be said that the original wounding is merely the setting in which another cause operates can it be said that the death does not result from the wound. Putting it in another way, only if the second cause is so overwhelming as to make the original wound merely part of the history can it be said that death does not flow from the wound.

#### ACTIVITY 4.5

Memorise the statement of principle in *Smith* – it will be time well spent.

#### ACTIVITY 4.6

Read Wilson, Section 5.6 'Particular examples of causal sequences giving rise to causation problems' and answer the following question.

**If the doctors had given the victim in *Smith* a huge overdose of painkillers by mistake, which would have killed any patient irrespective of their condition, would this prevent the initial wound from being the 'substantial and operative cause' of V's death?**

### Acts of third parties reacting to a danger caused by A's act

It is natural that when a person acts in a dangerous fashion third parties may act unpredictably by way of reaction. For this reason it will be rare that such a reaction will break the chain of causation linking the defendant with the eventual consequence. For an extreme example see *Pagett* (1983) 76 Cr App R 279, in which D used his pregnant girlfriend, V, as a human shield to prevent police officers arresting him. D had a shotgun with him and shot towards the police. They returned fire and V was killed. He appealed against conviction for manslaughter on the ground that the police, and not he, had caused V's death. The Court of Appeal disagreed. In reaching its decision it said:

if a reasonable act of self-defence against the act of the accused causes the death of a third party...[it does not] relieve the accused from criminal responsibility for the death of the third party.

#### ACTIVITY 4.7

Consider the case of *Pagett* and answer the following questions. Remember, there are no right answers to these questions. They are simply some of the considerations the court will have in mind in deciding whether to attribute cause to the defendant when their causal contribution is not obvious.

- a. Do you think the police's reaction was reasonable? Do you think the real issue should be whether the police response was 'foreseeable'?
- b. If D had simply waved the gun in the air and the police had opened fire, with the same result, would D still be the cause of V's death?
- c. What principle would you adopt to support your answer to Question (b) above?



**Hint:** In each case, ask yourself whether D's act was a substantial and operative cause of death; whether the police response was reasonable; whether the police response was foreseeable; whether the police response was made more likely by D's action? In principle, a 'yes' to any one of these questions might support D's conviction. Which question(s) do you think the court should ask?

### Medical interventions

We have already seen an example of poor medical treatment contributing to a criminal harm (*Smith*). In *Cheshire* [1991] 1 WLR 844 D shot V in the abdomen. V was taken to hospital where he was operated on. Almost immediately he started suffering breathing difficulties and so a tracheotomy was performed. Six weeks later, V's wounds were nearly healed but his breathing was getting progressively worse and he died. The doctors failed to recognise and respond to the cause of V's problems, which was that the tracheotomy had been negligently performed. The trial judge told the jury that this bad medical treatment did not relieve D from responsibility. On the basis of this direction the jury convicted. D appealed.

### ACTIVITY 4.8

Read Wilson, Section 5.6.B.2 'Third party's act contributing to the occurrence or extent of injury', Section (b) 'Medical treatment' and answer the following questions.

- What was the response of the Court of Appeal to the appeal in *Cheshire*? What principle did the Court lay down in reaching its decision? This is another principle that is worth committing to memory.
- Cheshire* was quite an extreme case of bad medical treatment yet D remained liable. In what situations will bad medical treatment rid D's criminal act of 'causal potency'?
- Consider the court's decision in *Jordan*. Is it consistent with *Cheshire*? If not, which do you prefer and why?

## 4.3.6 Supervening acts of the victim

### Supervening acts of the victim exacerbating the harm

If, after they have been hurt by D, V does something which is unexpected and prejudicial to their prospects of recovery, this will not break the chain of causation if D's act is still a substantial and operative cause. For example, in *Holland* (1841) 2 Mood & R 351, V, following a serious assault with an iron bar, refused to submit to the amputation of a finger, recommended to prevent tetanus. D was held to be causally responsible for V's resultant death from tetanus. In *Blaue* [1975] 1 WLR 1411, D stabbed V, causing serious blood loss. Doctors treating V told her she needed a blood transfusion else she would die. V refused the transfusion for religious reasons and died of blood loss. D argued that he was not the cause of V's death: the cause was V's refusal. The Court of Appeal rejected this argument, stating that the defendant must 'take the victim as he finds him'. D's act was still a substantial and operative cause of death. Remember the autopsy report!

### Escape attempts

If V is injured attempting to escape from D's unlawful attack, D will be causally responsible so long as the defensive action was attributable to that attack. In *Roberts* (1972) 56 Cr App R 95, V jumped out of a moving car in reaction to being sexually assaulted by D in the car. The Court of Appeal ruled that D was the cause of V's injuries as D's act began the causal chain and her reaction was reasonably foreseeable. The Court also stated that the chain of causation would be broken only by the victim doing something 'daft'. In *Williams and Davis* [1992] 1 WLR 380, on similar facts except that the result was the death of the escaping passenger, a slightly different test was used – namely whether V's response was within the range of responses which might be expected from a victim 'placed in the situation which he was'.

**ACTIVITY 4.9**

There are three different tests of causation used in *Roberts and Williams and Davis*. Two are used in one case!

- ▶ One says that the chain of causation is not broken unless V does something which was not reasonably foreseeable.
- ▶ Another says the chain of causation is not broken unless V does something 'daft'.
- ▶ The final test says that the chain of causation is not broken unless V's response was 'not within the range of responses which might be expected from a victim placed in his situation'.

Do all these tests mean the same thing or might the tests elicit different answers? Think of some situations which might.

**Suicide**

If V commits suicide as a result of D having raped, maimed or physically abused them, is D causally responsible for V's death? The tests of causation in Activity 4.9 are not terribly helpful here. Suicide is hardly a foreseeable response to a rape but if we ask the question 'is suicide "within the range of responses which might be expected from" a rape victim?' we would probably say yes. In *Dhaliwal* [2006] EWCA Crim 1139, a case involving suicide following a long period of domestic abuse, the Court of Appeal acknowledged that suicide could be triggered (and caused) by the most recent unlawful attack. Specifically:

where a decision to commit suicide has been triggered by a physical assault which represents the culmination of a course of abusive conduct, it would be possible...to argue that that final assault played a significant part in causing the victim's death.

**ACTIVITY 4.10**

Is the principle enunciated in *Dhaliwal* the same as rendered *Blaue* liable for his victim's unforeseen decision to refuse a blood transfusion?

**4.4 Breaking the chain of causation**

So far you will be forgiven for thinking that nothing can prevent the attribution of legal cause to a person whose culpable act began a chain of causation which ended with the victim's death or other harm. However, in certain circumstances, the chain of causation linking act and result can be broken. It can be broken by an act or an event which, in the words of the Draft Criminal Code, was neither foreseen nor foreseeable or, in certain circumstances, by the voluntary actions of the victim or third party – whether foreseeable or not.

An act or event which breaks the chain of causation is known as a *novus actus interveniens*, or a new act intervening. Now we will examine the special characteristics of a *novus actus interveniens*, of which the case of *Jordan* (1956) is an example. In this case the court ruled, rightly or wrongly, that the intervening causal contribution of a third party was **so powerful and independent of the initial wrongful act** of the defendant that that act was no longer fairly treated as the cause of death.

**ACTIVITY 4.11**

Read Wilson Section 5.6.B.2 'Third party's act contributing to the occurrence of injury'.

What were the special features in *Jordan* which prompted the court to hold that chain of causation had been broken? What was the test used? If that same test had been used in *Cheshire* would the outcome have been any different?

When will a subsequent act or event break the chain of causation? This depends upon whether the intervening event is an act or a natural occurrence.

### 4.4.1 New acts intervening

An intervening act of a third party will break the chain of causation if it is:

- ▶ voluntary
- ▶ independent of the initial act, and
- ▶ sufficient in itself to cause the harm suffered by the victim.

For example, in the American case of *People v Elder* (1894), D struck V and V collapsed on the ground. Then a bystander, B, who was not part of any plan to hurt V, stepped up and kicked V, killing him. D was not guilty of homicide. Although D was a factual cause of the death, the independent and voluntary act of B broke the chain of causation. A more modern example is the English case of *Rafferty* [2007] EWCA Crim 1846, which you will find in Wilson, Section 5.6.B.3 'Intervening cause supersedes defendant's act'.

The requirement that the act of the third party be independent of D's act is best illustrated by the cases of *Pagett* and *Cheshire*. The acts of the police officers in *Pagett*, and the medics in *Cheshire*, did not involve new acts intervening because they were by way of reaction to D's wrongful act. They were not independent of it.

#### ACTIVITY 4.12

Read Wilson Section 5.6.B.2 'Third party's act contributing to the occurrence or extent of injury'.

**Under what circumstances might very bad medical treatment break the chain of causation?**

The chain of causation in cases of intervening voluntary and independent acts is broken only if the intervening act was sufficient in itself to kill V. If V's death occurred only because V was already weakened by the initial attack the chain of causation will not be broken, as D's initial act will still be an operative and substantial cause.

As we have seen, unpredictable reactions of the victim to the defendant's wrongdoing do not generally break the chain of causation because they are not deemed to be independent of the initial act which is still an operative cause: see *Holland*, *Roberts* and *Blaue*, for example.

The most important cases of intervening acts of the victim breaking the chain of causation involve drug supply. In a number of cases in the past 20 years, the supplier of drugs to a person who has died following self-injection has been charged with manslaughter. The main question for the court is whether the unlawful act of supply causes the death. If we apply the usual rule of foreseeability (see *Roberts* and the Draft Criminal Code) the supply is the legal cause of death. However, supplying drugs to someone does not **cause them** to take the drugs. It is their choice. In other words, the cause of death seems to be the voluntary act of the victim in self-injecting rather than that of the supplier in supplying it to them.

For a number of years the courts could not decide which test to apply. In *Finlay* [2003] EWCA Crim 3868 the Court of Appeal said that the supplier had caused the death because it was foreseeable that the recipient would self-inject. The position now, following *Kennedy (No 2)* [2007] UKHL 38, is that the test is not whether the victim's act was foreseeable but whether it was voluntary. A free and informed choice to self-inject the drug breaks the chain of causation. It would not be free and informed if the victim lacked mental capacity or did not know of the strength of the drug.

We need to make one qualification to this. If the supplier witnesses the victim losing consciousness and fails to do anything to remedy the situation, a different causal inquiry may result in the supplier's conviction for manslaughter. In such a case, the supplier's omission in breach of duty (see *Evans* in Chapter 3 of this module guide) will be the new intervening cause of death.

## 4.4.2 Intervening events

An intervening event will break the chain of causation if it is:

- ▶ abnormal
- ▶ independent of D's act (i.e. a complete coincidence), and
- ▶ sufficient in itself to cause the death or other harm.

This would apply to case (e) in Activity 4.1 above, the ambulance case. It would also apply if V died in hospital due to an earthquake or contracted a fatal illness independent of their condition. For example, in *Bush v Commonwealth* (1880) V died of scarlet fever contracted in hospital following D's attack. D was held not to be the cause of death.

However, an intervening event will not break the chain of causation if the risk of it happening was created by or increased by D's act. For example, if D leaves V unconscious by the side of the road and V later stumbles on to the road and into the path of a passing car (*Corbett* [1996] Crim LR 594), if D leaves V on the beach and the tide comes in and drowns V, or if D leaves V in a cemetery and a wild animal attacks V (*The Harlot's Case* (1560)), D will remain causally accountable for the resulting harm, death or serious injury, as the case may be.

### ACTIVITY 4.13

Read Wilson, Section 5.6.B 'Intervening acts and events' and answer the following questions.

- a. Is there one test of causation or are there a number of different tests depending upon the facts of the case?
- b. Do you think *Kennedy (No 2)* is rightly decided?
- c. Consider the *Environment Agency v Empress Cars* case (Wilson, p.116). Is it consistent with *Kennedy*? Do you agree with the decision?
- d. Compare *Rafferty* with *Maybin*. Which decision do you prefer, and why?

## Am I ready to move on?

Are you ready to move on to the next chapter? You are if – without referring to the module guide or Wilson – you can answer the following questions.

1. State the general rule of thumb governing causation.
2. Give a verbatim account of the test for causation in either the Draft Criminal Code or *Smith*.
3. Explain how chains of causation come to an end.
4. Explain the 'Eggshell Skull Rule' and give one example.
5. Explain why in *Page*, although it was police rather than D who shot V dead, it was D who was the legal cause of her death.
6. Give three examples of cases in which the court's conclusion was that, although a later act or event had influence on the result, the initial wrongdoer was still accountable.
7. Give three examples of cases in which the court's conclusion was that, due to the intervention of a later act or event, the initial wrongdoer was no longer accountable.
8. Explain the meaning of 'operative' in the phrase 'substantial and operative'.
9. Explain the meaning of 'substantial' in the phrase 'substantial and operative'.

You can test your knowledge of this chapter through the online multiple choice questions available at [www.mylawchamber.co.uk](http://www.mylawchamber.co.uk)