Criminal law

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This edition is substantially based on the previous, 2010 edition of the guide, which was written by Mary Luckham, Norman Baird and Julia Fionda.

This is one of a series of subject guides published by the University. We regret that due to pressure of work the authors are unable to enter into any correspondence relating to, or arising from, the guide. If you have any comments on this subject guide, favourable or unfavourable, please use the form at the back of this guide.
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1 Introduction

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This subject guide, together with its study pack and the online resources provided for you, is designed to help you to study the criminal law of England and Wales. Although it is not intended that this guide should replace textbook and other reading, unlike your textbooks and other materials, its content reflects the Undergraduate Laws Criminal law syllabus of the University of London International Programmes. The syllabus can be downloaded from the Laws Virtual Learning Environment (VLE) which can be accessed through the student portal at https://my.londoninternational.ac.uk/

Each chapter of the guide will highlight the most important aspects of the topic and give guidance as to essential reading. Remember, though, that this guide is not exhaustive and cannot replace the reading of cases, textbooks and other materials.

Within each chapter you will find activities designed to test your knowledge and understanding of the topic. Feedback is provided at the end of the guide for most of these activities. Many of the activities will be based on material that is available through the Online Library (see below) or the Criminal law study pack.

A number of chapters end with a sample examination question and advice on how you should answer such questions. There are also self-reflection points and self-assessment questions throughout the guide. As these are ‘self-reflection/assessment’ no feedback is provided. These questions should be easily answerable if you have read the appropriate section of the chapter and the essential reading.

At the end of each chapter there is an opportunity for you to reflect on and review your understanding of the issues contained in that chapter. You are strongly advised to carry out this review and to go over any points which you still feel unsure about before proceeding to the next chapter.

In addition, there is an increasing amount of support material provided for you on the Laws VLE (see below). This material includes audio presentations and newsletters and you should get into the habit of using the VLE regularly.

**Learning outcomes**

When you have completed this chapter, you should be able to:

- begin your study of criminal law by approaching each topic in a systematic way
- understand how the various elements in each chapter of the subject guide are designed to help you with your understanding of the principles outlined in that chapter
- carry out basic legal research in the Online Library
- navigate the Criminal law area of the VLE and access any audio presentation(s)/newsletter(s) relevant to the topic you are studying.
1.1 Studying criminal law

The first thing to understand is that you are studying substantive criminal law and not rules of evidence and procedure which, although relevant in a criminal trial, are not part of this course.

Criminal law governs relationships between the individual and the state. If a person breaches the criminal law, this is viewed as being far more serious than a breach of the civil law, which governs relationships between individuals. Where there has been a breach of the criminal law, the state will intervene and bring a prosecution in a criminal court. If the defendant is found guilty of the crime then that defendant will be punished by the state.

**Self-assessment**

1. What is the difference between the two phrases: ‘*wrongdoing is a sufficient condition of punishment*’ and ‘*wrongdoing is a necessary condition of punishment*’?

2. Who said: ‘*All punishment is mischief. All punishment in itself is evil. It ought only to be admitted in as far as it promises to exclude some greater evil*’?

3. Which theory, according to Glanville Williams, do the courts act on in sentencing convicted offenders: the retributive or the utilitarian?

Criminal law can be found in a mixture of common law and statutory sources (see your Common law reasoning and institutions subject guide). It is a complex area which is constantly developing. You must learn to adopt a critical and analytical approach to the law and be able to apply your knowledge to factual situations. In order to be able to do this, please ensure that you read the relevant chapters in this guide and the textbook, and any cases or articles to which you are referred. The more you read around the subject, the better you will understand the principles which underpin the law. Reading a judgment from the Court of Appeal, the House of Lords or the Supreme Court (which was officially opened on 1 October 2009) on any particular topic is worth the effort as it is one of the best ways of gaining an understanding of the rules as they relate to that topic.

Most students find criminal law intrinsically interesting and many of you will have a general familiarity with some aspects of the subject. This familiarity is often generated by exciting journalism in the newspapers or on the television, which tends to give a misleading impression of the rules of criminal law. The headline: ‘He got away with murder because of a loophole in the law!’ does not provide any useful information about the rules of criminal law and how they were applied to the facts of that case. All it does is tell us that ‘he’ (i.e. the defendant) was found not guilty of murder; it certainly does not tell us why and it is pointless speculating as there could be any one or more of a variety of sensible legal reasons for that outcome.

As stated above, although the rules of criminal procedure do not form part of this course, some basic understanding of the trial procedure will help with your understanding as a whole.

Most textbooks contain a certain amount of information about the rules of procedure in their introductory chapters and it is worthwhile taking the time to read them.†

Although most criminal trials begin and end in Magistrates’ courts, the cases you will be considering will usually be appeals to the Court of Appeal (Criminal Division) from the Crown Court or further appeals on points of law of general public importance from the Court of Appeal (Criminal Division) to the House of Lords before October 2009 and, after that date, to the Supreme Court.

A trial in the Crown Court is held before a judge and a jury. The Crown Court tries defendants who have been charged with serious criminal offences (such as murder, manslaughter, rape, serious non-fatal offences against the person and offences against property) or with offences which are triable either way where there has been an election to the Crown Court. For more information about this, see your Common Law...
Throughout this guide, the defendant will normally be referred to as ‘the defendant’ or ‘D’ and the prosecution as ‘the prosecution’ or ‘P’; the victim of a criminal offence may sometimes be referred to as ‘V’.

1.1.1 Burden of Proof

Note that the burden of proof is on the prosecution to prove the defendant’s guilt beyond reasonable doubt. If it fails to discharge this burden in respect of any element of the offence the defendant must be acquitted.

In *Woolmington v DPP* [1935] All ER Rep 1 Lord Sankey said:-

Throughout the web of English criminal law one golden thread is always to be seen – that it is the duty of the prosecution to prove the prisoner’s guilt … If, at the end of and on the whole of the case, there is a reasonable doubt, created by the evidence given by either the prosecution or the prisoner, as to [the prisoner’s guilt] the prosecution has not made out the case and the prisoner is entitled to an acquittal.

In some exceptional cases, the defendant does have the burden of proving a defence, e.g. the common law defence of insanity or a statutory defence where the statute expressly provides for this. It was held in *R v Lambert, R v Ali and R v Jordan* House of Lords [2001] All ER (D) 69 (Jul) that this does not breach article 6 of the European Convention on Human Rights – the right to a fair trial.

It is important that you remember that the prosecution must prove every element of an offence beyond reasonable doubt. In those exceptional instances (see above) where the defendant has the burden of proving a defence he need only do so on balance of probabilities – i.e. the civil burden.

At the end of a case in the Crown Court – both the prosecution and the defendant having produced their evidence – the judge will sum up to the jury. In addition to summing up on the facts and the evidence produced during the trial, the judge will direct the jury on the law as it is to be applied to the facts. The jury will then make its decision. Depending whether they find the defendant guilty or not guilty of the offence charged, the judge will pass sentence or discharge the defendant.

There are rights of appeal to the Court of Appeal against conviction and sentence. The appeals we are concerned with are appeals by the defendant against conviction, where the defendant argues that the trial judge misdirected the jury on the law and that his conviction is therefore wrongful. It then falls to the Court of Appeal to determine whether or not the trial judge’s interpretation of the law was correct. If it finds that it was, then the Court of Appeal will uphold the conviction. If, however, it finds that the judge did misdirect the jury, it can quash the conviction unless it feels that the misdirection was not such as to render the conviction unsafe. Either the prosecution or the defence can appeal to the Supreme Court against the Court of Appeal’s decision on a point of law of general public importance.

Of course it may well be that the trial judge in the Crown Court directed the jury on the law in such a way that they acquitted the defendant and it is the prosecution which is of the opinion that the jury was misdirected. Here the prosecution may appeal provided it gets the authorisation of the Attorney-General. On appeal the defendant will not be named in the case; the case will be known as an Attorney-General’s reference. Therefore if the case was originally called *R v Jones* [2006] and the appeal by the prosecution is the sixth such appeal in 2006, the case will be known as Attorney-General’s Reference (No. 6) of 2006. If the Court of Appeal agrees with the prosecution that the trial judge misdirected the jury, this will not affect the defendant’s acquittal but trial judges in future will have to direct juries on that point according to the determination of the Court of Appeal. Therefore the decision of the Court of Appeal will have an impact on future cases.
1.1.2 Who can commit a criminal offence?

Only a person who has the legal capacity to commit a criminal offence can be the subject of a conviction. So, a six month-old baby who hits a person in the eye with its rattle causing injury to that person is unlikely to be seen as having committed a ‘wrong’, even in a general sense, and will certainly not be subjected to the criminal process.

What about an older child who, say, while in a sweetshop sneaks a bar of chocolate into his or her pocket and later eats it having left the shop without paying for it? An adult who did this, subject to a recognised defence, would be likely to be guilty of theft (see Chapter 16). So far as children are concerned, there is an irrebuttable presumption that a child under the age of 10 is incapable of committing a criminal offence. If, therefore, our child in the sweetshop was less than 10 years old then he or she would not have committed an offence. If he or she was aged 10 or above the position would be different. Once a child reaches the age of 10 they are deemed to be capable of committing an offence and can be subject to the criminal process (although special provisions in respect of trial and punishment apply to children).

Until 1998 there was the common law doctrine, of doli incapax, which meant that there was a rebuttable presumption that a child between the ages of 10 and 14 did not have the capacity to commit a criminal offence. This doctrine, however, was abolished by the Crime and Disorder Act 1998. See *R v T* [2008] EWCA Crim 815 and the July 2008 newsletter on the VLE.

Another example of legal incapacity is that of insanity. Where a person has been charged with an offence and can demonstrate on balance of probabilities that they were insane at the time they perpetrated the wrongdoing (i.e. the criminal offence) then the verdict will be ‘not guilty by reason of insanity’. A person found to be legally insane is deemed incapable of having committed the offence. Unlike the case of children under the age of 10, this will be tested in court and, if the prosecution proves beyond a reasonable doubt that the defendant was not insane within the strict rules which govern insanity, then the defendant, subject to any other defence, will be found guilty of the offence with which he or she has been charged. See Chapter 13.

1.2 Subject materials

1.2.1 Texts

The main text for this subject is:


This textbook is supported by MyLawChamber – a web-based set of material including source, materials, updates, multiple choice questionnaires, sample exam questions and skeleton answers. You are also required to read a criminal law casebook of your choice. Gobert, Dine and Wilson, *Cases and materials on criminal law* most neatly dovetails with the textbook but there are a number of others on the market. Whichever casebook you buy, ensure it is the latest edition. Aspects of criminal law can sometimes develop rapidly and an out of date textbook or casebook can be dangerously misleading. You will find guidance in each chapter of this guide as to which sections of the textbook you should read for any particular topic. Should a new edition of the textbook be published before the publication of a new edition of this guide, then the chapter and section headings given in this guide can be used to locate the Essential readings.

You will also find an up to date criminal law statute book very useful. This contains collected extracts of major legislation and, subject to the guidance in the *Programme Specifications and Regulations*, you will be able to take a copy into the examination.

You are also required to read the study pack materials, which are available on the VLE. Again, if you follow the chapters in the guide you will be referred to materials in the study pack as and when appropriate.

† Throughout this guide, this book will be referred to as Wilson. Often section references will be given to direct your reading. For example: ‘Wilson, Chapter 11: Section 11.4.’ Please note that all references to Wilson in this subject guide are to the fourth edition (2011).
Some of the exercises and essential reading will require you to access materials from the Online Library so please ensure that you become familiar with the databases as soon as you can. See below for more information about using the Online Library.

**Additional recommended reading**

In addition to the Wilson textbook and the essential reading you are referred to in this guide, you will find that the more additional reading you do, the better you will understand the subject. It really is worth taking the extra time to do this.

Students sometimes find it helpful to read a chapter of a textbook other than Wilson. Different writers approach topics in different ways and this can aid your understanding of criminal law, especially if you are having difficulty with a topic.

Students often find the following books to be particularly helpful.


Please ensure that whatever text or casebook you choose that you obtain the latest edition.

**1.3 Online resources**

In addition to the hard copy materials provided for you, we are now providing a number of online resources to further help you with your studies which you can access through the portal (https://my.londoninternational.ac.uk/)

Before you start your studies, go to www.londoninternational.ac.uk/current_students/programme_resources/laws/exercises/index.shtml and try the pre-course exercises. These exercises have been devised as a ‘taster’ to encourage you to consider the type of skills you will be expected to develop as you go through the laws programme.

**1.3.1 Online Library**

The databases available through the Online Library contain everything you would find in a well-stocked law library and we would therefore strongly encourage you to use it regularly. You may at first find it a little daunting but you should take the time to get used to using the password protected databases as some of the activities in this guide require you to use them. Generally you can use your portal password to access these databases, but there are instructions available on the VLE about how you can access each of the databases. There are also many free databases for which you do not need a password.

To help you learn your way around the Online Library, we have provided some online research exercises which you will find at www.londoninternational.ac.uk/current_students/programme_resources/laws/research_exe/index.shtml

You do not need a password to access these exercises but, as you will need to download materials from the Online Library for some of the exercises, please ensure that you have your portal password to hand.

The exercises will take you through some of the databases in order to find cases and articles and feedback is provided each step of the way in case you get lost.

Please note that these exercises are a compulsory component of your Common law reasoning and institutions course.
1.3.2 Virtual Learning Environment (VLE)

Criminal law has its own section of the VLE, which will be regularly updated and contains:

- the complete subject guide
- study pack readings
- audio presentations
- newsletters
- recent developments updates
- a direct link to the Online Library
- a direct link to the University of London website
- links to other useful criminal law websites
- a discussion board where you can post your comments and communicate with other University of London students anywhere in the world
- past examination papers and Examiners’ reports
- ’Student profiles’, where you can choose to provide details about yourself and see profile information provided by other students.

Important notices and dates will also be posted to the VLE. You should check it regularly.

Computer marked assessments

Once you have embarked on your studies and have covered some of the topics, you will find it useful to consolidate your learning by attempting the criminal law computer marked assessments. Each assessment is in three parts: knowledge, comprehension and application. Extensive feedback is provided for each question. You will find advice on taking these assessments on the VLE. You will also find these assessments to be a useful revision tool before you take your examinations.

Audio presentations

You can also access a number of criminal law audio presentations on the VLE. These presentations introduce you to each topic covered on the syllabus and in the subject guide. There is therefore an individual presentation for each chapter of this guide. You are advised to listen to the appropriate presentation before you embark on your study of a topic. You can, of course, listen again as you go through the topic and when you have completed it as a consolidation and revision aid.

Newsletters and Recent developments

As stated above criminal law is constantly developing and you are expected to be familiar with the current law up to 15 February in the year in which you take the examination. To help you to keep up to date, we provide a monthly criminal law newsletter on the VLE and in March of the year in which you will be taking your examination we bring all of the new developments together in Recent developments – also on the VLE. The monthly newsletter, however, is not limited to new developments but may also help to clarify areas of criminal law – in particular those which, in the author’s experience, some students can find especially difficult.
1.4 The examination

At the end of the course you will need to pass the examination in order to progress. Provided you have worked systematically through this guide, and completed the necessary readings and activities, you should have a good understanding of the subject. This will stand you in good stead for the criminal law examination.

There are, essentially, two types of examination question – the essay question and the problem question. You will find examples of both types of question in this guide, together with specific advice on answering such questions. Further guidance and illustrations are to be found in Wilson on MyLawChamber. However, here is some general advice on how to approach the questions.

1.4.1 Essay questions

Essay questions often consist of a quote on a particular issue within an area of law, followed by such words as ‘Explain and discuss’ or ‘Discuss’ or ‘To what extent do you agree?’

This type of question requires you to engage in an academic discussion focussed on the issue raised in the quote. It does not require a treatise containing everything you know about the area of law involved – you will not get many marks for that.

Aim to structure your answer so that it includes the following.

An introduction
Here you should define your terms and set out the ambit of your essay, stating what it is you intend to discuss.

A discussion of the issues raised by the question
Consider arguments which support the issue raised as well as arguments which do not. Do not use this as an opportunity to demonstrate, at length, your personal opinions. Use cases, or commentator’s opinions, to support any propositions you make but use them carefully and thoughtfully. Your essay should not resemble a ‘shopping list’ of cases. Relate what you say to the issue raised in the question.

Conclusion
Deal directly with the issue raised and conclude your discussion. It is permissible to state which of the arguments you consider to be the proper one and why. Provided your conclusion is a logical expression of some of the arguments set out in your essay it will be a valid conclusion.

1.4.2 Problem questions

These are more practical and will involve you in giving ‘legal advice’ in relation to a particular set of facts. These questions require a different approach to that for essays. Frequently, a long problem can be divided into a series of smaller problems. It is important that you deal with each issue individually.

Offence
You should first of all consider what possible offence(s) the facts of the question indicate in relation to the defendant(s). It is of the utmost importance that you deal with each offence/defendant individually. Do not begin your discussion of a second offence/defendant until you have completed your discussion of the first. Do not begin with a conclusion such as ‘Fred is guilty of murder’. If you consider this to be a possibility in the light of the facts disclosed in the question, then begin your answer by saying, for example, ‘Fred may be charged with murder’ or ‘I will begin by discussing Fred’s possible criminal liability for murder’. Then deal with the elements of the offence, relating your answer to the facts of the question.
Generally a definitive answer is not required for a problem question. There will usually be insufficient facts to enable you to be able to do that. So, for example, in a question where you are considering the offence of murder, the facts upon which liability will hinge may have been drafted ambiguously. Use ‘if’ and ‘then’ i.e. ‘If the jury is satisfied that the prosecution has proved beyond reasonable doubt that Fred committed the actus reus of murder with the appropriate mens rea [you will already have discussed these elements of the offence] then they may – subject to any defence he might raise – find him guilty of murder’.

**Defence**

You should consider whether, on the facts outlined in the question, there are any defences which may be available. Do not hypothesise. If the facts do not indicate the possibility of a defence do not discuss defences. Where the facts do indicate a defence, do not begin your answer with a discussion of that defence/those defences. Discuss the offence first and only when you have completed that part of the answer should you go on to discuss any possible defence.

**Summary**

Most students find the study of criminal law challenging and interesting. It is an intellectually demanding but very rewarding subject. This subject guide covers the law of England and Wales which may sometimes be very different from the legal system under which you live but we hope you will enjoy the challenge of this subject.

Good luck with your studies.
2  The elements of an offence

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Introduction

This chapter considers, in general terms, the elements of an offence which the prosecution must establish, beyond reasonable doubt, before a person can be convicted.

Before you go any further please listen to audio presentation 2 which you can access from the criminal law page of the VLE. It is important that you do so as it will give you an overview of the topic and guidance on the terms considered in this chapter (i.e. actus reus and mens rea).

You will now be aware that every offence is defined somewhere – either in a statute or at common law – and will be composed of a number of elements with which you should be familiar. Note that you should be equally familiar with the elements of each defence you consider as part of this course.

The elements of an offence are the external elements (actus reus) and the internal – or mental – elements of the offence (mens rea) which are contained in the definition of that offence (which will be found either at common law or in a statute). The offence of criminal damage contrary to s.1(1) of the Criminal Damage Act 1971 is used to exemplify analysis of the actus reus and the mens rea of a criminal offence.

Chapters 3 to 6 examine the general principles of actus reus and mens rea in more detail.

Essential reading and listening

- Audio presentation 2.

Learning outcomes

By the end of this chapter and the relevant readings you should be able to:

- find the definition of a criminal offence
- demonstrate an understanding of the constituent elements of that definition, i.e. actus reus and mens rea
- demonstrate an awareness of the limits of the terms actus reus and mens rea when used without further clarification.
2.1 General analysis of criminal offences

Every criminal offence is made up of a number of elements, each of which must be proved beyond reasonable doubt before a defendant can be convicted of the offence with which he or she has been charged. A criminal offence might be a statutory offence, such as theft contrary to s.1 of the Theft Act 1968, or it might be an offence at common law. Most offences are now statutory but a few – including murder and manslaughter (see Chapters 7 and 8) – remain offences at common law.

Traditionally criminal offences are analysed by reference to the actus reus and the mens rea.

The Latin maxim actus non facit reum, nisi mens sit rea means that the act itself does not constitute guilt unless it was done with a guilty mind. Another way of saying this is that criminal liability requires BOTH wrongdoing and culpability or blameworthiness. This is, in fact, not a completely accurate description of the criminal law as many crimes do not require mens rea, i.e. blameworthiness. Where mens rea is not required liability is termed ‘strict’.

Actus reus

This is the ‘external’ element of a crime – i.e. some form of measurable wrongdoing. It comprises the actor’s conduct, together with any circumstances which make that conduct wrongful, and, in the case of a result crime, the consequences.

Mens rea

This is the ‘internal’ or mental element of a crime. It must be proved that at the time the defendant was responsible for the actus reus of the offence with which he is charged, he behaved with the state of mind relevant to that offence. So to be guilty of theft he must be proved to be dishonest and intend to keep the property.

Where the offence is one which requires proof of mens rea, both elements (i.e. actus reus and mens rea) must be proved in order to secure a conviction. Furthermore, it must be proved that the mens rea coincided with the actus reus (see Chapter 6). Note that even if a defendant committed the actus reus of the offence with the appropriate mens rea he or she may be able to raise a defence which would negate any criminal liability.

Activity 2.1

Read Glanville Williams, Textbook of criminal law, 2nd edition pp.70–74, which you will find in your study pack and consider the following questions. (Note that the definition of rape on p.72 has changed since this book was written – see s.1 of the Sexual Offences Act 2003 – but the general point he makes remains valid.)

a. Why is a driver who accidentally runs over and kills a pedestrian not guilty of murder?

b. What factors would make this murder?

Self-reflection

Can you think of any examples where a person’s conduct might not be considered immoral under the circumstances but it would, nevertheless, be criminal?

Are there any types of conduct commonly considered to be immoral which you would like to see made criminal?

Now let us look at the definitional elements of the offence of theft contrary to s.1(1) of the Theft Act 1968. Go to your statute book and find this statute. Alternatively, go to www.legislation.gov.uk/ukpga/1968/60 where you will find it. You will see that a person is guilty of theft if he ‘dishonestly appropriates property belonging to another with the intention of permanently depriving the other of it’ (s.1(1) Theft Act 1968).
**Activity 2.2**

Consider the following scenarios. Bearing in mind that every element of an offence must be proved in order to convict, do you think that the parties below are guilty of theft? Use the wording of s.1 to guide you. This exercise requires you to consider both the *actus reus* (Chapters 3 and 4) and the *mens rea* (Chapter 5) of the offence.

a. Susan was in her local supermarket. After checking that nobody was looking, she picked up a bar of chocolate and ate it.

b. John grabbed Ann’s purse and ran away with it intending to take the money out of it and then throw the purse away. Ann’s friend, Anton, who saw what had happened, chased after John and caught him before he could take the money. Anton returned Ann’s purse to her.

c. Beth and Amy were in the library. Beth asked Amy if she could borrow her copy of Wilson for 10 minutes. Amy said ‘No’. Amy then went off for a coffee leaving her Wilson on the desk. Beth took the book, intending to return it before Amy returned. Unfortunately, before she could do so, Amy came back and was very angry with Beth for taking her book.

d. John took an umbrella believing it to belong to Fred. Unknown to John it was his own umbrella.

**Activity 2.3**

a. Find the definitions of the following offences:†
   i. Murder
   ii. Wounding with intent to cause grievous bodily harm
   iii. Robbery
   iv. Fraud.

b. What are the *actus reus* and *mens rea* of each of these offences?

Tip. The *mens rea* is what is left over when you have subtracted the *actus reus* from the definition.

There is no feedback for this activity.

2.2 Limitations on the value of the Latin terms *actus reus* and *mens rea*

A word of warning. The terms ‘actus reus’ and ‘mens rea’ are terms of art† which, when used on their own and without explanation, provide no sensible information.

Similarly if, having considered a scenario in which, say, A shot B killing him, you simply said, ‘The *actus reus* is established’, a reasonable response might be: ‘The *actus reus* of what offence?’ You might then respond: ‘The *actus reus* of murder.’ Although this may be correct it is still less than informative as you have not explained what the ingredients of the *actus reus* of murder are and why the facts indicate that it was made out. Therefore it would be correct to say that, in order to establish the *actus reus* of murder, the prosecution must prove that A unlawfully killed a human being (murder is considered in Chapters 7 and 8).

Nevertheless, these are the conventional terms which will be used in all the criminal law materials you are likely to read – including this subject guide. When you use these terms ensure that you use them appropriately.

**Self-reflection**

Return to Activity 2.3 and look again at the *actus reus* and *mens rea* for theft and each offence listed. Now compare them and you will see, on the whole, how different they are. (It might help to write them down.) For example, the *actus reus* of theft is entirely different from the *actus reus* of murder. In addition, although

† Use the index and the list of statutes in Wilson.

† A ‘term of art’ is a technical term which has a special significance.
the mens rea for each of these offences is expressed as ‘intention’, you can see that proof of an intention to achieve entirely different results is required depending upon which offence is charged. Always express this in any answer you give to activities or questions in the examination.

You might also have noted that, where the mens rea for murder is intention to kill or cause grievous bodily harm, the mens rea requirement for the offence contrary to s.18 of the Offences Against the Person Act is intention to cause grievous bodily harm. It follows from this that, if a person attacks another causing them grievous bodily harm, having intended to do so, they will be guilty of the s.18 offence. If, however, the victim of the attack dies the attacker will be guilty of murder – subject to any defences he or she may have.

For most of the offences we will be dealing with in this subject guide, it will be necessary for the prosecution to prove both the actus reus and the mens rea of the particular offence. However, for some offences liability is strict. This means that neither the definition of the offence imports a requirement of mens rea as to at least one of the elements of the actus reus, nor has the offence been interpreted by the courts as requiring proof of mens rea in respect of that element. See Chapter 6.

Activity 2.4
a. Where are the definitions of offences to be found?
b. What is meant by the Latin maxim actus non facit reum, nisi mens sit rea?
c. Read Sections 4.1–4.2 in Chapter 4 and Section 14.2 in Chapter 14 of Wilson. What are the conduct and circumstances elements of the actus reus of the offence of theft?
d. What is the consequences element of the actus reus of the offence of murder?
e. Read the article by Nigel Hanson in your study pack. Why did David Ibbetson, Professor of Civil Law at Cambridge University, have reservations about modernising legal language?

2.3 Proof of the ingredients of an offence

The burden is on the prosecution to prove beyond reasonable doubt all of the elements of an offence with which a defendant is charged (see Woolmington v DPP [1935] AC 462). It follows therefore that, whether the offence is one of strict liability or one which requires proof of mens rea, if all of the elements of the actus reus cannot be proved the defendant cannot be criminally liable, however guilty his mind is.†

Activity 2.5
Read Section 4.3 in Chapter 4 of Wilson.

Can Dadson (1850) 2 Den 35 be reconciled with Case 6?

There is no feedback for this activity as the answers are to be found within the passage in Wilson.

Now let us consider s.1(1) of the Criminal Damage Act 1971, which defines the offence of criminal damage as occurring where a person:

... without lawful excuse destroys or damages any property belonging to another intending to destroy or damage such property or being reckless as to whether any such property would be destroyed or damaged...

It will be clear that the actus reus of this offence (i.e. the external element of the offence) will be established where a person ‘destroys or damages any property belonging to another’.†

If we analyse this external element further it will also be clear that the ‘conduct’ element of the actus reus of criminal damage is any conduct which results in the damage to or destruction of the property and this would include an omission to act (see Chapter 3).

† Mens rea and strict liability offences are considered in Chapter 5.

† As to whether the requirement ‘without lawful excuse’ is an element of the offence or a defence is discussed below.
The ‘circumstances’ element of the *actus reus* of criminal damage will be satisfied by proof that what was destroyed or damaged was property which belonged to another and that the damage or destruction was effected without a lawful excuse.

Criminal damage is a result crime and the ‘consequences’ element of the *actus reus* of this offence will be satisfied by proof that the destruction of or damage to the property was caused by D’s conduct.

If all of these elements are proved by the prosecution (i.e. the jury is satisfied beyond reasonable doubt), then the *actus reus* of criminal damage is established. However, although proof of *actus reus* is a necessary precondition of conviction, where the offence is one which requires proof of *mens rea* – as is criminal damage – proof of *actus reus* alone is not sufficient to convict a defendant. The prosecution also needs to establish that the defendant committed the *actus reus* of the offence with the appropriate *mens rea*. If you return to the definition above you will see that the *mens rea* is expressed as an intention to destroy or damage property or being reckless as to whether any such property would be destroyed or damaged. Therefore the prosecution would need to prove that the defendant either intentionally or recklessly destroyed or damaged property belonging to another. The meaning of the terms intention and recklessness are considered in Chapter 5 of this guide.

**Activity 2.6**

a. What *mens rea* needs to be proved on the part of a defendant who has been charged with criminal damage contrary to s.1(1) of the Criminal Damage Act 1971?

b. What is the conduct element of the offence of criminal damage contrary to s.1(1) of the Criminal Damage Act 1971?

### 2.4 Lawful excuse

Before leaving the offence of criminal damage, the element ‘without lawful excuse’ needs clarification.

Although it could be expressed as an element of the *actus reus* of the offence, it could also be said that if the defendant knew he had a lawful excuse then he or she neither intended nor was reckless as to causing criminal damage. It follows that, under these circumstances, the defendant would not have the *mens rea* for the offence. Similarly, even if the defendant did not have a lawful excuse, but honestly believed that he did, then that mistaken belief would negate any criminal liability. See Chapters 11–12. Consider now the situation where the defendant did have a lawful excuse but, at the time he destroyed or damaged the property belonging to another, was not aware of this fact.

Imagine that the defendant is lawfully in possession of an item of property which belongs to V and the defendant deliberately destroys that property. If you consider the definition above it will be clear that D is guilty of criminal damage. The *actus reus* and *mens rea* are established.

Now imagine that, before the defendant destroyed the property, V had emailed him instructing him to destroy it. The email has reached D’s mailbox but D has not checked his emails and therefore does not know of V’s instruction. Is D guilty of criminal damage?

If, as stated above, without lawful excuse is an element of the offence of criminal damage, it could be argued that as D has – albeit unknown to him – a lawful excuse, he cannot be guilty of this offence. In order to convict D the prosecution must prove all of the elements of the offence with which D is charged (see *Deller (1952)*).

However, it could be argued that rather than being an element of the offence itself, a lawful excuse is, in fact, a defence. If this is the case, then on the basis of the decision in the case of *Dadson (1850)* 2 Den 35, D may be found guilty of criminal damage. Which outcome do you prefer?
Activity 2.7 Online research

Find the definition of the offence of robbery contrary to s.8 of the Theft Act 1968 using Westlaw. You can access this by logging on to the student portal and then going to the databases in the Online Library.

Summary

Every ingredient of an offence must be proved before a defendant may be found guilty of that offence. This is subject to the defendant having a lawful excuse for his or her conduct. Please note that you will always find the elements of an offence in its definition.
Reflect and review

Look through the points listed below:

Are you ready to move on to the next chapter?

**Ready to move on** = I am satisfied that I have sufficient understanding of the principles outlined in this chapter to enable me to go on to the next chapter.

**Need to revise first** = There are one or two areas I am unsure about and need to revise before I go on to the next chapter.

**Need to study again** = I found many or all of the principles outlined in this chapter very difficult and need to go over them again before I move on.

**Tick a box for each topic.**

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<td>I can demonstrate an understanding of the constituent elements of that definition, i.e. <em>actus reus</em> and <em>mens rea</em>.</td>
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<td>I can demonstrate an awareness of the limits of the terms ‘<em>actus reus</em>’ and ‘<em>mens rea</em>’ when used without further clarification.</td>
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If you ticked ‘need to revise first’, which sections of the chapter are you going to revise?

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Before you continue to the next topic listen again to audio presentation 2 to recap and consolidate what you have learnt.
3  Actus reus: the conduct element

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Introduction

The actus reus of any offence will be found in the definition of that offence. It will include:

- wrongful conduct on the part of the defendant. This may be an act or an omission where the defendant is under a duty to act. In either case, to constitute wrongful conduct the act or omission must be voluntary.
- the existence of one or more specified circumstances
- in the case of a result crime, a particular consequence caused by D’s conduct.

This chapter will examine, in outline, what the criminal law understands by voluntary conduct and, in detail, the scope of liability for omissions. Chapter 4/5 will deal with causation in relation to the consequences element of the actus reus of result crimes.

Essential reading and listening

- Wilson, Chapter 4: ‘Actus reus’, Section 4.5 ‘Exceptions to the act requirement’, Part C ‘Omissions’.
- Audio presentation 4. Listen to this before you go any further with this topic.
- Lane LJ’s judgment in R v Stone and Dobinson [1977] 1 QB 345. (Included in your study pack.)

Learning outcomes

By the end of this chapter and the relevant readings you should be able to:

- explain what is meant by voluntary conduct
- explain the distinction between an act and an omission
- assess whether an offence is capable of being committed by omission
- understand the notion of a duty to act and under what circumstances such a duty is likely to be imposed
- identify the circumstances under which a duty to act might change or cease
- recognise the circumstances element of the actus reus of an offence
- be able to identify when a state of affairs might amount to the actus reus of an offence.
3.1 Voluntariness

Although the conduct element of the actus reus of an offence usually requires proof of a positive act on the part of the defendant, some offences can be committed by an omission to act.

Whether the prohibited conduct is an act or an omission, such conduct must be voluntary conduct on the part of the defendant.

In the case of Woolmington v DPP [1935] AC 462 Viscount Sankey ruled that, subject to limited exceptions, the burden was on the prosecution to prove the defendant’s guilt beyond reasonable doubt.

One of the points he emphasised in relation to the defendant’s conduct was that: ‘The requirement that it should be a voluntary act is essential… in every criminal case’.

Some years later, in the case of Bratty v Attorney General for Northern Ireland [1961] 3 All ER 523 HL, Lord Denning said:

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…

It follows, therefore, that in order to attract criminal liability a defendant’s conduct must be voluntary – that is, it must be a willed bodily movement (or lack of action where D is under a duty to act). For example, if D does not control his car and it hits something causing damage, he will not be criminally liable if the reason he could not control the car was because, for example, he was being attacked by a swarm of bees. Brake failure through no fault of the defendant would equally give the driver no control over the situation (see Burns v Bidder [1967] 2 QB 227). Similarly, if the same thing happened because he had a heart attack or epileptic fit, his conduct is involuntary. Where a defendant has no control over what he is doing he is said to be acting in a state of automatism which, like insanity its close cousin, is a defence to criminal liability. Automatism and insanity will be looked at in detail in Chapter 12.

3.2 Omissions

The conduct element of the actus reus usually requires proof of a positive act on the part of the defendant. Although it could be said that we owe negative duties to others – such as not to kill them, not to injure them and not to steal from them – there is no general liability for failure to act under the common law of England and Wales. A stranger, for example, would not incur criminal liability for watching somebody drown in a swimming pool even if that person could have been saved with very little effort on the stranger’s part.

The stranger would, however, incur criminal liability if he or she carried out a positive act, such as holding the other’s head under the water, which caused or contributed to the death. Either way, the victim has died, but in the situation where the stranger merely watched the victim drown without doing anything, the victim would have died in any event, whether or not the stranger had been there.

† Although some jurisdictions have adopted a general principle of liability for failure to act – e.g. France – many, including England and Wales, have not done so.

SELF-REFLECTION

Consider the example of the stranger (above).

Do you think a general duty to act should be imposed under English law?

Do you think the position would be different had it not been the stranger watching but:

- a lifeguard
- the victim’s
3.3 Imposition of liability for an omission to act

A crime can be committed by omission, but there can be no omission in law in the absence of a duty to act. The reason is obvious. If there is an act, someone acts; but if there is an omission, everyone (in a sense) omits. We omit to do everything in the world that is not done. Only those of us omit in law who are under a duty to act (Glanville Williams, Textbook of criminal law, pp.148–149.)

There are circumstances where the law does impose on a person a duty to act. Sometimes a statute will specifically state that the actus reus of an offence is committed by omission, for example, by virtue of s.1(1) of the Children and Young Persons Act 1933 it is an offence to wilfully neglect a child. This is an offence of ‘mere omission’. Offences of ‘mere’ omission are rarely found at common law. Sometimes the courts will determine that a particular offence may be committed by omission even though the definition of that offence does not specifically provide for this – for example murder. See Gibbins and Proctor [1918] 13 CAR 134.

Self-reflection

What might be the arguments in favour of imposing a general legal obligation to go to the assistance of someone who is in the process of committing or has attempted to commit suicide? Should the parents of an adult child attract criminal liability if they observe (without assisting) their child committing suicide? Can you think of any arguments against imposing such a general obligation?

Where a statute specifically provides that an actus reus is committed by omission it will be clear that a duty to act has been imposed on a particular class of person. The scope of any such duty will also be clear.

Where the offence is not one satisfied by proof merely of prohibited conduct on the part of the defendant, but is a result crime – an offence such as murder or manslaughter which requires proof of a consequence arising from the defendant’s conduct – it will fall to the court to determine whether a defendant’s inaction might result in criminal liability.

Where an offence is capable of being committed by omission it will need to be determined whether the defendant was under a duty to act and is therefore liable for failing to do so.

Where it is found by the court that a defendant was under a duty to act in a particular situation and has unreasonably failed to do so, the burden remains on the prosecution to prove all the other ingredients of the offence (i.e. any remaining elements of the actus reus and the mens rea required for the particular offence with which the defendant has been charged). So, if the court finds that A was under a duty to B, if A has allowed B to die and has been charged with murder or manslaughter, it will still need to be proved that A’s conduct was unlawful and that it caused B’s death. The relevant mens rea for the particular offence will also need to be established.

3.3.1 Is the offence capable of being committed by omission?

Essential reading

The rule of thumb is that any offence can be committed by omission, unless the definition of the offence excludes this possibility. Offences which have been interpreted by the courts as capable of being committed by omission include murder (*Gibbins and Proctor* [1918] (above)) and gross negligence manslaughter. Most of the cases referred to below are manslaughter cases. Murder and manslaughter are common law offences.

*Offences which cannot be committed include unlawful act manslaughter: Lowe [1973] QB 702 and assault. See also the case of Santana-Bermudez [2004] in which the defendant was convicted of an assault.*

**Activity 3.1**

Read Wilson, Chapter 11: ‘Non-fatal offences’, Section 3 ‘Offences protecting personal autonomy’, Part A.2 ‘Battery’. If assault cannot be committed by omission why then was the defendant in *Santa-Bermudes* convicted?

**Activity 3.2**

Can the word ‘acts’ in a statute be construed as being satisfied by an omission?

See Ahmad [1986] Crim LR 739 and the discussion in Wilson, Chapter 4: Section 4.5 ‘Exceptions to the act requirement’, Part C.3 ‘Omissions: the common law approach’.

**3.3.2 Was the defendant under a duty to act?**

Once it has been established that the offence is capable of being committed by omission, the court must determine whether the defendant was under a duty to act.

The duty, where it exists, is not an onerous one. A person is not expected to put his or her own life at risk. Rather the question that will be considered by the courts is whether a defendant who was under a duty to act has discharged that duty to a reasonable standard. What is reasonable will depend upon the circumstances in each case.

For example, whereas a stranger may, without doing anything to help, watch with interest a person drowning in a lake, a lifeguard who has been appointed to ensure the safety of people at, for example, the seaside or in a swimming pool will be under a duty to act. Although the lifeguard must discharge any such duty to a reasonable standard, he will not be expected to put his own life in danger. He would merely be expected to do that which a reasonable lifeguard would do. If there was any particular danger to him – e.g. a shark swimming in the sea – he would discharge his duty by obtaining proper assistance. He would not be expected to swim into the zone of danger or put his own life and safety at risk in any other way.

Nonetheless, the lifeguard must discharge his duty to a reasonable standard. What he did or did not do in attempting to discharge that duty will be judged according to how the court considers a reasonable lifeguard would have acted under the particular circumstances. It is thus an ‘objective’ test. Therefore even if a defendant thought he was doing his best, if that ‘best’ was an ‘incompetent best’ it is unlikely to have been sufficient to discharge his duty. See *Stone and Dobinson* in 3.4 below.

Most people, of course, will act over and above any duty the law may have imposed upon them and many will act when they are under no legal duty at all. It is difficult, for example, to imagine a passer-by who sees a person drowning or witnesses an accident not even bothering to call one of the rescue services. It should be remembered, however, that they are under no duty to do so and if they do not do anything they will not attract any criminal liability.

There is a difference, however, between what we might term ‘moral’ duty to act and a ‘legal’ duty to act. No legal sanction is imposed for breach of a moral duty – although there may be social opprobrium. However many legal duties could be said to have arisen from moral ones.

As Lord Coleridge CJ said in the case of *Instan* [1893]:
It would not be correct to say that every moral obligation involves a legal duty; but every legal duty is founded on a moral obligation. A legal common law duty is nothing else than the enforcing by law of that which is a moral obligation without legal enforcement.

**Self-reflection**

It is an offence under the law of England and Wales not to wear a seat belt when travelling in a motor car. Can this duty be said to have arisen from any moral obligations?

The issue for the courts in developing the law and the legislature in enacting law is: when should a legal duty to act be imposed and what should be the scope of any such duty? The boundaries are very unclear. Although a parent is under a legal duty towards his or her child, should a legal duty be imposed on someone in respect of their brother or sister? Their neighbour? Or perhaps someone to whom they have supplied illicit drugs, as in Evans (2009) and Khan and Khan (see section 3.6 below)? Are you under a duty towards your friend? It is likely to depend upon the situation. What might be the scope of any such duty which may exist?

In Lewin v CPS [2002] EWHC Crim 1049 a decision by the Crown Prosecution Service not to prosecute was upheld. In this case the defendant, at the end of a car journey in Spain with his friend, left his friend (who was intoxicated) asleep in the car. It was summer and the weather was hot. His friend died. The court held that the defendant was only responsible for the welfare of his passenger whilst the car was in motion. His duty towards his friend did not continue because the risk of death was not reasonably foreseeable. In other words the court considered that the reasonable man would not have foreseen that occurrence under those particular circumstances.

In determining in any case whether a legal duty exists, the courts consider such factors as the relationship between the parties, whether there was a voluntary undertaking or a contractual duty to act, or whether the defendant actually created the situation which gave rise to a danger where it would have been reasonable for him to do something to rectify it.

This is not an exhaustive list of factors: the categories of situation where the courts will recognise a duty are not closed (see Khan and Khan in section 3.6 below).

The scope of a person’s duty to act will be determined by the circumstances and may change. For example, a parent’s duty to his young baby will be different to that of a parent to an older or adult child. Depending upon the circumstances, there may be no duty at all towards an adult child.

Although you may find the law in this regard to be somewhat vague, you will also find that if you give careful consideration to the reasoning of the judges in the various cases (some of which are considered below) where a duty to act has been imposed, you will be in a better position to predict the likely outcome in a novel situation that might, for example, arise in an examination question.

**Self-reflection**

Would you be in favour of the imposition of a general legal duty to act? What, at this stage, do you think might be the advantages and disadvantages of this?

Do you agree with the decision in Lewin that the driver owes no duty to his passenger to ensure his continued safety after he had completed the journey?

### 3.4 Duty to act under the common law

In addition to those offences where a duty to act is expressed in the definition, there are situations where it has been established by the courts that a defendant will be under a duty to act. By completing Activity 3.3 below you will become aware of these situations.
Activity 3.3

Read the following cases:

- Pittwood (1902) 19 TLR 37
- Miller [1983] 2 AC 161 HL
- Gibbins and Proctor [1918] (see also Instan [1893])

Now answer the following questions

1. Can a contractual duty towards one person give rise to a duty to act towards another or others?
2. What was decided in the case of Miller [1983]?
3. Can a duty to act arise out of a relationship?
4. Can a person, not otherwise under a duty to act, voluntarily assume such a duty for the purposes of the criminal law?

Activity 3.4

Read Lane LJ’s judgment in Stone and Dobinson which you will find in your study pack and answer the following questions.

a. What had Dr Usher said was the likelihood of Fanny’s survival had she been admitted to hospital two weeks before he examined her body?

b. What did the Crown allege in respect of the appellants’ (i.e. Mr Stone and Mrs Dobinson) responsibility for Fanny’s death?

c. Lane LJ said that there was ‘no dispute, broadly speaking, as to matters on which the jury must be satisfied before they can convict of manslaughter in circumstances such as the present’. What did he say were those matters?

d. What was the first ground of appeal made by counsel for the appellants?

e. Did the court accept or reject that proposition? What were its reasons?

f. Lane LJ considered that the trial judge’s direction to the jury was wholly in accord with the principles outlined in Bateman. What was the one criticism he thought might be made in respect of that direction?

g. Did the appellants succeed or fail with their appeal against conviction for manslaughter?

Self-reflection

Could Stone and Dobinson be said to have caused Fanny’s death? Would she have died anyway?

Reminder of learning outcomes

By this stage you should be able to:

- make an assessment as to whether an offence is capable of being committed by omission
- understand the notion of a duty to act and under what circumstances such a duty is likely to be imposed.

Summary

The conduct element of the actus reus usually requires proof of a positive act on the part of the defendant. Although it could be said that we owe negative duties to others such as not to kill them, not to injure them and not to steal from them, there is no general liability for failure to act under the common law of England and Wales. You will have seen that there are situations where the law imposes a duty to act on a person that will result in criminal liability for an omission to act or a failure to act to a reasonable standard. You will see as you continue reading this chapter that the
situations recognised by the courts which may give rise to a duty to act are not closed and that new categories of duty may evolve.

3.5 Distinguishing between act and omission

**ESSENTIAL READING**

- Wilson, Chapter 4: 'Actus reus', Section 4.5 ‘Exceptions to the act requirement’, Part C.2 ‘Acts and omissions: what’s the difference?’.

Andrew Ashworth, in his article ‘The scope of criminal liability for omissions’, *Law Quarterly Review* 1992 108 (Jan) comments:

> Whether we term certain events ‘acts’ or ‘omissions’ may be both flexible in practice and virtually insoluble in theory: for example, does a hospital nurse who decides not to replace an empty bag for a drip feed make an omission, whilst a nurse who switches off a ventilator commits an act? It would seem wrong that criminal liability or non-liability should turn on such fine points, which seem incapable of reflecting any substantial moral distinctions in a context where the preservation of life is generally paramount.

Although the distinction between an act and an omission is generally self-evident – e.g. doing nothing while somebody drowns as opposed to holding that person’s head under the water so that they drown – the House of Lords in *Airdale NHS Trust v Bland* [1993] ruled the removal of a nasogastric tube (used to provide nutrition and hydration to a comatose patient) to be an omission rather than an act, artificial nutrition and hydration having been classified as medical treatment.

This case was distinguished by the Court of Appeal in *Re: A (Conjoined twins: Surgical separation)* [2001], the court holding that surgery to separate the twins was an act. Although not apparently so at first glance, this case is in one sense analogous with *Bland*. This is because in *A* the separation of the twins would result in the removal of the blood supply to the weaker twin causing her death and in *Bland* the removal of the nasogastric tube resulted in the withdrawal of nutrition and hydration causing his death. The trial judge in *A* considered that the reasoning in *Bland* could be applied to *A* but the Court of Appeal did not agree. The blood supply received by the weaker twin was not medical treatment: the operation to separate them would be a positive act. Although the Court of Appeal agreed that the surgery could go ahead without legal consequences for the doctors it was on different grounds. See Chapter 6.

The problems associated with distinguishing between acts and omissions are more likely to arise in the area of medical treatment than under any other circumstances. This is because decisions sometimes have to be made as to whether to end a course of treatment which is perceived to have become futile, in order to allow the patient to die, as happened in *Bland* (above). In *NHS Trust A v M, NHS Trust B v H* [2001] it was held that the withdrawal of artificial nutrition and hydration from a patient in a persistent vegetative state would not breach Article 2 of the European Convention on Human Rights.

Similar problems have arisen with handicapped neonates as in *Arthur* [1981] and *Re B (a minor)* [1981] – and see also *R (Burke) v GMC* 2004 EWHC 1879 (Admin).

**SELF-REFLECTION**

Read Article 2 of the European Convention on Human Rights in your study pack.

Do you agree that the decision in *Bland* (1993) does not contravene this Article?

Where a patient is competent and refuses treatment, that refusal must be honoured. To treat a person against their wishes – no matter how benevolent the motive – would amount to an assault or worse. In *Ms B v An NHS Hospital* [2002] Ms B sought and obtained a declaration from the court that the refusal of her doctors to disconnect the life support machine to which she was connected and from which she wished to be disconnected and allowed to die was an unlawful trespass (assault and/or battery).

Note, however, that a doctor who performs a positive act to end a patient’s life will be guilty of murder even where the patient has requested this. In *R v Cox* [1992] Dr Cox’s patient was dying. With her family’s approval she begged Dr Cox to give her a
lethal injection, which he did. He was convicted of attempted murder. He could not be
convicted of murder because before his conduct came to light the patient had been
cremated and it could therefore not be proved that there was a causal link between
his conduct and her death. As she was dying anyway, it was just possible that it was her
illness which actually killed her. Causation is discussed in Chapter 5.

Another issue which has fallen to be considered by the courts is under what
circumstances, if any, can an existing duty to act be said to have ceased?

Take doctors, for example. It has long been established that a doctor owes a duty to
his or her patient. If a doctor does not act to a reasonable standard and the result of
that breach of duty is that the patient suffers injury or death then the doctor might be
criminally liable, provided of course the other elements of the offence are established
(see Adomako [1995]).

This duty necessarily only exists in the context of the doctor-patient relationship.
Its scope is therefore limited and will depend upon the circumstances of each
individual case.

**Activity 3.5**

Under what circumstances might an existing duty to act cease to operate?

### 3.6 New categories of duty

The list of situations recognised by the courts giving rise to a duty to act is not a closed
one and it may be that as situations arise the courts will recognise new categories.

In Khan and Khan [1998] two drug dealers supplied heroin to the victim. Having
ingested the drug she fell into a coma, the defendants failed to obtain medical
assistance and she died. They were convicted of manslaughter and appealed to the
Court of Appeal where their convictions were quashed. Swinton LJ commented:

> To extend the duty to summon medical assistance to a drug dealer who supplies heroin
to a person who subsequently dies on the facts of this case would undoubtedly enlarge
the class of persons to whom on previous authority, such a duty may be owed. It may
be correct to hold that such a duty does arise... Unfortunately, the question as to the
existence or otherwise of [any such] duty... was not... at any time considered by the judge
and the jury was given no direction in relation to it.

In Singh (Gurphal) [1999] the Court of Appeal held that the question as to whether a
situation gave rise to a duty to act was one of law for the judge to determine.

Following these two cases it was unclear whether the position was that the issue of
whether there was a duty was to be left to the jury, the judge having ruled that there
was evidence capable of establishing that there was such a duty (Khan) or whether
it was purely a question of law to be determined by the judge (Singh). In Willoughby
[2004] Rose LJ confirmed that, although there may be special cases where a duty
obviously exists (such as that between doctor and patient) and where the judge may
direct the jury accordingly, the question whether a duty was owed by the defendant to
the deceased will usually be a matter for the jury provided there is evidence capable of
establishing a duty in law.

In R v Evans (Gemma) [2009] EWCA Crim 650 the appellant obtained heroin and gave
some to her sister who self-administered the drug. The appellant was concerned that
her sister had overdosed so decided to spend the night with her but did not try to obtain
medical assistance as she was worried she would get into trouble. When she woke up she
discovered that her sister was dead. She was convicted of manslaughter and appealed.
Her grounds of appeal were that the judge had been wrong to find that she was capable,
having supplied the heroin to her sister, of owing her a duty of care and that this was
consistent with the authorities and that it was open to the jury to consider whether she
owed a duty of care on the basis that she had supplied the heroin. In addition, she argued
that the judge had been wrong in leaving it to the jury to decide whether to extend the
category of persons by whom and to whom a duty might be owed.
The Court of Appeal dismissed her appeal. For the purposes of gross negligence manslaughter, when a person had created or contributed to the creation of a state of affairs that he knew, or ought reasonably to have known, had become life threatening then, normally, a duty to act by taking reasonable steps to save the other’s life would arise. Although the trial judge’s directions about the ingredients of gross negligence manslaughter had been correct, he had misdirected the jury in respect of the question as to whether the defendant had owed a duty of care to her sister should have been left to the jury to decide. The question of whether a duty of care existed was a question of law for the judge, not the jury and Willoughby (2004) did not relegate the duty question to one of fact. It remained a question of law. Nonetheless, the judge was not to be criticised for this as he was following Willoughby as it had been commonly understood. The jury had been sure, both in law and in fact and, accordingly the defendant’s conviction was safe.

**Self-reflection**

Do you think that the Court of Appeal decision in Evans [2009] would have been the same if all of the facts had been the same but, instead of the defendant having given her sister heroin, she had given her a prescription painkiller, such as morphine, which had prescribed for D?

**Activity 3.6**

a. John, who does not like doctors but instead believes in the power of prayer and natural healing, goes to stay with his friend Luke. Luke is not very clean and always forgets to throw old food away. John eats a piece of cooked meat which he finds in the kitchen, not realising it has gone mouldy. He contracts food poisoning and begins to feel very ill. Luke wishes to call a doctor but John refuses to allow it. Eventually, John falls into a coma. Luke waits for a day hoping John will wake up but he does not. Eventually Luke calls for an ambulance but it is too late. John dies on the way to hospital. Luke has been charged with manslaughter.

i. What factors will the court take into account when determining whether Luke was under a duty to act?

ii. If it was decided that he was under a duty to act, what factors would the court take into account in determining whether or not he was in breach of that duty?

b. Susan is a doctor. One day on her way to work she comes upon the aftermath of a road accident. Jane is lying at the side of the road, badly injured. The ambulance has not yet arrived. Susan is late for work so she rushes on. Jane dies but would have survived had she received earlier medical treatment.

i. Was Susan under a duty to act?

ii. Might your answer differ if Jane was a patient of Susan?

iii. Might your answer differ if Susan had taken Jane’s pulse before moving off?

### Activity 3.7

#### The ‘circumstances’ element of the actus reus

**Essential reading**

- Wilson, Chapter 4: ’Actus reus’, Section 4.2 ‘Elements of liability’.

Many crimes require the existence of a specified circumstance or specified circumstances as part of the actus reus. For example, the circumstances element of the actus reus of the offence of criminal damage contrary to s.1(1) of the Criminal Damage Act 1971 is that what is destroyed or damaged must be ‘property belonging to another’.

**Activity 3.7**

Find the definitions of the following offences. What is the ‘circumstances’ element of the actus reus of each of these offences?

a. Theft contrary to s.1(1) of the Theft Act 1968.
b. Criminal damage contrary to s.1(1) of the Criminal Damage Act 1971.

c. Rape contrary to s.1(1) of the Sexual Offences Act 2003.

d. The common law offence of murder.

e. Bigamy contrary to s.57 of the Offences Against the Person Act 1861.

State of affairs as an actus reus

Occasionally the actus reus of an offence is the state of affairs rather than the conduct of the defendant. These offences are called ‘state of affairs’ or ‘situational’ crimes and, arguably, can result in strange and unfair results.

ACTIVITY 3.8

Read Wilson, Chapter 4: ‘Actus reus’, Section 4.5 ‘Exceptions to the act requirement’.

What was decided in the cases of Larsonneur (1933) 24 Cr App R 74 and Winzar v Chief Constable of Kent (1983) The Times, 28 March?

SELF-REFLECTION

What do you think about the decisions in these cases? Was either of the parties to blame for the circumstances in which they were ‘found’?

Summary

The conduct element of the actus reus of an offence can include an act, an omission or a state of affairs. In the overwhelming majority of cases it will be the defendant’s act which satisfies the conduct element of the actus reus. Occasionally, however, it falls to be decided whether a defendant’s omission to act will satisfy the conduct element of the actus reus. In this regard, it must be determined first of all whether or not the particular offence is capable of being committed by omission. If that is the case, the next issue to be determined is whether the defendant was under a duty to act. There are a number of circumstances where it has been established that a duty to act will lie, but note that the category of duty is not closed. Note also that if the defendant was not under such a duty there can be no criminal liability.

Very occasionally, a state of affairs might result in a defendant being found guilty of a criminal offence. These offences are sometimes known as ‘situational offences’ and tend to be treated with great caution by the courts, although there are exceptions such as those outlined above. Many offences require the existence of certain specified circumstances and you will find the relevant circumstances in the definition of the offence you are considering.
Reflect and review

Look through the points listed below:

Are you ready to move on to the next chapter?

Ready to move on = I am satisfied that I have sufficient understanding of the principles outlined in this chapter to enable me to go on to the next chapter.

Need to revise first = There are one or two areas I am unsure about and need to revise before I go on to the next chapter.

Need to study again = I found many or all of the principles outlined in this chapter very difficult and need to go over them again before I move on.

Tick a box for each topic.

| I can explain the distinction between an act and an omission. | Ready to move on | Need to revise first | Need to study again |
| I can assess whether an offence is capable of being committed by omission. | | |
| I understand the notion of a duty to act and under what circumstances such a duty is likely to be imposed. | | |
| I can identify the circumstances under which a duty to act might change or cease. | | |
| I recognise the circumstances element of the actus reus of an offence. | | |
| I can identify state of affairs as actus reus. | | |

If you ticked ‘need to revise first’, which sections of the chapter are you going to revise?

| Must revise | Revision done |
| 3.1 Voluntariness | |
| 3.2 Omissions | |
| 3.3 Imposition of liability for an omission to act | |
| 3.4 Duty to act under the common law | |
| 3.5 Distinguishing between act and omission | |
| 3.6 New categories of duty | |
| 3.7 The ‘circumstances’ element of the actus reus | |

Before you continue to the next topic listen again to audio presentation 4 to recap and consolidate what you have learnt.
# Actus reus: consequences

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Introduction

You will recall that there are some crimes – called ‘result’ crimes – where the definition of the actus reus requires the prosecution to prove that the defendant’s conduct caused a prohibited result, or consequence. Result crimes, therefore, require proof of causation as one of the elements of the actus reus of the offence charged.

Causation is an important aspect of the actus reus of all result crimes but the issue arises mainly in cases of homicide. Where causation is in issue, the prosecution must prove that the defendant’s conduct was both the factual cause and the legal cause of the result.

Ultimately, the decision as to whether the defendant’s conduct caused the result is one for the jury but in determining this issue the jury must apply the legal principles which will have been explained to them by the trial judge (Pagett [1983]).

Essential reading and listening

- Wilson, Chapter 5: ‘Causation’.
- Audio presentation 5.
- Extract from Textbook of criminal law by Glanville Williams, pp.381–82. (Included in your study pack.)
- Stannard, J.E. ‘Criminal causation and the careless doctor’ (1992) MLR 55 4. (Included in your study pack.)

Cases

- Blaue [1975] 1 WLR 1411; Pagett [1983] 76 Cr App R 279; Smith [1959] 2 QB 35; Cheshire [1991] 3 All ER 670 and other cases referred to throughout this chapter.

Learning outcomes

By the end of this chapter and the relevant readings you should be able to:

- identify when the issue of proving causation is relevant
- explain the distinction between the factual cause and the legal cause of the consequence element of a result crime
- explain the notion of novus actus interveniens
- give a coherent account of the reasoning behind the rules relating to causation
- apply the rules relating to causation to factual situations
- successfully complete computer-marked assessment 1.
4.1 Causation and liability

Generally, the issue of causation presents no problem; it is usually self-evident.

For example, A, intending to kill B, shoots B and B dies. It would normally follow that B has died as the result of A’s conduct. If that is the case A would be guilty of murder as he would appear to have unlawfully killed a human being (actus reus) with the intention to kill (mens rea).

But what if A, intending to kill B, shoots at B, the bullet hitting B in the chest, seriously injuring him. An ambulance is called but takes over an hour to arrive. When B arrives at the hospital, weakened by the combination of the injury and the delay, the junior doctor who attends to him has been up all night dealing with emergencies and, because he is tired, fails to look at the bracelet B is wearing which reveals that B is allergic to penicillin. He gives B a large dose of penicillin. B has an allergic reaction to the drug and dies. Can it be said that A’s conduct caused B’s death? It certainly is a cause but for legal purposes should it be deemed to be the operative cause? These are the types of issues which trouble the courts.

Self-reflection

Do you think that these intervening events should obliterate A’s contribution to B’s death which would result in A being guilty of neither murder nor manslaughter? If so, do you think that the doctor and/or the ambulance service should be held to be criminally responsible?

Alternatively, are you of the view, perhaps, that, as A initiated the chain of events which resulted in B’s death – after all, he did intend to kill B – the intervening events would not be sufficient to obliterate A’s contribution? That A’s contribution should be deemed to be the operative cause of B’s death, making A guilty of murder? Perhaps you are of the view that A’s state of mind should be taken into account at this stage. Note, however, that we are considering the actus reus and not the mens rea. (Causation is an element of the actus reus of result crimes although, arguably, the state of mind of the defendant is a factor which might influence the outcome of a trial or appeal.)

Activity 4.1

You should now consider the following situations. Do you think that, in each case, the defendant should be criminally liable for the death of the victim?

Do not, at this stage, try to identify any offences or defences. You should merely consider what you think would be an appropriate outcome.

Why, in each case, do you think that the defendant should or should not be criminally liable? By the time you have completed this chapter of the subject guide and the associated readings, you should be able to predict an outcome based upon the law. It might be useful for you at that time to reflect on any differences between your initial view and the likely outcome under the current law. You might also reflect on the likely outcome of the initial example given above.

a. John has been convicted of the rape of Betty. Six months after the rape Betty has still not recovered psychologically. She feels ashamed. She commits suicide.

Should John be accountable for Betty’s death?

b. Sabina accepts a lift in Freddie’s car. Whilst driving at 30 miles per hour Freddie touches Sabina’s breast and asks her if she will have sexual intercourse with him. Sabina is frightened. She panics and jumps out of the car, breaking her ankle.

Should Freddie be accountable for Sabina’s injury?

c. Anna has a fight with Iqbal and stabs him. Iqbal is seriously injured. He is taken to hospital and placed on a life-support machine. One night a nurse, who hates money being wasted on expensive life-support machinery and without being authorised to do so, switches off the life-support machine. Iqbal dies.

Should Anna be accountable for Iqbal’s death?
d. Lee attacks Sam and beats him up. Sam is injured and taken to hospital. The doctor who attends to Sam has avian flu. The doctor does not know this. The doctor recovers, but Sam who contracts the virus from the doctor does not and dies some days later.

Should Lee be accountable for Sam’s death?

e. Natalia, intending to seriously injure him, stabs Ivan. Ivan is taken to hospital where he is told that he needs emergency surgery and a blood transfusion. Ivan is a Jehovah’s Witness. One of the tenets of this religion is that its adherents must not accept the blood of another. Ivan, despite being told that if he does not have a transfusion he will probably die, refuses the blood. He dies.

Should Natalia be accountable for Ivan’s death?

f. Rahul, intending to kill Sachin, of whom he is jealous, shoots at him with a gun. It causes a slight flesh wound. An ambulance is called. On the way to hospital the ambulance collides with a speeding car. All of the occupants including Sachin are killed.

Should Rahul be accountable for Sachin’s death?

No feedback provided at this stage, but see Activity 4.6.

Self-reflection

- Reflect now on what you thought should be the outcomes in respect of questions c and d above.†
- Did you come to the same conclusion for both of them? Why (or why not)?
- How did your conclusions compare with those in respect of the example given at the beginning of this section?
- What factors influenced your decisions?
- Did relative blameworthiness influence your decisions at all? Even though we are considering an element of the actuus reus and not mens rea here you might have found it difficult not to attach importance to the various states of mind of the actors or what in some cases you perceived them to be.
- What type of intervening event, if any, do you think would be sufficient to obliterate the defendant’s conduct in each of the situations outlined above?

It is worth reflecting very carefully at this stage on why you came to your conclusions in respect of the above questions. Even if, as you work through this section of the guide and the readings, you find that your solutions are not necessarily those adopted by the courts, you might discover that your reasoning – or at least your instinct – was, in some instances, not dissimilar to that of the judges.

Note that the issue of causation should (where it is relevant) always be considered as an element of the actuus reus.

The defendant’s conduct must be both the factual and legal cause of the result.

4.2 Factual causation

Essential reading

- Wilson, Chapter 5: ‘Causation’, Section 5.5 ‘Causation: the legal position’.

Factual causation is determined by reference to the sine qua non (or ‘but for’) test.

It is a precondition of proof of causation but is not sufficient, in itself, to determine the causal link.

For example, if A invited B to his house and on the way B was killed in a road accident, it could be said that ‘but for A inviting B to his house, B would not have died’. However, although A’s conduct was therefore a sine qua non of B’s death (i.e. a ‘but for’ or factual cause) it is not the legal cause and A could not be criminally liable for the death of B.

† Never make assumptions as to a defendant’s state of mind or as to anything else for that matter. If you have not been given sufficient information in a question to come to a determinative conclusion on guilt or innocence then point this out.
Nonetheless the defendant’s conduct must actually be demonstrated to have been the *sine qua non* of the result (see *White* [1910]).

Whether something amounts to a factual cause of an event is a question of fact for the jury, who will determine this by reference to the ‘but for’ test (above). If the result would have occurred regardless of the defendant’s conduct – as in *White* – then he cannot be said to have caused that result regardless of his intention. The ‘but for’ test is the starting point for the consideration of causation but will never, of itself, determine the outcome.

In *Carey* [2006] EWCA Crim 17 a girl had died following an affray during which she had had her face punched by one of the appellants. After the danger from the appellants was over – they had been chased away – the girl had run 109 yards uphill. Neither she nor her doctor was aware that she suffered from a heart disease. She collapsed and died after her run.

**Activity 4.2**

Read the case of *Carey* (which you can access on Westlaw through the Online Library) and consider the following questions.

1. With what offence were the appellants convicted?
2. What was the issue for the Court of Appeal?
3. What did the court decide?

**4.2.1 Causation by omission**

Can a non-event be a ‘but for’ cause of the consequence in any result crime? If you reconsider the cases on liability for omissions to act (Chapter 3) you will see that the courts seem to assume that it can. Whatever the philosophical view, however, if it were otherwise, none of the defendants in the cases outlined in that chapter would have been convicted.

You will recall from Chapter 4 the case of *Instan* [1893] 1 QB 450 where the defendant was convicted of the manslaughter of her elderly aunt with whom she lived and who became very ill and unable to fend for herself. The defendant had made no attempt to help her aunt, she had not given her food and neither had she tried to obtain medical help.

Lord Coleridge CJ said in that case:

"[There can be no] question that the failure of the prisoner to discharge her legal duty at least accelerated the death of the deceased, if it did not actually cause it. There is no case directly in point; but it would be a slur upon and a discredit to the administration of justice in this country if there were any doubt as to the legal principle, or as to the present case being within it. The prisoner was under a moral obligation to the deceased from which arose a legal duty towards her; that legal duty the prisoner has wilfully and deliberately left unperformed, with the consequence that there has been an acceleration of the death of the deceased owing to the non-performance of that legal duty."

The Law Commission working paper on causation produced in 2002 proposes:

(1)... A defendant causes a result which is an element of an offence when:

(a) he does an act which makes a substantial and operative contribution to its occurrence

or

(b) he omits to do an act, which he is under a duty to do according to the law relating to the offence, and the failure to do the act makes substantial and operative contribution to its occurrence.

**Summary**

When a person is charged with a result crime it must be proved that his or her conduct actually caused that result. Generally, this element of the offence needs no special consideration as it is clear from the facts that causation is established. For example, A stabs B and B dies instantly. There are occasions, however, where it is not clear that
the defendant’s conduct was the cause of the result. It may be that A stabbed B but B was taken to hospital and given the wrong treatment following which B died. Where causation is an issue it must first of all be established that the defendant’s conduct was the ‘sine qua non’ or the ‘but for’ cause of the result. This is known as ‘factual causation’. If the defendant’s conduct was not the factual cause of the result then there can be no criminal liability. You should remember, however, that even if factual causation is established this does not, of itself, determine guilt. It must also be proved that the defendant’s conduct was the legal cause.

4.3 Legal causation

Here, the judge will direct the jury as to whether something is capable of being the legal cause according to legal principles and the jury will decide on the basis of what the judge has told them whether or not it was in the case under consideration. In other words, whereas whether there was factual causation is a question of fact for the jury, it is a question of law as to whether a factual cause is capable of amounting to a legal cause of an event.

Expert evidence will frequently play a role in court in the determination of cause – especially cause of death – when there are a number of possible causes. It will be obvious, for example, why medical evidence was necessary in the cases of White and Carey above. It should be noted, however, that although expert testimony is often both relevant and necessary it is not determinative. It is not for doctors to determine whether a defendant is or is not legally responsible for a victim’s death; that is a question of law to be decided according to the principles outlined below. This is one of the reasons why the case of Jordan [1956] 40 CAR 152 has been criticised, in that it is argued that it was the medical experts who determined the cause of death. Jordan, however, is a case which, although not explicitly overruled, is not followed and whose decision was described in Malcherek [1981] 1 WLR at 696D as ‘very exceptional’ and in Smith [1959] 2 QB 35 as a ‘very particular case depending upon its exact facts’.

Self-reflection


Glanville Williams points out that ‘several attempts have been made to find a suitable name for this second notion of cause’. He is of the opinion that some of the words used to describe it are ‘misleading’ but thinks the word ‘just’ in the Model Penal Code indicates the true nature of the problem – that is, he says: ‘… the further test to be applied to the but-for cause in order to qualify it for legal recognition is not a test of causation but a moral reaction’. Bear this in mind as you work through the cases on legal causation. It may help you to understand why the decisions were made in the way that they were.

Another factor to bear in mind is that causation – or lack of it – is frequently pleaded by defendants where all the other elements of the offence with which they have been charged, including the mens rea, have been established. It is thus often a ‘last ditch’ attempt to be exonerated from liability and, for this reason, judges are wary of allowing it to succeed. This is particularly the case where there is evidence that medical treatment has contributed to the death. It has been pointed out in many of these cases that it is the defendant and not the doctors who are on trial.

In addition to the descriptive words used in the above extract, other terms you will frequently come across which are used to define a ‘legal’ cause will include ‘operating’, ‘substantial’, ‘substantive’ and ‘significant’.
4.3.1 Operating and substantial cause

**ESSENTIAL READING**

- Wilson, Chapter 5: ‘Causation’, Section 5.6 ‘Particular examples of casual sequences giving rise to causation problems’.

The defendant’s conduct must be an operating and substantial (or significant) cause of the result but it does not have to be the main or only cause.

**Smith [1959] 2 QB 35**

You will find the facts of this case in Wilson or, even better, you can access and read the case which you can access through the Online Library

Lord Parker CJ said in this case:

... [I]f at the time of death the original wound is still an operating cause and a substantial cause, then the death can properly be said to be the result of the wound, albeit that some other cause of death 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 be said that the death did not result from the wound. Putting it 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 the death does not flow from the wound.

See also **Benge (1846) 2 Car & KIR 230**.

The culpable act must be more than a minimal cause of the result. In **Cato [1976] 1 WLR 110**, Lord Widgery CJ said:

As a matter of law it was sufficient if the prosecution could establish that [the heroin] was a cause [of death] provided it was a cause outside the de minimis range, and effectively bearing upon the acceleration of the moment of the victim’s death.

4.3.2 The result must be attributable to the culpable act

**ESSENTIAL READING**

- Wilson, Chapter 5: ‘Causation’, Section 5.5 ‘Causation: the legal position’, Part B.1 ‘The general framework for imputing cause’.

- **Dalloway (1847) 2 Cox 273**.

**ACTIVITY 4.3**

The facts of this case can be found in Wilson.

Why was Dalloway found not guilty of manslaughter?

See also **Smith [1959]** (above) and **Cheshire [1991]** (below) where the court decided that negligent medical treatment could only break the chain of causation where it was so independent of the defendant’s acts, and in itself so potent in causing death that the jury regard the contribution made by the defendant’s acts as insignificant.

See also **Carey [2006]** (above). In **R v Campbell (Andre), R v Yateman (Jermaine), R v Henry (Lloyd Rudolf)** [2009] EWCA Crim 50 the victim had been attacked by a number of men including Campbell and Henry. Sometime later, Yateman, who had been a member of the original group of attackers, committed another assault on the victim and attempted to rob him. The victim subsequently died. Campbell and Henry appealed against their convictions for murder and manslaughter. They argued that the victim’s death was caused by the subsequent attack, with which they were not involved. The Court of Appeal dismissed their appeals. There was medical evidence on which the jury was entitled to conclude that their actions in the earlier incident were a significant cause of death and that causation could be established from the injuries sustained by the victim before Yateman’s attack. The judge’s summing up on causation was appropriate, as was his direction to the jury that it was for them to decide whether Yateman’s use of his fists in the course of the attempted robbery went beyond any pre-existing purpose. Therefore, the jury was entitled to conclude that Campbell and Henry were parties to a joint enterprise which extended to Yateman’s actions.
4.3.3 Victims must be taken as found

The defendant must take his victim as he finds him. Therefore if A inflicts a slight wound on a haemophiliac, or lightly hits the head of a person with a thin skull, A will be liable for the consequences. The victim's weakness will not break the chain of causation.

Blaue [1975] 1 WLR 1411

The defendant stabbed a woman who needed surgery and a blood transfusion to save her life. She refused the transfusion as she was a Jehovah's Witness and it was contrary to her beliefs. She died. The defendant, appealing to the Court of Appeal against his conviction for manslaughter, argued that the jury should have been directed that if they thought the victim's refusal of blood was unreasonable then the chain of causation would have been broken. Lawton LJ said:

At once the question arises – reasonable by whose standards? Those of Jehovah's Witnesses? Humanists? Roman Catholics? Protestants of Anglo-Saxon descent? The man on the Clapham omnibus?† … Two cases each raising the same issue of reasonableness of religious belief, could produce different verdicts depending on where the cases were tried.

And later in his judgment:

It does not lie in the mouth of the assailant to say that the victim's religious beliefs which inhibited him from accepting certain kinds of treatment were unreasonable. The question for decision is what caused her death. The answer is the stab wound. The fact that the victim did not stop this coming about did not break the causal connection between the act and death...

See also Holland (1841) 2 Mood & R 251.

Summary

We have seen that the defendant’s conduct, in addition to being the factual cause of the result, must also be the legal cause. Although it must be a significant cause of the result it does not have to be the main or only cause provided it is more than a minimal cause. The result must be attributable to the defendant’s conduct and the defendant takes his victim as he finds him. As to whether the defendant’s conduct is deemed to be the legal cause of the result where there is another intervening cause is discussed in the section below.

4.4 Intervening causes

Essential reading

- Wilson, Chapter 5: ‘Causation’, Section 5.6 ‘Particular examples of causal sequences giving rise to causation problems’.

Once the defendant’s conduct has started a chain of events he will be legally responsible for the result unless the chain is broken by some novus actus interveniens or supervening event. This might be the act of a third party, the act of the victim or an act of God/nature which has become the operating cause. It has been argued that this will only break the chain of causation, thus negating the defendant’s liability, where it was not reasonably foreseeable and has operated to render the defendant’s original conduct no longer an operating and substantial cause but merely part of the background history.

Goff LJ in Pagett said:

Occasionally…a specific issue of causation may arise. One such case is where, although an act of the accused constitutes a causa sine qua non of (or necessary condition for) the death of the victim, nevertheless the intervention of a third person may be regarded as the sole cause of the victim’s death, thereby relieving the accused of criminal responsibility. Such intervention, if it has such an effect, has often been described by
lawyers as a novus actus interveniens... a term of art which conveys to lawyers the crucial feature that there has not merely been an intervening act of another person, but that that act was so independent of the act of the accused that is should be regarded in law as the cause of the victim's death, to the exclusion of the act of the accused.

An act done instinctively for the purposes of self-preservation will not break the chain of causation.

**Pagett [1983] 76 Cr App R 279**

The defendant, using his girlfriend as a human shield, shot at police officers who returned fire, killing his girlfriend. His appeal against conviction for manslaughter was dismissed by the Court of Appeal. The conduct of the police was justified as it was a reasonable act of self-defence.

Goff LJ said:

There can, we consider, be no doubt that a reasonable act performed for the purpose of self-preservation, being of course itself an act caused by the accused's own act, does not operate as a novus actus interveniens.

It was also stated in Pagett that a free deliberate and informed intervention (i.e. a fully voluntary act) may have the effect of breaking the chain of causation, but see the Empress Car case and the comments in Wilson. See also the drug administration cases below.

**Escape cases**

Where the defendant has frightened the victim to the extent that the victim has killed or injured himself trying to escape the danger then, provided the victim's reaction was not so 'daft' as to make it the victim's own voluntary act (Roberts (1971) 56 Cr App R 95 and Williams and Davis [1992] below), then it will not break the chain of causation between the defendant's conduct and the result.

In Williams and Davis [1992] 1 WLR 380 Stuart-Smith LJ stated:

The nature of the threat was important in considering both the foreseeability of harm to the victim from the threat and the question whether the deceased's conduct was proportionate to the threat, that is to say that it was within the ambit of reasonableness and not so daft as to make it his own voluntary act which broke the chain of causation. The jury should consider...whether the deceased's reaction in jumping from the moving car was within the range of responses which might be expected from a victim placed in his situation. The jury should bear in mind any particular characteristic of the victim and the fact that in the agony of the moment he might act without thought and deliberation.

See also Mackie (1973) 57 Cr App R 453 and Marjoram [2000].

**Activity 4.4 Online research**

Find the cases of Roberts [1971] and Williams and Davis [1992] using the Online Library.

Could the reasoning in these cases be said to conflict with that in Blaue?

**4.4.1 Killing by fright**

**Essential reading**

- Wilson, Chapter 5: ‘Causation’, Section 5.6 ‘Particular examples of casual sequences giving rise to causation problems’.

When a victim dies as the result of fright – where, for example, the fear caused by the defendant causes a physiological reaction such as a heart attack – then the defendant takes the victim as he finds him.

The abnormal state of the deceased's health did not affect the question whether the prisoner knew or did not know of it if it were proved to the satisfaction of the jury that the death was accelerated by the prisoner’s unlawful act. (Ridley J in Hayward (1908) 21 Cox 692.)
4.4.2 Neglect by the victim

Where the victim neglects to treat an injury inflicted on him by the defendant and death results it is likely that the defendant will be held to be responsible for the death, as in Holland (above) where the defendant, in the course of an assault, injured one of the victim’s fingers. The victim rejected the surgeon’s advice that the finger should be amputated. The wound became infected with lockjaw (tetanus) from which the victim died. Maule J said in his direction to the jury that ‘the real question is, whether in the end the wound inflicted by the prisoner was the cause of death’. He who inflicted an injury which resulted in death could not excuse himself by pleading that his victim could have avoided death by taking greater care of himself. The jury convicted.

In the more recent case of Dear [1996] Crim LR 595 the defendant had attacked the victim with a Stanley knife,† the victim having sexually abused the defendant’s daughter. The victim’s wounds were stitched but reopened and the victim bled to death. It was not clear whether the victim had reopened the wounds himself or whether they had reopened themselves. Either way, the victim had not obtained medical help. Rose LJ stated:

It would not, in our judgment, be helpful to juries if the law required them... to decide causation in a case such as the present by embarking on an analysis of whether a victim had treated himself with mere negligence or gross neglect, the latter breaking but the former not breaking the chain of causation between the defendant’s wrongful act and the victim’s death.

It is to be noted from cases such as Blaue, Holland and Dear that an omission to act on the part of the victim will not break the chain of causation where the result can be said to be attributable to the original injury.

4.4.3 Medical interventions

Essential reading

- Wilson, Chapter 5: ‘Causation’, Section 5.6 ‘Particular examples of casual sequences giving rise to causation problems’, Part B.2 ‘Third party’s act contributing to the occurrence of injury’.

In Jordan [1956] the defendant who stabbed the victim was held not to be liable for his death. The victim had died after receiving ‘palpably wrong’ medical treatment when his wounds had almost healed. According to the court, death which resulted from ‘normal medical treatment’ would not break the chain of causation. However the effect of Smith [1959] (above) is to isolate Jordan – although not to overrule it – by referring to it as a ‘very particular case depending upon its own facts’. In Smith, had the Jordan test of ‘abnormal’ or ‘palpably wrong’ treatment been applied it would have been difficult to uphold Smith’s conviction unless it could be argued that the wound in Smith remained an ‘operating cause’. In Jordan the wound had practically healed and no longer posed a danger to the victim. Arguably, if there is a doctrine of ‘intervening act’ it was evaded in Smith by Parker CJ’s use of vague terms such as ‘operating’ and ‘substantial’ causes.

In Malcherek [1981] Lane LJ stated:

There may be occasions, although they will be rare, when the original injury has ceased to operate as a cause at all, but in the ordinary case if the treatment is given bona fide by competent and careful medical practitioners, then evidence will not be admissible to show that the treatment would not have been administered in the same way by other medical practitioners. In other words, the fact that the victim has died, despite or because of medical treatment for the initial injury given by careful and skilled medical practitioners, will not exonerate the original assailant from responsibility for the death.

† Stanley knife: a knife with a sharp retractable blade used for ‘do it yourself’ projects.
Subsequently, in *Cheshire* [1991] the court decided that negligent medical treatment could only break the chain of causation where it was so independent of the defendant’s acts, and in itself so potent in causing death, that the jury regard the contribution made by the defendant’s acts as insignificant.

See also *Gowans* [2003] All ER (D) (Dec) where the Court of Appeal held that the jury had been properly directed in accordance with *Smith* [1959]. They were entitled to conclude on the basis of the evidence that the attack necessitated treatment which had rendered the victim vulnerable to the infection and therefore that the death was attributable to the acts of the defendants. The court added that if the hospitalised victim of an attack contracted a fatal infection ‘purely by chance’ – for example by breathing in airborne germs – the attack would merely amount to the setting in which another cause operated. In those circumstances, the death of the victim would not be attributed to the acts of the assailant.

Consider now the situation where the injuries inflicted by the defendant prevent life-saving treatment for another unconnected condition.

**SELF-ASSESSMENT**

Read the case of *McKechnie* (1991) 94 Cr App R 51. Why was the defendant’s conviction for manslaughter upheld by the Court of Appeal.

**ACTIVITY 4.5**

Read the article ‘Criminal causation and the careless doctor’ by John E. Stannard in your study pack and consider the following questions.

a. What was the ‘direct conflict of expert testimony’ with which the court was confronted in the case of *Cheshire*?

b. In what way was the trial judge ‘uncompromising’ in his direction to the jury?

c. What was the question for the Court of Appeal in this case?

d. What does the author consider to be the three criteria to be satisfied (assuming the defendant’s conduct is the factual cause of death) in order to hold the defendant criminally responsible?

e. Why was Jordan’s conviction quashed?

f. Did the Court of Appeal in *Cheshire* agree with the trial judge’s direction to the jury?

g. What were the points of principle stressed by Beldam LJ in this case?

h. Why did the author consider the reasoning in the case of *Evans and Gardiner (No.2)* [1976] VR 523 to be ‘questionable’?

i. In cases concerning the competence of medical treatment, what did the author consider the ultimate question to be?

### 4.4.4 Acts of God/nature

**ESSENTIAL READING**

- Wilson, Chapter 5: ‘Causation’, Section 5.6 ‘Particular examples of casual sequences giving rise to causation problems’, Part B.3 ‘Intervening cause supersedes defendant’s act’.

Generally the result will be deemed not to have been reasonably foreseeable.

### 4.4.5 Unlawful administration of controlled drugs

**ESSENTIAL READING**

- Wilson, Chapter 5: ‘Causation’, Section 5.6 ‘Particular examples of casual sequences giving rise to causation problems’, Part B.3 ‘Intervening cause supersedes defendant’s act’.
The following cases should be considered here. These cases are more fully discussed in Chapters 7–8 in the context of manslaughter.

- **Kennedy (No.1) [1999] Cr App R 54**
- **Dias [2002] EWCA Crim 1**
- **Finlay [2003] EWCA Crim 3868**
- **Kennedy (No.2) [2005] EWCA Crim 685**

What you should note at this stage, and will consider further when you study manslaughter, is that a line of recent cases concerning constructive manslaughter and involving the administration of drugs has proved controversial. In these cases the defendant supplied a controlled drug to a user who consumed or self-injected the drug and then died from its effects.

**Self-reflection**

Read Wilson, Chapter 5: Section 5.6 ‘Particular examples of casual sequences giving rise to causation problems’, Part B.3 ‘Intervening cause supersedes defendant’s act’, which contains a brief account of the above cases.

**Can D who supplies drugs to V to self-inject ever be guilty of manslaughter if V dies?**

**Activity 4.6**

In Activity 4.1 you were asked to consider a number of scenarios as a self-reflection exercise. Return to questions a–e. Having worked your way through this topic, how would you now answer these questions?

a. Should John be accountable for Betty’s death?

b. Should Freddie be accountable for Sabina’s injury?

c. Should Anna be accountable for Iqbal’s death?

d. Should Lee be accountable for Sam’s death?

e. Should Natalia be accountable for Ivan’s death?

Do not attempt to deal with the offences themselves. This is purely an exercise on the principles of causation.

**Summary**

Where the offence is a ‘result’ crime it must be proved that the defendant’s conduct was both the factual and the legal cause of the prohibited result or consequence. The issue is one for the jury to determine, applying the legal principles which will have been explained to them by the judge in the summing up. This issue is, generally, not a contentious one but you should be able to recognise when it is.
Reflect and review

Look through the points listed below:

Are you ready to move on to the next chapter?

Ready to move on = I am satisfied that I have sufficient understanding of the principles outlined in this chapter to enable me to go on to the next chapter.

Need to revise first = There are one or two areas I am unsure about and need to revise before I go on to the next chapter.

Need to study again = I found many or all of the principles outlined in this chapter very difficult and need to go over them again before I move on.

Tick a box for each topic.

<table>
<thead>
<tr>
<th>I can identify when the issue of proving causation is relevant.</th>
<th>Ready to move on</th>
<th>Need to revise first</th>
<th>Need to study again</th>
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<tr>
<td>I can explain the distinction between the factual cause and the legal cause of the consequence element of a result crime.</td>
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<td>I can explain the notion of novus actus interveniens.</td>
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<td>I can give a coherent account of the reasoning behind the rules relating to causation.</td>
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If you ticked ‘need to revise first’, which sections of the chapter are you going to revise?

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<thead>
<tr>
<th>Must revise</th>
<th>Revision done</th>
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<tr>
<td>4.1 Causation and liability</td>
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<td>4.2 Factual causation</td>
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<td>4.3 Legal causation</td>
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<td>4.4 Intervening causes</td>
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Before you continue to the next topic listen again to audio presentation 5 to recap and consolidate what you have learnt.