

# Introduction to criminal liability

## Underlying principles of criminal liability

The traditional basis for criminal liability — that is, liability to be prosecuted in a criminal court and, if convicted, to be punished by the state — is an *actus reus* (the physical element) accompanied by the appropriate *mens rea* (the mental element). This section looks at these two important concepts in detail.

It is a general principle of criminal law that a person may not be convicted of a crime unless the prosecution has proved beyond doubt that he or she:

- has caused a certain event, or responsibility is to be attributed to him or her for the existence of a certain state of affairs, which is forbidden by criminal law
- had a defined state of mind (*mens rea*) in relation to the event or state of affairs (*actus reus*)

### ***Actus reus***

*Actus reus* literally means the ‘guilty act’ and is made up of all the parts of the crime except the defendant’s mental state. While most crimes require the accused to commit a certain act, this is not always the case, and criminal liability can also arise through a failure to act (an omission) and from a certain type of conduct. Few crimes can be adequately described simply by reference to the act; most require proof of accompanying circumstances and of a particular consequence. For example, in criminal damage the offence consists of destroying or damaging property that belongs to another (the act) and there being no lawful excuse (the circumstances).

Each separate crime has its own specific *actus reus*. For battery, it is the infliction of unlawful personal violence. For assault occasioning actual bodily harm, it is both the original assault or (more usually) battery and the actual bodily harm suffered by the victim as a consequence.

Note also that while *mens rea* may exist without an *actus reus*, if the *actus reus* of a particular crime does not exist or occur, that crime is not committed.

Ordinarily, the prosecution must prove that the accused person voluntarily brought about the *actus reus* of the crime — that is, the act or omission must have occurred because of a **conscious exercise of will** of the defendant. If in an assault case the defendant’s arm was physically forced by another to strike the victim, or if the defendant was pushed against the victim by another person, there would be no crime by the defendant, although it is probable that the perpetrator of the force would be guilty of crimes against both the defendant and the victim. In *Hill v Baxter* (1958), the trial judge gave a useful hypothetical example: if a swarm of bees flew through an open car



window and caused the driver to lose control of the vehicle, he or she would not be liable for a resulting accident. This would be an instance of an involuntary act, so there would be no *actus reus*.

### Crimes of omission

As well as actions, such as hitting someone over the head or stealing a wallet, an *actus reus* can also be an **omission** or failure to act. In most criminal prosecutions, the prosecutor will be seeking to prove that a prohibited situation or result has been brought about by the acts of the defendant. However, in certain situations the defendant's failure to act will have led to the prohibited event occurring.

Most jurisdictions, including that of England and Wales, have not adopted a general principle of liability for failing to act — a '**Good Samaritan law**'. Instead, the law has defined certain factual situations in which persons are under a duty to act. If they fail to act in these situations, thereby causing a prohibited criminal result, they shall be liable for that result.

There are five areas where such liability for omissions exists:

- **Duty arising from a contract.** This occurs when a failure to perform a contractual obligation endangers life. In *R v Pittwood* (1902), a railway crossing gatekeeper opened the gate to let a cart through and went off to lunch, forgetting to shut it again. Ten minutes later a haycart, while crossing the line, was struck by a train and the driver was killed. The gatekeeper was convicted of manslaughter on the ground that 'there was gross and criminal negligence, as the man was paid to keep the gate shut and protect the public... A man may incur criminal liability from a duty arising out of contract'.
- **Duty arising from statute.** An Act of Parliament can make it an offence to fail to act in defined circumstances. For example, under s.1(1) of the **Children and Young Persons Act 1933**, the House of Lords ruled that the *actus reus* of the offence is simply the failure for whatever reason to provide the child with the necessary medical care. Other examples include offences under the **Road Traffic Act 1988**, such as failure to wear a seatbelt or failure to stop and report a road accident.
- **Voluntary assumption of a duty.** If someone voluntarily takes responsibility for another person, he or she also assumes the positive duty to act for the general welfare of that person. In *R v Stone and Dobinson* (1977), an unmarried cohabiting couple invited Stone's middle-aged sister, who was anorexic, to live with them. Although Stone and Dobinson were aware that the woman was neglecting herself and that her health was deteriorating rapidly, they did nothing to assist her, such as summoning medical help or informing social services. Three years after she came to live with them, she was found dead in her bed, naked and severely emaciated. The cause of death was toxæmia from infected bed sores and prolonged immobilisation. Stone and Dobinson were convicted of her manslaughter — they had assumed a duty of care for her, a duty that they could easily have discharged by calling for help or by providing even basic care.
- **Duty arising from prior conduct.** If the defendant accidentally commits an act that causes harm, and subsequently becomes aware of the danger he or she has

created, there arises a duty to act reasonably to avert that danger. In *R v Miller* (1983), Lord Diplock had no doubts that the defendant had been convicted correctly. This was because the *actus reus* of the offence of arson is present if the defendant accidentally starts a fire and fails to take any steps to extinguish it or prevent damage, due to an intention to destroy or damage property belonging to another or being reckless regarding whether any such property would be destroyed or damaged (as in this case). The defendant, by his own admission, became aware of the fire and chose to do nothing. Note that this case is *not* suggesting liability for purely accidental fire. If, when Miller realised he had started a fire, he had tried to phone the fire brigade or had alerted neighbours, he would not have incurred criminal liability, even if in the meantime the fire had spread to an adjoining gas-holder and half the town had blown up.

- **Public duty.** A person in a public office may be under a duty to care for others. In *R v Dytham* (1979), a police officer was held to be guilty of a crime when, without justification, he failed to perform his duty to preserve the Queen's Peace by not protecting a citizen who was being kicked to death.

It is essential that you learn statutory and/or case references for each of the above rules — they are one of the key elements that examiners are looking for.

The most common examples of omissions in exam questions are those of 'assumed responsibility', where a relative or other responsible adult takes on responsibility for the care of a child, and the 'dangerous situation', where the defendant has accidentally created a dangerous situation and has thus simultaneously put him- or herself under a duty of care to do something about it.

There are also **circumstance crimes** or **state of affairs offences**, where the *actus reus* is simply that a particular circumstance has occurred, for example the circumstance of being drunk and in control of a motor vehicle. Other such offences are possession crimes, where the defendant is in possession of stolen goods, a firearm or illegal drugs.

### Rules of causation

Another issue that needs to be understood is causation. This occurs in so-called **result crimes** — those where the defendant's actions cause the prohibited result. In murder, for example, the prosecution must prove a causal link between the defendant's actions and the death of the victim.

#### **Factual causation**

The factual rule of causation, referred to as the '**but for**' test, simply requires the prosecution to prove that 'but for' the defendant's act, the harm would not have occurred. This is well illustrated by the famous case of *R v White* (1910), where the defendant put potassium cyanide into a drink with intent to murder his mother. She was found dead shortly afterwards with the glass, three-quarters filled, beside her. The medical evidence showed that she had died not of poisoning, but of heart failure. The defendant was acquitted of murder and convicted of attempted murder. Although the consequence that the defendant intended had occurred, he did not cause it to occur and therefore there was no *actus reus* of murder.



### ***Legal causation***

While it is usually easy to prove the 'but for' rule, there are many situations where the question of causation is much more difficult to establish clearly. A. M. Dugdale in *A Level Law* (Butterworths, 3rd edn, 1996) lists some examples:

- A points a gun at B and B dies of a heart attack.
- A knocks B unconscious and leaves him lying in a road, where he is run over by a car and killed.
- A injures B, who is being taken by ambulance to the hospital. The ambulance crashes, killing all the occupants.
- A knocks B unconscious and she remains lying in a street for several hours, where she is robbed, raped or assaulted further.

In all these examples, it could be argued that A caused the consequences, on the basis that none of these events would have happened 'but for' the initial attack by A on B. The obvious difficulty with this approach, however, is that it can link an initial cause (the attack) with consequences that are both highly improbable and unforeseeable. This has been a particular problem in cases of unlawful killing — murder and manslaughter — where there is a less direct link between act and effect. In such cases, one has to consider the responsibility of the defendant for the victim's death.

At one time, the legal position was that the defendant was liable for all natural and probable consequences of his or her voluntary acts, but this presumption has now been overturned on the grounds that it could link together events that are connected too remotely. In *R v Marjoram* (1999), the trial judge instructed the jury to consider the legal cause — there must be something that could reasonably be foreseen as a consequence of the unlawful act. Nowadays, it is accepted law that the defendant need only have made 'a significant contribution' to the unlawful result, as in *R v Cheshire* (1991), or have been an 'operative and substantial cause of harm'.

Another case exemplifying this principle is *R v Smith* (1959). The defendant was involved in a fight with a fellow soldier, during which he stabbed the victim twice with a bayonet. The victim was taken to the medical centre but was dropped twice during the journey. The medical officer did not notice the victim had been stabbed in the back, causing lung damage, and gave treatment that was later described as 'thoroughly bad'. The victim died and the defendant argued that he was not responsible for his death because the chain of causation had been broken by the way in which the victim had been treated. However, the defendant was convicted of murder because the stab wound was the 'operating and substantial cause' of death:

If at the time of death the original wound is still the operating and substantial cause, then the death can properly be said to be the result of the wound, albeit some other cause of death is also operating. Only if it can be said that the original wound is merely the setting in which another cause operates can it be said that the death does not result from the wound.

The latter situation occurred in the case of *R v Jordan* (1956), where the victim of a serious injury made a good recovery in hospital, but while recuperating received an injection of a drug to which he was allergic. The doctors confirmed that the death was

caused not by the original wound, which was mainly healed at the time of death, but by the injection (and also the intravenous introduction of large quantities of liquid).

Further rules that occur in causation address the question of what constitutes a new intervening act (*novus actus interveniens*). This requires something that cannot be foreseen, and it must be so overwhelming as to invalidate the original *actus reus*. For example, consider a situation where A shoots at B and causes B serious internal injuries, which could be treated successfully if immediate and specialised medical treatment were provided. However, the ambulance takes 10 minutes to arrive and as a result B dies. This is a foreseeable result and A is guilty of murder. **'Acts of God'**, however, such as earthquakes and tidal waves, are regarded as intervening acts and will therefore break the causal chain. Note also what are called **escape cases**, in which the victim has suffered injury or has been killed while trying to escape from a serious attack. In such cases, the defendant will be liable if the victim's conduct in running away was within the range of foreseeable responses to the defendant's behaviour. This occurred in *R v Roberts* (1971) (see p. 26).

### **The 'thin skull' rule**

The 'thin skull' rule dictates that if some pre-existing weakness or medical condition of the victim makes the result of an attack more severe than it would be ordinarily, the defendant cannot argue that the chain of causation has been broken. It is also known as 'you take your victims as you find them'. For example, if the victim has an abnormally thin skull, a blow on the head could cause serious injury or even death, whereas in a 'normal' person it would usually only cause a bruise. The attacker would be liable for the more serious injury or the death.

This rule covers not only physical but also mental conditions, and even the victim's beliefs or values, as in *R v Blaue* (1975). Here, the victim of a stabbing was a Jehovah's Witness, who refused on religious grounds to accept a blood transfusion that would have saved her life. The defendant was convicted of her manslaughter and the Court of Appeal rejected his appeal, holding that the victim's refusal to accept the transfusion did not break the causal chain.

In most of the questions that are likely to be asked in this unit, this issue should not present too many difficulties, but remember that these rules are even more important if you study fatal offences in Unit 4.

### **Mens rea**

Having looked at issues of *actus reus* — the physical element in a crime — we now need to examine the even more important areas dealt with under *mens rea* — the mental element necessary for all serious crimes. Criminal law does not exist to punish a person who has simply committed some kind of wrongful action; to be criminally liable, that person must have carried out the wrongful act in circumstances in which blame can be attached to his or her conduct. To put it more simply, a criminal is punished not so much on account of what he or she has done, but because of *why* he or she did it. All the crimes that form part of Unit 2 — non-fatal offences — and those that are included



in later A2 units have both a separate *actus reus* and *mens rea*. The following states of mind are used to denote *mens rea*:

- **intention** — where the offender makes a decision to break the law
- **recklessness** — where the offender acts while realising that there is a possibility that his or her action could cause the illegal outcome
- **gross negligence** — where the defendant did not foresee causing any harm, but should have realised the risks involved. An example is *R v Adomako* (1995), where an anaesthetist failed to notice for 6 minutes that an oxygen tube had become disconnected from the ventilator. By this time, the patient had suffered a cardiac arrest and attempts to resuscitate were unsuccessful.

For the crimes studied in Unit 2, it is enough that you understand the issues surrounding intention and recklessness. All these offences — except wounding or causing grievous bodily harm with intent — can be committed either intentionally or recklessly.

### Intention

The meaning of intention is not found in any statute but in judicial decisions. It is clear that a person intends a result when it is his or her aim, objective or purpose to bring it about. This might be termed '**dictionary intention**'.

However, the concept of intention is subject to ambiguity. What is the position when someone has clearly caused an illegal result, realising that it would almost certainly occur, although it was not his or her primary intention? There is a well-known hypothetical example of a person placing a bomb in an aircraft, with the intention that it will explode when the plane reaches an altitude of 20,000 feet. His specific aim or objective is to obtain the insurance money on the lost aircraft. In these circumstances, he surely knows that when the plane explodes all the passengers and crew will be killed, but does he really intend their deaths? This type of case is one of **oblique intention**.

In *R v Hancock and Shankland* (1986), this issue was at the heart of the case — how the law should deal with a defendant who has created an unlawful result where it is clear that the outcome was probable and the defendant may well have foreseen it.

The defendants were Welsh coal miners on strike, and when one of their fellow miners wanted to return to work, they tried to stop him. The 'strike-breaker' was driven in a taxi to another coal mine, and the route was via a motorway. The defendants knew that the taxi would pass under a particular bridge and when the taxi drove under it they pushed concrete blocks onto the road below. One of the blocks hit the windscreen of the taxi and the driver was killed. The defendants claimed that their only intention was to block the road and prevent the strike-breaker from reaching the coal mine, not to kill the driver of the taxi. Had they been charged with manslaughter, they would have pleaded guilty; however, the charge was murder, which requires intention to kill or commit serious injury.

Although the defendants were convicted of murder at their trial, the Court of Appeal and the House of Lords both quashed that conviction and substituted a manslaughter conviction, holding that the issue of intention had not been established.

Lord Scarman indicated that, in cases like these, juries needed to be told by the judge that 'the greater the probability of a consequence occurring, the more likely it was so foreseen and, if so, the more likely it was intended'. This emphasised the point that foresight of the degree of probability was the only evidence from which intention could be inferred.

In the more recent cases of *R v Nedrick* (1986) and *R v Woollin* (1998) (see below), a tighter rule was laid down for such cases of oblique intent. This now requires juries to return a verdict of murder only where they find that 'the defendant foresaw death or serious injury as a virtually certain consequence of his or her voluntary actions'. It is worth pointing out that, in both these cases, the original murder conviction was changed on appeal to a manslaughter conviction.

*R v Woollin* (1998) resulted from the death of a 3-month-old baby. Although initially the defendant gave a number of different explanations, he finally admitted that he had 'lost his cool' when his baby started to choke. He had shaken the baby and then, in a fit of rage or frustration, had thrown him in the direction of his pram, which was standing against the wall some 3 or 4 feet away. He knew that the baby's head had hit something hard but denied intending to throw him against the wall or wanting him to die or to suffer serious injury. The trial judge directed the members of the jury that they might infer intention if they were satisfied that when the defendant threw the baby, he appreciated there was a 'substantial risk' of causing serious harm.

In the Court of Appeal, the defendant argued that the judge should have used the words 'virtual certainty', as 'substantial risk' was merely a test of recklessness. The Court of Appeal, although critical of the trial judge, dismissed the appeal, and certified questions for the House of Lords. The House of Lords quashed the defendant's conviction for murder and substituted a conviction for manslaughter. Lord Steyn gave the main speech, saying that 'a result foreseen as virtually certain is an intended result'. Thus, the phrase 'substantial risk', used by the trial judge, blurred the distinction between intention and recklessness, and was too serious a misdirection for the conviction to stand.

### **Recklessness**

A standard dictionary definition of recklessness is 'unjustified risk-taking'. Following the case of *R v G and Others* (2003), English law now only recognises subjective ('Cunningham') recklessness.

### ***Cunningham recklessness***

The prosecution must prove that the defendant appreciated that his or her action created an unjustified risk and then went ahead with the action anyway. In *R v Cunningham* (1957), the defendant ripped a gas meter from a wall to steal the money it contained, causing gas to escape. The gas seeped into a neighbouring building, where it partially asphyxiated a woman. Cunningham was convicted of a s.23 offence — administering a noxious substance — but he appealed successfully on the ground that the prosecution had failed to prove that he recognised the risk of the gas escape. The question was simply whether the defendant *had* foreseen that his act might injure someone, not whether he *ought* to have foreseen this risk.



### Coincidence of *actus reus* and *mens rea*

In order for an offence to be committed, the *mens rea* must coincide in point of time with the *actus reus*. If I happen to kill my neighbour accidentally, I do not become a murderer by thereafter expressing joy over his death, even if a week previously I had planned to kill him but had then changed my mind. *Mens rea* implies an intention to carry out a present act, not a future one. In most cases, there is no problem in proving the necessary coincidence of *actus reus* and *mens rea*, but there are a few occasions that illustrate the fact that judges can take a more generous view of this issue of coincidence.

One such case is that of *Thabo Meli v R* (1954), where the defendants clearly intended to kill their victim. Having attacked him, they threw what they believed to be his dead body over a cliff in order to dispose of it. The victim in fact survived both the murderous attack and the fall, but died subsequently of exposure. On appeal, the Privy Council ruled that it was 'impossible to divide up what was really one series of acts' and that if during that series of acts the necessary *mens rea* was present, that was sufficient coincidence to justify a conviction. This ruling was followed in *R v Church* (1966). A more recent case was *R v Le Brun* (1992), where again the view was upheld that where there is a series of actions that can be regarded as a linked transaction or continuing act, the coincidence rule is satisfied, provided that at some point during the transaction the required *mens rea* is present.

A final example is that of *Fagan v Metropolitan Police Commissioner* (1969). The defendant had accidentally driven his car onto a police officer's foot when he had been instructed to park his car close to the kerb. When the officer ordered him to move the vehicle, Fagan swore and turned off the ignition. He was later convicted of assaulting a police officer in the execution of his duty. Fagan appealed on the ground that when he drove accidentally onto the officer's foot there was no *mens rea*, and when he had *mens rea* (when he swore and turned off the ignition) there was no act but an omission (failure to act), and the *actus reus* of this particular crime required an act. The appeal was dismissed — the court held that Fagan's driving onto the officer's foot and staying there was one single continuous act rather than an act followed by an omission. So long as the defendant had the *mens rea* at some point during that continuous act, he was liable.

### Transferred malice

Under the rule of transferred malice, if A fires a gun at B, intending to kill B, but misses and in fact kills C, A is guilty of murdering C. The intention (malice) is transferred from B to C. The leading case is that of *R v Latimer* (1886). In this case, the defendant had a quarrel in a public house with another person. He took off his belt and aimed a blow at his intended victim, which struck him lightly. However, the belt then struck a person standing beside the intended victim and wounded her severely. The jury found that the blow was unlawfully aimed at the original victim but that the striking of the second victim was purely accidental. It was held on appeal, however, that the defendant should be convicted of unlawfully and maliciously wounding the second victim.

The other important aspect of this rule is that it is limited to situations where the *actus reus* and the *mens rea* of the same crime coincide. If A fires a gun at B, intending to

kill B, but misses and the bullet breaks a valuable Ming vase, the *mens rea* of damage to property was not present so the intent does not transfer (*R v Pembliton*, 1874).

### Strict liability offences

Strict liability offences do not require *mens rea* to be proved. They are often referred to as **'no fault' offences**, and almost all of them are created by statute law. Many of them concern road traffic offences or breaches of health and safety legislation. A good example of such a crime occurred in *Callow v Tillstone* (1900), where the defendant, who was a butcher, asked a vet to examine a carcass to ensure it was fit for human consumption. On receiving the vet's assurance that it was fit, the butcher offered it for sale. However, the vet had been negligent and the meat was contaminated. The defendant was convicted of exposing unsound meat for sale, even though he had exercised due care.

The argument most frequently advanced by the courts for imposing strict liability is that it is necessary to do so in the interests of the public. It may be conceded that, in many of the instances where strict liability has been imposed, the public does need protection against negligence. Assuming that the threat of punishment can make the potential harm-doer more careful, there may be a valid ground for imposing liability for negligence as well as where there is *mens rea*. This is particularly true when the offence involves a non-human consequence such as causing pollution; the courts have consistently ruled that such an offence is one of strict liability. A good illustrative case is *Alphacell v Woodward* (1972), where the House of Lords held that the offence of causing polluted matter to enter a river was a strict liability offence.

It is also argued that the majority of strict liability cases can be described as 'administrative' or **'quasi' crimes** — offences that are not criminal 'in any real sense' and are merely acts prohibited in the public interest. Parliament makes no such distinction: an act either is, or is not, declared by Parliament to be a crime, but the courts decide whether it is a 'real' or 'quasi' crime on the basis that an offence which, in the public eye, carries little or no stigma and does not involve 'the disgrace of criminality' is only a 'quasi' crime. In this instance, strict liability may be imposed, because 'it does not offend the ordinary man's sense of justice that moral guilt is not of the essence of the offence'.

This distinction was made in *Sweet v Parsley* (1970). Here, Lord Reid acknowledged that strict liability was appropriate for regulatory offences. However, he stated that the kind of crime to which a real social stigma is attached should usually require proof of *mens rea*. In this case, the defendant's conviction for being concerned in the management of premises that were being used for the purpose of smoking cannabis was quashed on appeal, on the ground that such an offence was not one of strict liability and required *mens rea* to be proved. A similar ruling was made in *B v DPP* (2006).

In most of these cases, the penalty imposed is a fine and not a community or custodial sentence. However, in *Gammon v Attorney-General of Hong Kong* (1985), the Privy Council admitted that the fact that the offence was punishable with a fine of \$250,000 and 3 years' imprisonment was not inconsistent with the imposition of strict liability.



## Non-fatal offences

Now that you have studied the theory in terms of *actus reus* and *mens rea*, you can apply it to actual offences — those grouped together as non-fatal offences. There are five of these:

- assault
- battery
- assault occasioning actual bodily harm (ABH)
- malicious wounding or inflicting grievous bodily harm (GBH)
- wounding or causing grievous bodily harm with intent (to cause GBH)

Assault and battery were two distinct crimes at common law and their separate existence is confirmed by s.39 of the **Criminal Justice Act 1988**. The other three more serious offences are defined in the **Offences Against the Person Act 1861**.

### Assault

This is any act by which the defendant, intentionally or recklessly, causes the victim to apprehend immediate and unlawful personal violence. In other words, this offence can be described as ‘a threat of violence which the victim believes to be a threat’. Accordingly, if any harm is caused, a more serious offence than assault has been committed, although the defendant may also have committed an assault. An example would be if the defendant shouted at the victim ‘I am going to thump you’ and then proceeded to do just that.

### *Actus reus of assault*

In a typical case of assault (as opposed to battery), the defendant, by some physical movement, causes the victim to believe that he or she is about to be struck. There may even be an assault where the defendant has no intention of committing battery or has no means of carrying out the threat. The issues to be decided are whether the defendant intends to cause the victim to believe that he or she can and will carry it out, and whether the victim does believe this. It is clear that a threat to inflict harm at some future time cannot amount to an assault — an apprehension of *immediate* personal violence is essential.

However, there is a tendency to enlarge the concept of assault by taking a generous view of ‘immediacy’, to include threats in which the impending impact is more remote. In *Logdon v DPP* (1976), it was held that the defendant committed an assault by showing his victim a pistol in a drawer and declaring that he would hold her hostage. In *Smith v Superintendent of Woking Police* (1983), the defendant committed an assault by looking at the victim in her nightclothes through a window, intending to frighten her.

It was made clear in *R v Ireland* (1998) that an assault may be committed by words alone, or even, as in that case, by silent telephone calls where the caller ‘intends by his silence to cause fear and he is so understood’.

In *R v Constanza* (1997), it was held that there had been an assault when the victim read the letters that had been sent by a stalker and interpreted them as clear threats — there was a ‘fear of violence at some time not excluding the immediate future’.