UNIVERSITY
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Criminal law

William Wilson

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This is one of a series of module guides published by the University. We regret that owing to pressure of work the author is unable to enter into any correspondence relating to, or arising from, the guide.

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Contents

NOTES

Module descriptor

GENERAL INFORMATION

Module title

Criminal law

Module code

LA1010

Module level

4

Contact email

The Undergraduate Laws Programme courses are run in collaboration with the University of London. Enquiries may be made via the Student Advice Centre at: https://sid.london.ac.uk

Credit value

30

Courses in which this module is offered

CertHE, LLB, EMFSS

Module prerequisite

None

Notional study time

300 hours

MODULE PURPOSE AND OVERVIEW

Criminal law is one of the seven foundation modules required for a qualifying law degree in England and Wales and is a core requirement of the University of London LLB and CertHE Common Law programmes.

This module is concerned with the general principles of criminal liability, fatal and non-fatal offences against the person and offences against property. Attempts to commit offences, secondary liability and defences also form part of the curriculum.

MODULE AIM

This module introduces students to the aims and principles of criminal law and how these are applied and analysed in criminal prosecution and defence.

LEARNING OUTCOMES: KNOWLEDGE

Students completing this module are expected to have knowledge and understanding of the main concepts and principles of criminal law. In particular they should be able to:

1. Explain the relationship between morality, policy and principle in common law and legislative provisions in criminal law;
2. Describe and analyse the legal principles governing liability for: (i) non-fatal offences; (ii) criminal homicide; (iii) property crimes; and (iv) inchoate offences;
3. Describe and analyse the legal principles governing liability as an accomplice;
4. Identify and apply the legal principles governing criminal defences;

5. Demonstrate an understanding of the hierarchy of courts and the appeal process in criminal cases;
6. Identify and explain the points of comparison and distinction between different offences within the same family, and different criminal defences;
7. Demonstrate an understanding of how questions of morality, policy and principle influence reform and proposals for reform in the criminal law.

LEARNING OUTCOMES: SKILLS

Students completing this module at a threshold level should be able to construct and present a legal argument explaining different concepts and arguments, demonstrating in particular the ability to:

8. Analyse a set of facts, providing reasoned arguments and conclusions as to the criminal offences that may have been committed and defences that may be available;
9. Analyse an area of law with a view to showing understanding of its strengths and weaknesses in terms of underlying considerations of morality, principle and policy;
10. Communicate effectively, orally and in writing, in a clear and concise manner, using accurate legal terminology, referring to primary and secondary sources of law and giving practical examples;
11. With guidance, use legal databases and the internet to locate primary and secondary sources relevant to criminal law.

BENCHMARK FOR LEARNING OUTCOMES

Quality Assurance Agency (QAA) benchmark statement for Law 2019.

MODULE SYLLABUS

a. *General principles of criminal law.*
b. *Actus reus.* Act requirements. Liability for omissions and situational ability.
c. *Causation.*
d. *Mens rea.* Intention recklessness and negligence.
e. *Coincidence of actus reus and mens rea.*
f. *General defences 1.* Insanity. Automatism. Intoxication.
g. *General defences 2.* Necessity. Duress. Self-defence. Consent.
h. *Murder and voluntary manslaughter.*
i. *Involuntary manslaughter.*
j. *Non-fatal offences 1*: Section 39 Criminal Justice Act 1988.
k. *Non-fatal offences 2:* Sections 18, 20, 47 OAPA 1861.
l. *Rape.*
m. *Theft.* Fraud. Burglary.
n. *Criminal damage.*
o. *Secondary participation.*
p. *Inchoate offences.* Assisting and encouraging crime and criminal attempts.

LEARNING AND TEACHING

Module guide

Module guides are the student's primary learning resource. The module guide covers the entire syllabus and provides students with the grounding to complete

the module successfully. It sets out the learning outcomes that must be achieved as well as providing advice on how to study the module. It also includes the essential reading and a series of self-test activities together with sample examination questions, designed to enable students to test their understanding. The module guide is supplemented each year with the pre-exam update, made available on the VLE.

The Laws Virtual Learning Environment

The Laws VLE provides one centralised location where the following resources are provided:

- a module page with news and updates;
- a complete version of the module guides;
- online audio presentations;
- pre-exam updates;
- past examination papers and reports;
- discussion forums where students can debate and interact with other students;
- quizzes – multiple-choice questions with feedback are available for some modules.

The Online Library

The Online Library provides access to:

- the professional legal databases LexisLibrary and Westlaw;
- cases and up-to-date statutes;
- key academic law journals;
- law reports;
- links to important websites.

Core text

Students should refer to the following core text. Specific reading references are provided for this text in each chapter of the module guide:

- **Wilson, W. *Criminal law*. (Harlow: Pearson, 2020) seventh edition [ISBN 9781292286747].**

ASSESSMENT

Learning is supported by means of a series of activities in the module guide, which develop skills outcomes 8–11. Self-assessment questions also help students to test their knowledge and understanding (outcomes 1–7). The formative activities also prepare students to reach the module learning outcomes tested in the summative assessment.

Summative assessment is through a three hour and fifteen minute unseen written examination.

Please be aware that the format and mode of assessment may need to change in light of extraordinary events beyond our control, for example, an outbreak such as the coronavirus (COVID-19) pandemic. In the event of any change, students will be informed of any new assessment arrangements via the VLE.

Permitted materials

Students are permitted to bring into the examination room the following specified document:

- ***Core statutes on criminal law 2021–22* (Palgrave Macmillan).**

NOTES

1 Introduction

Contents

Introduction

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

1.1 The lawyer's method

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

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

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

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

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

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

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

1.2 What does criminal law comprise?

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

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

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

Which of these propositions were contradicted in *Ireland*?

1.3 Procedure

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

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

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

Offences are triable:

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

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

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

> John Ireland is charged as follows:
>
> **Statement of Offence**: assault occasioning actual bodily harm
>
> **Particulars**: John Ireland, between the dates of September 1998 and May 2004, assaulted Vicky Henderson, causing her actual bodily harm.

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

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

1.4 The sources of criminal law

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

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

The consequences of the United Kingdom leaving the European Union will have no immediate effect but in time it appears likely that questions of compatibility will no longer be demanded.

1.5 Study materials

The core textbook for this subject is:

- **Wilson, W. *Criminal law*. (Harlow: Pearson, 2020) seventh edition [ISBN 9781292286747].**

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

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

You are also advised to read a criminal law casebook of your choice. The following ties in most closely with the textbook:

- **Dine, J., J. Gobert and W. Wilson *Cases and materials on criminal law*. (Oxford: Oxford University Press, 2010) sixth edition [ISBN 9780199541980].**

There are a number of others on the market which are equally useful.

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

- **Ormerod, D. and K. Laird *Smith, Hogan and Omerod's criminal law*. (Oxford: Oxford University Press, 2018) 15th edition [ISBN 9780198807094].**
- **Horder, J. *Ashworth's principles of criminal law*. (Oxford: Oxford University Press, 2019) ninth edition [ISBN 9780198777663].**
- **Kyd, S, T. Elliott and M.A. Walters *Clarkson and Keating: criminal law: texts and materials*. (London: Sweet & Maxwell, 2020) 10th edition [ISBN 9780414075559].**
- **Herring, J. *Criminal law: text, cases and materials*. (Oxford: Oxford University Press, 2020) ninth edition [ISBN 9780198848479].**
- **Herring, J. *Great debates in criminal law*. (Basingstoke: Palgrave Macmillan, 2020) fourth edition [ISBN 9781352010237]. You will find this book both helpful and enjoyable for that part of the module and examination which requires you to analyse and evaluate areas of criminal doctrine.**

Please ensure that you use the latest edition of any textbook or casebook you choose. You will also need an up-to-date criminal law statute book. You will be able to take an unannotated copy into the examination.

1.6 Online resources

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

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

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

1.7 Preparing for the examination

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

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

1.8 Getting started

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

Good luck!

NOTES

2 The building blocks of criminal liability

Contents

Introduction

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

CORE TEXT

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

2.1 General principles

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

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

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

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

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

These elements can be reduced to an equation:

prohibited conduct + mental element = criminal liability

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

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

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

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

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

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

is the prohibited act; that is, 'an unlawful killing'. The *mens rea* is the accompanying mental element which renders that prohibited act punishable, which is 'malice aforethought'. At Section 4.2 you will also discover that 'malice aforethought' means 'an intention to kill or cause serious injury'.

To analyse the problem you therefore ask the following questions.

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

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

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

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

2.2 The three basic elements in crime

2.2.1 *Actus reus*

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

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

2.2.2 *Mens rea*

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

- intention
- recklessness
- dishonesty
- knowledge
- belief.

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

Note: this is not the only possible justification for punishment. Another is prevention. Utilitarian theorists believe that punishment can never be deserved because it involves harming people and 'two wrongs do not make a right'. The utilitarian justification for punishment is to reduce the incidence of anti-social and dangerous conduct through punishment's deterrent or preventive function. The contemporary view, which favours retribution, is that for stigmatic crimes such as are dealt with in this module guide, prevention is not a moral justification for punishment as punishment for these crimes requires the defendant to be blameworthy because punishment without blame is unjust and unfair. One area where there is less unanimity is the law of criminal attempts (see Chapter 14).

Where prevention comes into its own is with respect to those offences that have harm prevention rather than moral wrongdoing as their primary focus. Such offences often have a fault element that requires no conscious awareness of doing wrong: careless driving and gross negligence manslaughter are examples of these. Other crimes need no fault element at all. These are known as crimes of strict liability: most driving offences are of this nature. Such offences are justified as being not contrary to principle because they do not tend to involve social stigma or carry imprisonment as a potential punishment.

2.2.3 Defences

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

Defences involve one of two moral claims to avoid liability.

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

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

Activity 2.1

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

2.3 Proving the elements of the offence

2.3.1 Burden of proof

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

So who does the proving? Does she have to prove it was an accident or do the prosecution have to prove it was not?

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

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

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

2.3.2 Standard of proof

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

Am I ready to move on?

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

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

3 *Actus reus*: conduct and circumstances

Contents

Introduction

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

3.1 What does the *actus reus* consist of?

The *actus reus* in crime comprises:

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

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

3.1.1 Conduct: the act requirement

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

3.1.2 What is an act?

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

A bodily movement

Taking murder as an example, the conduct element in murder consists of any act that causes the death of a human being. The prosecution must identify and prove that such an act took place.

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

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

ILLUSTRATION 3.1

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

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

The bodily movement must be voluntary

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

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

ILLUSTRATION 3.2

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

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

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

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

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

- find the definition of the crime
- distil from that definition the *actus reus*
- identify from that *actus reus* the act of the defendant which you are to rely on in establishing that *actus reus*. This is not always easy.

ACTIVITY 3.1

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

a. **What is the *actus reus* of theft?**

b. **What does the *actus reus* component of theft known as 'appropriation' in theft mean?**

c. **If V lends D his book and a week later D decides to keep and sell the book, does D need to sell the book to satisfy the act component of the *actus reus*?**

ACTIVITY 3.2

Consider the following cases and answer the question below.

a. **Aftab has an infectious respiratory disease. He kisses Miah. Miah catches Aftab's disease and suffers serious illness.**

b. **Aftab has a heart attack while driving his car. He loses consciousness and crashes into Margaret, injuring her.**

c. **Vikram pushes Aftab. Aftab falls onto Isobel who falls over and breaks her leg.**

d. **Aftab is driving a car with Bella, his dog, in the back seat. Bella unexpectedly jumps on to Aftab's lap, causing him to lose control of the car and go through a red traffic light.**

e. **Aftab, a practical joker, explodes a paper bag behind Adele's back. Adele falls over in fright, bangs her head and loses consciousness.**

f. **Aftab, Bashir's teacher, tells Bashir that he has failed his final year examinations. In despair, Bashir commits suicide.**

g. **Aftab overhears Hui tell Wen that he intends to kill Ming. Aftab makes a note of this but does not tell the police. The next day Hui kills Ming.**

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

3.1.4 Exceptions to the act requirement

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

Situational crimes, crimes of possession and crimes of omission

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

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

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

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

Activity 3.3

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

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

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

No feedback provided.

Omissions and commissions

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

A more controversial exception to the act requirement concerns crimes of commission. Can these be committed by omission? Crimes of commission are those crimes whose definition includes an *actus reus* which satisfies the act requirement, but whose result component can be caused by **doing nothing**. For example, the *actus reus* of murder is 'an unlawful killing'. Dictionaries define 'kill' as 'an act of killing', but also define it simply as 'causing death'. An act of killing involves some affirmative action such as a stabbing, a shooting, a beating, a poisoning, a suffocating and so on. But it

is possible to 'cause death' by doing nothing. For example, it is a perfectly correct use of language to say that a parent who gives her baby no food so that it dies causes the death of the child – and indeed 'kills' the child. The controversy concerns how far this principle should stretch. Only one person can pull a trigger, but every passerby who sees a baby drowning in a puddle but does nothing to help can be said to 'cause' the baby's death. Are they all to be charged with murder? How do we ensure that only the truly deserving suffer conviction and punishment?

Key requirements for criminal liability

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

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

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

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

ACTIVITY 3.4

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

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

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

ACTIVITY 3.5

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

a. **A is a swimming pool attendant. He sees V, a swimmer, struggling out of her depth in the pool.**
b. **A is the sister of V. She sees V struggling out of her depth in the pool.**

c. A is the mother of V. She sees V struggling out of her depth in the pool.

d. A is the son of V. He sees V struggling out of her depth in the pool.

e. A is the owner of the swimming pool. She sees V struggling out of her depth in the pool.

f. A is the mother of T (aged 10) who has invited V, his friend (also aged 10), to go swimming with him at the local pool. A sees V struggling out of his depth in the pool.

g. A and V are an unmarried couple who live together. A sees V struggling out of his depth in the pool.

h. A, who is supervising her child at a swimming pool, drops an ice cream accidentally at the poolside. V (a child) slips on the ice cream and falls into the pool. A sees V struggling out of her depth in the pool.

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

> A sees B drowning and is able to save him by holding out his hand. A abstains from doing so in order that B may be drowned, and B is drowned. A has committed no offence.
>
> (*A digest of the criminal law*, 1887)

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

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

Activity 3.6

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

a. Why were the doctors in *Airedale NHS Trust* v *Bland* (1993) not guilty of murder for switching off the machine keeping Anthony Bland alive?

b. Do you think this is the right decision?

c. If Anthony Bland's parents had switched off the machine out of compassion for his position would they have been guilty of murder?

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

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

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

Activity 3.7

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

No feedback provided.

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

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

5. The harm must be caused by the omission

The prosecution must be able to prove that the defendant's breach of duty **caused** the harm. In *R* v *Morby* (1882) 8 QBD 571 a parent failed to call for medical support for his ailing child. The child subsequently died of smallpox. The parent was convicted of manslaughter at first instance, but the Court for Crown Cases Reserved allowed the appeal, since the prosecution could not prove that prompt medical attention would have saved the child. Put another way, the prosecution could not prove that the defendant's failure to perform his duty had caused the infant's death since the child might have died anyway. For more information on what must be proved to show that the prohibited harm was caused by the accused's act or omission, see Chapter 4.

ACTIVITY 3.8

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

a. Name three crimes which cannot be committed by omission.

b. For result crimes, how does the criminal law ensure that liability for failing to prevent a result does not criminalise too many people?

c. Under what circumstances is a person placed under a duty to act to prevent harm?

d. Does a sibling owe a duty to other siblings?

e. Do offspring owe duties to parents?

f. Do live-in partners owe a duty to each other?

g. Do mountain climbers owe a duty to each other?

h. Assault is one of those few result crimes which cannot be committed by omission. Why then was the defendant in *Fagan* v *MPC* (1969) (Wilson, Section 8.1.A 'Temporal coincidence') found guilty of assault when he refused to remove his car which had been inadvertently parked on a policeman's foot? It might be helpful to read the case report in the Online Library.

i. Read Wilson, Sections 4.5.D.3(d) 'The duty to avert a dangerous situation caused by the defendant' and 4.5.D.3(e) '*Miller* and beyond'. How does the case of *Evans* (2009) extend the principle in *Miller* (1983)?

j. What reason did the House of Lords give for deciding that if doctors turned off Anthony Bland's life support machine this would be an omission, not an act?

k. Consider the case of *R* v *Morby* (1882). Is it ever possible for the prosecution to prove, beyond reasonable doubt, that V would not have died when he did if D had sought prompt medical care? Does this put an undue burden on the prosecution?

No feedback provided.

3.2 Circumstances

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

Activity 3.9

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

(1) A person is guilty of theft if he dishonestly appropriates property belonging to another with the intention of permanently depriving the other of it; and "thief" and "steal" shall be construed accordingly. (s.1, Theft Act 1968)

(1) Subject to any exemption under this Act, it is an offence for a person –

(a) to have in his possession, or to purchase or acquire, a firearm to which this section applies without holding a firearm certificate in force at the time, or otherwise than as authorised by such a certificate. (s.1, Firearms Act 1968)

In each case state:

a. the prohibited conduct

b. the prohibited circumstances.

No feedback provided.

Sample examination question

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

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

Advice on answering the question

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

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

Am I ready to move on?

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

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

NOTES

4 *Actus reus*: consequences and their causes

Contents

Introduction

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

CORE TEXT

- **Wilson, Chapter 5 'Causation'.**

4.1 Result crimes

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

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

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

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

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

Activity 4.1

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

a. **D, as a joke, places a wet bar of soap on the floor of V's bathroom, hoping that V will slip on the soap. V does slip on the soap, hits her head on the floor and is knocked unconscious. Does D cause V's injury?**

b. **As above, except that V dies because her skull was unusually thin. Does D cause V's death?**

c. **D rapes V. So distressed is V that she commits suicide. Does D cause V's death?**

d. **D rapes V. When V's father finds out he kills V due to the dishonour caused to the family by V's loss of virginity. Does D cause V's death?**

e. **D stabs V. An ambulance is called to take V to hospital. On the journey to hospital the ambulance is involved in an accident which kills the driver, X, and V. Does D cause V's death?**

f. **D is the lifeguard on a beach. She sees V struggling in the water and dives in to save him. Unfortunately D is not a good swimmer and is unable to rescue V in time. Does D cause V's death?**

g. **D stabs V. An ambulance is called to take V to hospital. The ambulance crew are on their lunch break and refuse to come until it has ended. By the time they arrive, V has died of blood loss. Does D cause V's death?**

h. **D and V attend a party together. D gives V an ecstasy pill which V takes. Unknown to both D and V the pill has unusual strength. V falls unconscious and dies almost immediately. Does D cause V's death?**

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

No feedback provided.

4.2 Accountability: basic guidelines

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

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

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

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

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

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

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

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

There are, however, certain aspects of causation doctrine which part company with this restatement. For example, the courts will sometimes treat a later voluntary act

of a third party or the victim as breaking the chain of causation between act and result if it was sufficient cause of the result, even if it was perfectly foreseeable or indeed foreseen. Case (h) in Activity 4.1 is an example. In law, D is not the cause of V's death because although D began the chain and V's taking the pill was foreseen and foreseeable, V's voluntary taking of the pill breaks the chain of causation. It is now V's (voluntary) act rather than D's which causes V's death.

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

4.3 Principles governing causation

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

4.3.1 Factual cause

Hart and Honoré describe a factual cause as:

> an event or act which 'makes the difference' between something happening and something not happening.
>
> (*Causation and the law*. (1959))

The common way of representing this is:

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

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

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

Activity 4.2

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

(2000) *Crim LR* 31, Smith, J.C. 'A comment on Moor's Case' (2000) *Crim LR* 41 and Goss, J. 'A postscript to the trial of Dr David Moor' (2000) *Crim LR* 568.

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

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

4.3.2 Legal cause

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

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

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

Principles of application

To be the legal cause of a criminal harm, the consequence must be the consequence not merely of the defendant's act but of their **wrongful** act. So if A is charged with causing B's death by dangerous driving and A does kill B by running him over in her car, while driving dangerously, this does not necessarily mean that A is guilty of causing death by dangerous driving. The crime is causing death **by** dangerous driving not causing death **while** driving dangerously. The prosecution's task in such a case is to rebuff the possibility that, although the defendant was driving dangerously, the death might still have been unavoidable because, for example, the victim jumped out in front of the car at the last second.

ACTIVITY 4.3

Read Wilson, Section 5.5.B 'Legal cause' and answer the following questions.

a. **Why was the defendant in *Dalloway* (1847) not guilty of manslaughter, although he was driving his cart very dangerously when it ran over the child?**

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

No feedback provided.

To be a legal cause, the defendant's contribution to the result must be substantial, although it need not be the sole cause. Even if a result would not have occurred but for D's acts, it is appropriate to ask to what extent D's acts significantly contributed to the result. The criminal law ignores trivial causes. For example, in *Adams* (1957) a doctor gave his terminally ill patient a dose of painkillers so strong that it killed the patient.

Devlin J ruled that if the dose were given for pain relief in accordance with the doctor's duty it would not be the doctor but the disease which was the real cause of death. The doctor's contribution could be ignored as negligible.

Compare *Benge* (1865) 4 F & F 504 in which D, a foreman platelayer on a railway, failed to check the train timetable to ensure the men working for him were safe on the line. A train killed one of the workmen. D claimed that he was not the legal cause since the driver of the train could have prevented the deaths if he had kept a proper lookout. It was held that D's contribution was substantial enough to justify attributing responsibility for the death to him; his contribution was too substantial to be ignored.

4.3.3 Problem cases

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

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

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

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

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

Activity 4.4

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

a. **Why was Blaue the cause of V's death when V could have easily prevented it by agreeing to a blood transfusion?**

b. **Eve asks Adam, her husband, to shoot her because she is terminally ill and wishes to die. Adam does so out of compassion and respect for her wishes. However, his shot fails to kill her but causes massive internal bleeding. Adam then realises that he does not want to be responsible for Eve's death so he takes her to hospital. The hospital tells Eve that she needs a blood transfusion and that she will die without it. Eve refuses, as she still wants to die – which she does.**

Is Adam the legal cause of her death? In other words, is there any significance difference between this case and *Blaue* that warrants *Blaue* being distinguished? Please note that there is no right answer here. Questions about whether the factual cause of a criminal harm is also the cause recognised by the law is a matter of moral and common-sense judgement – so exercise yours!

4.3.5 Supervening acts of third parties

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

Acts of third parties exacerbating the harm

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

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

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

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

ACTIVITY 4.5

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

ACTIVITY 4.6

Read Wilson, Section 5.6.A.4(c) 'When will inappropriate medical treatment break the chain of causation?' and answer the following question.

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

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

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

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

Activity 4.7

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

a. **Do you think the police's reaction was reasonable? Do you think the real issue should be whether the police response was 'foreseeable'?**

b. **If D had simply waved the gun in the air and the police had opened fire, with the same result, would D still be the cause of V's death?**

c. **What principle would you adopt to support your answer to question (b) above?**

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

Medical interventions

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

Activity 4.8

Read Wilson, Section 5.6.A.3(e) 'Medical responses to the danger posed by A's conduct' and Section 5.6.A.4(c) 'When will inappropriate medical treatment break the chain of causation?' and answer the following questions.

a. **What was the response of the Court of Appeal to the appeal in *Cheshire*? What principle did the Court lay down in reaching its decision? This is another principle that is worth committing to memory.**

b. ***Cheshire* was quite an extreme case of bad medical treatment yet D remained liable. In what situations will bad medical treatment rid D's criminal act of 'causal potency'?**

c. **Consider the court's decision in *Jordan*. Is it consistent with *Cheshire*? If not, which do you prefer and why?**

4.3.6 Supervening acts of the victim

Supervening acts of the victim exacerbating the harm

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

Escape attempts

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

ACTIVITY 4.9

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

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

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

Suicide

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

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

In other words, if the suicide was simply a response to the defendant's abusive behaviour, he would not be responsible for her death. It is only where the suicide was triggered by a particular wrongful act that the jury would be entitled (not bound) to find causation proved. In 2017 another case (*R* v *Wallace* [2018] EWCA Crim 690) was decided involving a suicide triggered by the defendant's wrongful act. The defendant threw concentrated sulphuric acid over her former lover while he was sleeping. This left him blind, paralysed and suffering from catastrophic injuries and pain. Two years later he checked into a euthanasia clinic in Belgium where euthanasia is legal and his life was terminated. He had decided that he could not continue to live with his injuries and the pain to which he was still subject. The defendant was charged with murder and the trial judge refused to allow the question of causation to be considered by the jury on the ground that there was too long a delay between the act and the death. The jury convicted of throwing corrosive fluid on a person, with intent to do grievous bodily, an offence under s.29 of the Offences Against the Person Act 1861. The Court of Appeal ruled that the trial judge was wrong to withdraw the question of causation from the jury. It was open to the jury to conclude that, despite the separation in time between the throwing of the acid and the death, the acts of the victim were a direct response to the injuries inflicted for which the defendant was directly responsible. The question to be considered in all cases where more than one cause contributed to the death is whether 'the accused's acts can fairly be said to have made a significant

contribution to the victim's death'. A retrial was ordered and in June 2018 the jury again acquitted of murder and convicted of the s.29 Offence.

Activity 4.10

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

4.4 Breaking the chain of causation

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

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

Activity 4.11

Read Wilson, Section 5.6.A.4(c) 'When will inappropriate medical treatment break the chain of causation?'.

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

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

4.4.1 New acts intervening

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

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

For example, in the American case of *People* v *Elder* (1894), D struck V and V collapsed on the ground. Then a bystander, B, who was not part of any plan to hurt V, stepped up and kicked V, killing him. D was not guilty of homicide. Although D was a factual cause of the death, the independent and voluntary act of B broke the chain of causation. A more modern example is the English case of *Rafferty* [2007] EWCA Crim 1846, which you will find in Wilson, Section 5.6.A.4 'Breaking the chain of causation–intervening cause supersedes defendant's act'.

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

Activity 4.12

Read Wilson, Section 5.6.A.4(c) 'When will inappropriate medical treatment break the chain of causation?'.

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

No feedback provided.

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

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

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

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

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

4.4.2 Intervening events

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

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

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

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

ACTIVITY 4.13

Read Wilson, Section 5.6.A.4 'Breaking the chain of causation – intervening cause supersedes defendant's act' and answer the following questions.

a. **Is there one test of causation or are there a number of different tests depending upon the facts of the case?**

b. **Do you think *Kennedy (No 2)* is rightly decided?**

c. Consider the *Environment Agency* v *Empress Cars* case. Is it consistent with *Kennedy*? Do you agree with the decision?

d. Compare *Rafferty* with *Maybin*. Which decision do you prefer, and why?

e. Was the deceased's suicide in *Wallace*, above, a voluntary decision in the sense intended in *Kennedy*?

Am I ready to move on?

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

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

NOTES

5 *Mens rea*: criminal fault

Contents

Introduction

As we saw in Chapter 3 of this module guide, criminal guilt, at least for traditional core crimes, requires both wrongdoing and fault. It is not a crime to kill someone; but it is a crime to intentionally or recklessly kill someone.

Criminal fault is necessary to ensure that conviction and punishment are deserved. It acts as the criminal law's filtering mechanism to ensure that only the blameworthy are punished. Criminal fault is of two types – objective fault and subjective fault.

5.1 Objective fault

A person is objectively at fault if they are thought blameworthy, irrespective of their state of mind at the time of acting. For example, if my son is playing football too near to the house and breaks a window, I will be tempted to tell him off, even if the breakage was not deliberate and he was oblivious to the likelihood of causing damage. I will tell him that he is at fault because he failed to conform to the family Wilson's standards of carefulness. These are objective standards which do not vary with the context and take no account of the intentions or beliefs of the wrongdoer. Negligence or carelessness are two fault terms representing 'objective fault' and are the attributes of a person who fails to conform to the standards of ordinary, reasonable people. Examples of crimes of objective fault are careless driving, dangerous driving and gross negligence manslaughter.

Many commentators feel that objective fault should have little or no place in criminal law. This is because of the importance of desert in punishment. While we may rightly criticise people who fail to live up to the standards of behaviour we expect from ordinary, reasonable people, is it fair to punish them if they were doing their incompetent best? In *McCrone* v *Riding* [1938] 1 All ER 157, for example, the court ruled that it was no answer to a charge of careless driving that the driver was a learner driver and was not able to drive as proficiently as those who had passed their test.

In his book *Punishment and responsibility* (Oxford: Clarendon Press, 1968) H.L.A Hart, while accepting that punishment is deserved for failing to conform to objective standards of behaviour, nevertheless argued that punishment should be limited to those who could have conformed had they put their mind to it.

> What is crucial is that those whom we punish should have had, when they acted, the normal capacities, physical and mental, for doing what the law requires and abstaining from what it forbids, and a fair opportunity to exercise these capacities.

5.2 Subjective fault

Traditional core crimes are, with the exception of rape and gross negligence manslaughter, crimes of subjective fault. Most of these crimes carry substantial terms of imprisonment as maximum sentences. Citizens are protected against unfair punishment by a general requirement that, when performing their act of wrongdoing, they have an accompanying **mental attitude to what they are doing**. It is this mental element which makes them blameworthy and so punishable. Put simply, desert in punishment requires the defendant to **be conscious of** the wrong they are about to perform. There is no such requirement in relation to objective fault. There the defendant is at fault simply because they did something bad or stupid, not because they consciously chose to do so.

These (subjective) mental attitudes are of diverse kinds.

- For murder, the prosecution must prove an intention to kill or cause serious injury.
- For theft, the prosecution must prove that the defendant intended to deprive someone of their property.
- For criminal damage, the prosecution must prove that the damage was done intentionally or recklessly (with foresight).
- For handling stolen goods, the prosecution must prove that the handler knew or believed that the goods were stolen.

In this chapter we will examine the meaning of two forms of subjective fault (*mens rea*) – namely intention and recklessness – and the major form of objective fault – namely negligence.

5.3 Intention

Intention lies at the heart of criminal liability, since a basic element in all core crimes is that D intended to do the act which formed the substance of their wrongdoing. To be guilty of murder by shooting, for example, the prosecution must prove **both** that D intended to pull the trigger and that D intended to kill, or at least cause serious injury. It is important from the outset to understand that intention is different from motive. As a rule of thumb, the motive provides the actor's reason for forming the intention. Criminal liability, in theory, ignores motive.

ILLUSTRATION 5.1

a. A shoots B, a police officer, through the heart in order to escape arrest.

b. A (B's wife) gives B, who is suffering a painful terminal illness, a lethal dose of poison so that B can die without further suffering.

In both of these cases A intends to kill B. The motive, good or bad, is ignored.

5.3.1 Basic and specific intent

Certain crimes can only be committed with intention as the fault element. These crimes are known as **crimes of specific intent**. A crime of specific intent is a crime for which the prosecution has to prove that D intended to bring about some state of affairs by doing what they did. An example of a state of mind labelled as 'specific intent' is the fault element of murder, which is the intention to kill or cause grievous bodily harm. The prosecution in a murder case must always prove that D acted with one of these two states of mind.

Crimes which do not require the prosecution to prove that the defendant intended to do anything other than perform the acts which they did perform are known as **crimes of basic intent**. Criminal damage is a crime of basic intent. The prosecution has to prove that D intended to light the match, throw the stone, fire the gun and so on. But it does not have to prove that D intended to damage the relevant property by that act. If D foresaw that what they were doing might have this consequence that is a sufficiently blameworthy state of mind to support the conviction.

5.3.2 Murder and manslaughter: what does 'intention' mean?

Because murder is a crime of specific intent, we need to know **precisely** what 'intention' in this context means in order to ensure that those who commit murder are successfully distinguished from those who commit manslaughter, where no such intention has to be shown. In *Hyam* v *DPP* [1975] AC 55 this proved a great challenge to the House of Lords when considering whether Hyam was guilty of murder or manslaughter. Hyam had dropped a petrol bomb through the letterbox of her neighbour, Mrs Booth, late one night when Mrs Booth was asleep. She did so not to kill or cause serious injury to Mrs Booth but to frighten her out of the neighbourhood, since Hyam was in love with Mrs Booth's husband and wanted him for herself. Two of Mrs Booth's children died in the fire. Hyam argued that she did not intend to kill or cause serious injury to Mrs Booth or the children: her intention was to frighten Mrs Booth. This argument was unsuccessful and Hyam was convicted. The House of Lords upheld the conviction on the basis that since she acted in the knowledge that death or serious injury was likely she must be taken to have intended those consequences.

ACTIVITY 5.1

Read Wilson, Section 6.6.A.1 'Intention and risk-taking' and answer the following questions.

a. How would you define intention?

b. Do you agree with Lord Diplock's definition of 'intention' in *Hyam*?

c. Why do you think he defined intention in this way?

d. What problems are created by this definition?

e. Give an example of such a problem.

Subsequent to this case, first in *Moloney* [1985] AC 905 and then in *Hancock and Shankland* [1986] AC 455, the House of Lords revisited the meaning of intention. These are cases on murder but their conclusions hold good for all crimes of specific intent. In both cases the House of Lords, overruling *Hyam*, stated that if it could be shown that D foresaw a consequence as probable or highly probable and yet carried on regardless, this did not mean that D, therefore, intended the consequence **as a matter of definition**. However, if the prosecution can prove that D acted with this foresight, it can use this as evidence that the consequence was in fact intended. Why else would the defendant have continued to act as he did? Indeed, in many cases, the only evidence that D intended an outcome is the fact that it was so likely to result from D's act. The higher the degree of probability foreseen by the defendant, the more likely it was that the consequence was intended. Why else would the defendant have continued to act as he did? Indeed, if the evidence showed that D foresaw the consequence as virtually certain, the inference that D intended it might be 'irresistible'. In *Nedrick* [1986] 1 WLR 1025, on facts similar to *Hyam*, Lord Lane CJ put it this way:

> Where a man realises that it is for all practical purposes inevitable that his actions will result in death or serious harm, the inference may be irresistible that he intended that result, however little he may have desired or wished it to happen.

However, the jury must decide whether the consequence was intended by reference **to all the evidence**, and not just the probability of the consequence occurring. Section 8 of the Criminal Justice Act 1967 states that the jury:

> shall not be bound in law to infer that he intended or foresaw a result of his actions by reason only of its being a natural and probable consequence of those actions.

It should instead make the decision about whether D did have such an intention or foresight:

> by reference to all the evidence, drawing such inferences from the evidence as appear proper in the circumstances.

Some have taken the effect of *Nedrick* to mean that if a person acts in the knowledge that a consequence is **practically certain** then they intend it as a **matter of definition. It does not**. It means that the jury will normally find it difficult (because the evidence of intention is so strong) to resist finding that D did intend the consequence, even though it may not have been their primary purpose.

Illustration 5.2

D rapes V, a four-year-old infant. D then throws V into a fast-flowing river in order to destroy any trace of his DNA. He knows that this will certainly, for all practical purposes, result in V's death, which it does.

D does not act for the purpose of killing but the jury will nevertheless find it difficult, if not impossible, to conclude that D did not intend to kill V because he knew that this was inevitable and yet did nothing to stop it. If D did not intend the death of V, then why did he do what he did? He intended, in other words, the whole package.

This approach was adopted by the House of Lords in the case of *Woollin* [1999] 1 AC 82, in which *Nedrick* was approved. Woollin threw his infant son across the room in a moment of fury, and the son's skull fractured and he died. Woollin was charged with murder. The prosecution accepted that Woollin did not act in order to kill or cause serious injury, but nevertheless argued that he intended at least serious injury. Woollin was convicted of murder. He appealed on the basis that the trial judge misdirected the jury on the meaning of intention.

The House of Lords made two very important points in this case. The first point is that in the vast majority of cases the jury should not be directed by the judge as to what intention means since it is an everyday word. The jury should be directed simply that it should find the defendant not guilty of murder unless it was sure he intended to kill or, if not to kill, then to cause grievous bodily harm (the simple direction). However, it must be explained to the jury that intention is not the same as motive.

The second point is that the jury should be given some guidance in those rare cases, such as in *Woollin* and in Illustration 5.2, where, although the evidence does not indicate a purpose to kill or cause grievous bodily harm it does indicate that the defendant was aware that death or grievous bodily harm might well occur. This is what the guidance in *Woollin* states. It is in the form of a model direction from which judges should not deviate.

> Where the charge is murder and in the rare cases where the simple direction is not enough, the jury should be directed that they are not entitled to find the necessary intention, unless they feel sure that death or serious bodily harm was a virtual certainty (barring some unforeseen intervention) as a result of the defendant's actions and that the defendant appreciated that such was the case. The decision is one for the jury to be reached upon a consideration of all the evidence.

This direction makes clear that the foresight of virtual certainty is not intention in itself but only evidence from which the jury is entitled to infer intention, depending upon the rest of the evidence (see *Matthews and Alleyne* [2003] EWCA Crim 192). For example, in Illustration 5.2 the jury would no doubt wish to find the death of V intended. But it would be less inclined to find intention in Illustration 5.3, where D would also foresee death as a virtual certainty.

Illustration 5.3

V is in hospital on a life support machine. Doctors have concluded that there is no prospect of recovery. X is admitted to the hospital following a car accident. X will die unless put on to a life support machine immediately, but there are none free. Y, X's surgeon, removes the life support machine from V, who is terminally ill and about to die, and gives it to X. Y knows that the inevitable result of this will be V's death. Does Y intend to kill V?

The *Woollin* direction tells the jury that it is entitled to say 'yes' but should make its decision on the basis of all the evidence. In other words, the jury is also entitled to say 'no' if the evidence as a whole supports that conclusion, which in this case it clearly does. The *Woollin* direction is important for giving the jury some discretion (or elbow room) not to find intention in cases where death occurs as a side effect of an action otherwise quite acceptable, such as this. This is a surprising state of affairs because motive is not supposed to be taken into account in deciding whether intention is present or not.

Activity 5.2

Read Wilson, Section 6.6.C 'The meaning of intention in the criminal law' and answer the following questions.

a. **What is the difference between intention and motive?**
b. **Why is motive not supposed to be relevant to a person's culpability?**
c. **Have the courts always kept to this principle?**
d. **Why do you think that courts sometimes take motive into account when they are not supposed to?**
e. **In the case of *Steane* (1947), on what ground could Steane have been acquitted other than his lack of criminal intent?**

The *Woollin* direction is most important for drawing a clear line between intention and recklessness. Foresight of anything less than virtual certainty cannot be intention but can only be recklessness.

A succinct restatement of the present state of the law as to the meaning of intention and the guidance juries are to be given appears in a Law Commission Report:

> A person is taken to intend a result if he or she acts in order to bring it about.
>
> In cases where the judge believes that justice will not be done unless an expanded understanding of intention is given, the jury should be directed as follows: an intention to

> bring about a result may be found if it is shown that the defendant thought that the result was a virtually certain consequence of his action.
>
> (LC 304: Murder, manslaughter and infanticide (2006), para.3.27)

Intention as understood by clause (1) above is commonly known as direct intention. R.A. Duff (*Intention, agency and criminal liability*. (Oxford: Blackwell, 1990) [ISBN 9780631153122]) has explained direct intention as being the state of mind of someone who when acting would consider his act a failure if the consequence did not result. Intention as understood by clause (2) is commonly known as indirect or oblique intention. This definition and that of the Law Commission should be learned and understood. It is as good as it gets and you can use it to help you find your way through the sometimes confusing case law.

Activity 5.3

Read Wilson, Sections 6.6.A 'Everyday usage and its relevance to criminal responsibility' and 6.6.C 'The meaning of intention in the criminal law'. In each of the following questions state whether Adam intentionally kills Eve and, if so, whether the form of intention is direct or indirect.

a. **Adam's wife, Eve, is trapped in a car which is about to be engulfed by flames after an accident. She pleads with Adam, who has escaped the wreckage, to kill her before she is burnt to death. Adam does so by a gunshot through the heart.**

b. **Adam and Eve go climbing together in the mountains. While climbing a steep cliff, for which they are roped together, Eve slips and starts to fall. The weight of Eve's body begins to drag Adam off the cliff. Adam therefore cuts the rope, causing Eve to fall to her death.**

c. **Adam, sees Eve trespassing on his field about a kilometre away. In a fury, he takes out his rifle and aims it at her. He knows he is unlikely to hit her since the rifle has a range of only around a kilometre, it is not a very reliable rifle and he is not a very accurate shot. However, Adam is so angry he takes aim and shoots anyway. The shot hits Eve and she is killed.**

5.4 Recklessness

The mental element known as recklessness has had an undistinguished history. On numerous occasions it has been used by judges interchangeably with negligence or gross negligence, especially in the field of manslaughter. In theory, these two fault elements are very different: recklessness is a subjective fault element requiring proof of 'awareness' or 'thought', whereas negligence is an objective fault element which does not. The traditional meaning of recklessness is the deliberate running of an unjustified risk **of which D was aware**.

5.4.1 Awareness of the risk is necessary

The first major authority for the requirement that D be conscious of the risk they were running was *Cunningham* [1957] 2 QB 396. In this case, D ripped a gas meter from the wall of a house in order to steal from it. Gas escaped from the exposed pipes and penetrated next door's house, affecting the occupants. D was charged and convicted of 'unlawfully and maliciously administering a noxious thing so as to endanger life' contrary to s.23 of the Offences Against the Person Act 1861 (OAPA 1861). His conviction was quashed on appeal, as the judge had misdirected the jury on the meaning of 'malicious', telling them it meant 'wicked'. The Court of Appeal stated the correct meaning was that propounded by Professor Kenny, who had said in his *Outlines of the criminal law*. (Cambridge: Cambridge University Press, 1911):

> In any statutory definition of a crime, malice must be taken not in the old vague sense of wickedness in general but as requiring either (1) An actual intention to do the particular kind of harm that in fact was done; or (2) recklessness as to whether such harm should occur or not (i.e., the accused has foreseen that the particular kind of harm might be

> done and yet has gone on to take the risk of it). It is neither limited to nor does it indeed require any ill will towards 'the person injured.

This definition was adopted in *Briggs (Note)* [1977] 1 WLR 605, a case on criminal damage to a car caused by overenthusiastic wrenching of the door handle.

5.4.2 Being aware of a risk does not always require conscious thought process

This definition is true for the few crimes of malice which still remain, of which the most important is malicious wounding, an offence under s.20 OAPA 1861. Professor Kenny talks of the defendant 'foreseeing' the risk of harm of damage. Perhaps a better phrase is 'being aware of', since it is quite possible to be aware of things which might happen without explicitly thinking about them (foreseeing them) at the time of acting. An illustration is *Parker* [1977] 1 WLR 600 in which the defendant, after a bad day at the office, slammed down the receiver on the cradle of a defective public telephone in frustration, which broke the telephone. He was fined for the damage caused and he appealed. The Court of Appeal upheld the fine saying that if D did not think about the risk of damage before he slammed down the telephone then 'he was, in effect, deliberately closing his mind to the obvious – the obvious being that damage in these circumstances was inevitable'.

The Court concluded (Lane LJ at p.604):

> A man is reckless in the sense required when he carried [sic] out a deliberate act…closing his mind to the obvious fact that there is some risk of damage resulting from that act but nevertheless continuing in the performance of that act.

This statement applies to those who know what the risks are but 'close their mind to the obvious'.

But what about those, such as the young and those with learning difficulties, who do not or would not know them in the first place? Are they reckless? In *Stephenson* [1979] QB 695 the defendant was a vagrant who lit a fire to keep warm in a haystack. The haystack was destroyed and he was charged and convicted of criminal damage. However, D had a long history of schizophrenia and expert evidence at trial suggested that he may not have had the same ability to foresee or appreciate risks as the mentally normal person. The trial judge told the jury that it could convict if D closed his mind to the obvious fact that the haystack could be destroyed. Then the judge said 'all kinds of reasons which make a man close his mind to the obvious fact – among them may be schizophrenia, that he is a schizophrenic'. The jury convicted and D appealed.

ACTIVITY 5.4

Read Wilson, Section 6.7.A.1 'The subjectivist stance'.

a. What was the Court of Appeal's response to *Stephenson*?

b. 'Closing the mind' to a risk is obviously a metaphor. But what does it actually mean?

Apart from the 'closing the mind' type of recklessness, one further qualification needs to be made with respect to the requirement that the prosecution must prove conscious foresight. That is if the lack of awareness is due to voluntary intoxication. In *Brady* [2006] EWCA Crim 2413, D was drunk when he climbed on railings at a nightclub and fell on to the dance floor below, causing serious injuries to V who was dancing there. He was charged with malicious infliction of grievous bodily harm, an offence under s.20 OAPA 1861.

Directing the jury as to recklessness, the judge said:

> …where there is no issue of intoxication the test requires that the defendant should be aware of a risk and go on to take it, the risk being of injury.

He then directed the jury on recklessness in the context of voluntary intoxication, saying:

> …if the defendant had been sober and in good mental shape would he have realised that some injury…might result from his actions in what he was doing in the condition he was in that night.

This was accepted as a correct statement of law by the Court of Appeal.

In short, a person is reckless if they are conscious that they were taking an unjustified risk, or were not aware of the risk only because they were intoxicated but would have been aware had they had been sober.

5.4.3 The risk taken must be unreasonable in the circumstances known to the defendant

All of us take risks in our everyday lives. We run across roads, we climb trees. We play cricket, rugby, football and other dangerous sports. We drive cars. Taking risks is part of being a human being: it is not necessarily blameworthy behaviour. Risk-taking is blameworthy, therefore, only if it is a risk that should not have been taken. Lord Justice Lane in *Stephenson* explained the position as:

> A man is reckless when he carries out the deliberate act appreciating that there is a risk that damage to property may result from his act. It is however not the taking of every risk which could properly be classed as reckless. The risk must be one which it is in all the circumstances unreasonable for him to take.
>
> Whether the risk taking is reasonable or not depends upon, in particular, the degree of risk involved, the type and amount of harm which will occur if the risk materialises, and the social utility of the risk taking. Stated as a loose equation the more likely and dangerous the risk taken is, the greater the social utility of taking the risk must be to offset it. A person who drives their car at 90mph in a 60mph zone may well be driving recklessly if they do so because they are late home for dinner. However, a jury may have other views if the person drives so fast because their daughter's appendix has burst, she is bleeding to death and they are taking her to hospital. The risk here is arguably offset by the social utility of the risk-taking. To help you decide these matters for yourself ask yourself honestly 'Is this a risk that I might have taken myself in the circumstances?'

Activity 5.5

Read Wilson, Section 6.7.A 'Recklessness in the criminal law' and answer the following questions.

D returns to the car park where he has left his car to find that it is boxed in by cars on either side. He knows that he will not be able to escape from his parking spot without risking damage to one or other cars. He decides to take that risk. Despite taking as much care as possible, the consequence is that he breaks the wing mirror of one of the cars. Is he reckless for the purpose of criminal damage? Who decides, judge or jury?

5.4.4 Objective form of recklessness

For a short period at the end of the last century, recklessness took on an objective meaning. No longer was it necessary to prove that D **foresaw** the risk of harm accompanying their action; it was enough that they **should have foreseen it**. This was the consequence of the case of *Caldwell* [1982] AC 341.

In this case the defendant had set fire to a hotel while drunk and was charged with reckless arson. He argued that he was so drunk he was unaware of his actions and the likely consequences. This was the kind of argument which had succeeded in *Stephenson,* except here the reason for D's lack of awareness was drunkenness, whereas in *Stephenson* it was his general mental capacity. D was convicted at first instance on the basis of the trial judge directing the jury that his lack of awareness could not be relied upon if it was due to self-induced intoxication (see *Brady* above). The Court of Appeal agreed.

The House of Lords dismissed the subsequent appeal but gave a different reason, namely that whether or not D was intoxicated, it was not in any event a negation of fault that a person did not think that what they were doing was dangerous, when reasonable people would have done so. Far from it; such a failure to think **manifested fault**. Lord Diplock gave the following model direction for judges to give to juries in explaining the notion of recklessness. A person is reckless for the purpose of criminal damage if:

> (1) he does an act which in fact creates an obvious risk that property will be destroyed or damaged and (2) when he does that act he either has not given any thought to the possibility of there being such risk or has recognised that there was some risk involved and has nonetheless gone on to do it.

The key thing about this direction is that it tells the jury that it can convict of a crime of recklessness (such as criminal damage) although D gave no thought to the risk of damage, so long as the risk was obvious; in other words, as long as the reasonable person would have recognised the risk. This definition became the standard definition for all crimes of recklessness, except for crimes of violence such as assault and malicious wounding which, confusingly, continued to require actual awareness of the dangers of causing harm on the part of the defendant (*Spratt* [1990] 1 WLR 1073).

Activity 5.6

Read Wilson, Section 6.7.A.2 '*Caldwell* recklessness' and answer the following questions.

a. **What were the major problems posed by Lord Diplock's new test of recklessness?**

b. **Is the test simply a way of incorporating the 'closed mind' form of recklessness into the definition while ridding it of its ambiguity?**

In *G and R* [2003] UKHL 50, the House of Lords was faced with yet another case involving an unforeseen conflagration. The defendants were young boys of 11 and 12 who were away from home without permission. They set up camp in the back yard of a shop and in the early hours of the morning they lit a fire in a dustbin to keep warm. The fire spread and the shop was gutted: the boys were charged with arson.

The House of Lords acknowledged that the *Caldwell* test of recklessness might operate unfairly for 11 and 12-year-old boys if they were held to the same standard of foresight as reasonable adults. An obvious risk for the latter would not necessarily be obvious for the former. Their Lordships had three choices: to keep the law as it was; to modify it so as to render the test of recklessness sensitive to the characteristics of age, experience and mental capacity of the defendant; or to return the law to its pre-*Caldwell* state. They chose the final option and overruled *Caldwell*.

Activity 5.7

Read Wilson, Section 6.7.A.3 'The retreat from *Caldwell*' and answer the following questions.

a. **What reasons did the House of Lords give for overruling *Caldwell*?**

b. **Do you think that the House of Lords went too far in requiring the defendant to be aware of the risk they are taking?**

c. **Is the 'closed mind' form of recklessness still recklessness or does the overruling require actual foresight of the risk in all cases?**

d. **Do you agree with the decision in *Booth* v *CPS*?**

e. **A finds her car in the car park pinned by the car on either side. She can only enter her car by opening her car door and squeezing inside. She considers whether this creates a risk of denting the neighbouring car and concludes that so long as she is particularly careful when entering the car any damage will be avoided. She is wrong and the car is dented. Is she reckless for the purpose of the crime of criminal damage?**

f. Here is part of a past examination question.

- **D, who is thinking about other things, parks his car in a car park and, without checking to see if any other car is in the vicinity, opens his car door. V's car, which is close by, suffers a serious dent.**
- **Now consider whether D is reckless, in which case he is guilty of criminal damage, or simply negligent, in which case he is guilty of nothing. Apply the law to the facts of this case and make your decision. Remember, there are two routes to concluding D is reckless: (1) D runs an (unreasonable) risk of which he is aware; (2) D closes his mind to an (unreasonable) risk of which he would ordinarily have been aware.**

5.5 Negligence

It is important to be able to distinguish recklessness from negligence. As you know, the formal distinction is that recklessness, which is a form of subjective fault, requires awareness. Negligence, which is a form of objective fault, does not.

All cases of recklessness are automatically also cases of negligence. Recklessness is negligence with added fault, namely 'awareness' of the risk being run. However, not all cases of negligence are cases of recklessness because negligence does not require proof of any awareness of the risk. The two fault elements start to fade into each other when we consider 'closed mind' recklessness, because here the fault element can be established without conscious awareness, so long as the risk was obvious. This can be seen in question (f) in Activity 5.7. Clearly D was negligent but he may also have been reckless if the jury concludes that the risk to the other car was so obvious that he must have closed his mind to it.

Negligence covers a far wider field of fault than recklessness, however, since it describes a person's conduct rather than their state of mind. There are a lot of ways a defendant's conduct may be found wanting, other than by them creating a danger consciously. The Law Commission's definition of negligence makes this clear. It occurs where a person 'fails to exercise such care, skill or foresight as a reasonable man in his situation would exercise' (Law Commission Working Paper No. 31: Codification of the criminal law, general principles, the mental element in crime (1970) www.bailii.org/ew/other/EWLC/1970/c31.pdf).

Activity 5.8

Read Wilson, Section 6.9.B 'Negligence in the criminal law' and answer the following questions.

a. Apply the Law Commission's definition to careless driving. Give examples of the three ways a driver can drive negligently.

b. Which, if any, of these examples might lead the jury to conclude that the defendant was also reckless?

c. Can a person who lacks the skill, capacity for care and foresight of reasonable people escape liability for careless driving by relying on this lack?

d. Are those who possess special skills negligent if they fail to exercise those extra skills or only if they fail to satisfy the standards of ordinary reasonable people?

Crimes of subjective fault are often graduated in terms of the degree of commitment shown to the result. This is why murder is treated more seriously than reckless manslaughter, because D's commitment to the outcome is greater than where D kills only recklessly. Negligence, as a form of objective fault, also forms part of a ladder of gravity. There may be degrees of negligence. At the top end there is gross negligence which is the fault element of gross negligence manslaughter. To be guilty of this offence, the prosecution must prove far more than simply that D 'failed to exercise such care, skill or foresight as a reasonable man in his situation would exercise'. It must show the failure which led to the victim's death **was of such a high degree** that nothing but a manslaughter conviction would address it.

For other crimes, such as dangerous driving, 'extra' negligence beyond that necessary for careless driving is necessary. Careless driving becomes dangerous driving when a driver falls 'far below' the expected standard, and when such a failure brings obvious risks of danger (s.2A of the Road Traffic Act 1988).

Many other crimes have a negligence component. The most obvious example is rape for which, until the passing of the Sexual Offences Act 2003, D would not be liable if he honestly believed the victim to be consenting. The new fault element is negligence (objective fault). D will escape liability for non-consensual intercourse only if his belief that V consented was based on **reasonable grounds**.

A negligence component may also be included in an otherwise strict liability offence by the incorporation of a no-negligence or 'due-diligence' defence. For example, by s.28 of the Misuse of Drugs Act 1971, a person has a defence to the otherwise strict liability crime of possessing controlled drugs if they can prove that they neither believed nor suspected **nor had reason** to suspect that the substance or product in question was a controlled drug. Notice here that there is a reversal of the usual burden of proof. The defence rather than the prosecution has to do the proving. The apparent justification for this is that the offence is one of strict liability and that therefore any escape from liability must be 'hard won'.

Sample examination question

Compare and contrast intention, recklessness and negligence.

Advice on answering the question

Write a skeleton answer, using either the module guide or Wilson or both, of no more than one page which includes:

a. definitions of all three fault elements (remember to highlight the two forms of intention)

b. three (bullet) points of comparison (similarity) and three points of distinction between intention (both forms) and recklessness

c. two (bullet) points of comparison (similarity) and two points of distinction between recklessness and negligence

d. one (bullet) point of comparison (similarity) and three points of distinction between intention and negligence.

Am I ready to move on?

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

1. What is the difference between subjective and objective fault?
2. Is recklessness an example of subjective or objective fault?
3. Define:
    a. direct intention
    b. indirect intention.
4. State the difference between them.
5. True or false? A person does not intend a consequence unless they foresee it as virtually certain.
6. Define recklessness. How does it differ from:
    a. direct intention
    b. indirect intention?
7. Define negligence. How does it differ from recklessness?
8. True or false? A person can be reckless but not negligent if they lack the experience or capacity to appreciate the risk they are taking.

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

Contents

Introduction

So far we have learned that criminal liability requires *actus reu*s and *mens rea*. *Actus reu*s is the external element in the crime package; *mens rea* is the internal element – that which the prosecution has to show was going on in the defendant's mind. We need to understand something further about these elements, namely that in relation to any given crime, *actus reus* and *mens rea* should, in principle, coincide.

There are two facets to this premise. The first is that *actus reus* and *mens rea* should coincide in point of time; that is, liability should depend upon proof that the defendant had the relevant mental attitude **at the moment of** doing the acts which form the *actus reus* of a criminal offence. This is known as **temporal coincidence**. The second facet is that offence definitions should match any relevant conduct, consequence or circumstance with an exactly matching mental state on the part of the defendant. This is known as the **correspondence principle**. Without such correspondence, it is thought, the defendant will be punished for the wrong harm.

6.1 Temporal coincidence

Temporal coincidence is an easy concept to grasp, a less easy concept to apply. Here are some examples falling on either side of the liability fence.

Illustration 6.1

D takes V's wallet, intending to steal from it. A few seconds later he changes his mind and puts the wallet back. Is he guilty of theft?

The commonsense answer is no. D momentarily had the ***mens rea*** for theft but since he decided to put the wallet back there was no ***actus reus***. This is not the legal answer. To discover this we need to apply the lawyer's method. This requires us to consider the definition of theft. Here is a simplified version:

- A person is guilty of theft if they take property belonging to another intending not to return it.

This definition tells us that the offence is made out, since at the time D took the property it was his intention not to return it. ***Actus reus*** and ***mens rea***, thus, coincided in point of time.

We have already come across a few cases where this principle was at issue. One is *Ahmad* (1986) Crim LR 739, where the landlord was charged with harassing his tenant with intent to make him give up occupation. The landlord was not guilty of this crime because he had formed the intention only **after** he had committed the acts (removing windows) relied upon as acts of harassment. See Wilson, Section 4.5.D.2 'Omissions: the common law approach'.

Activity 6.1

Read Wilson, Section 8.1 'Introduction' and answer the following question.

D is a contract killer, with a contract to kill V. He drives to V's house with his gun. On the way there D is involved in an accident when a pedestrian unexpectedly runs out in front of his car. The pedestrian is killed. D gets out of his car to discover the victim is V. D rubs his hands, pleased that he has been saved some effort. Is D guilty of murder?

6.1.1 Avoiding the coincidence requirement

If act and mind do not coincide in time this is not always fatal to a successful prosecution. This is because it may be possible to ignore the initial act and graft liability on to a subsequent omission. This is what happened in *Miller* (1983) (see Chapter 3, Activity 3.8 of this module guide). The act which caused the fire in this case was unaccompanied by *mens rea*, since D was asleep at the time. *Mens rea* was formed only after the act was complete, when D woke up and realised his bed was on fire. This will normally mean that D would escape liability for criminal damage. The House of Lords ruled, however, that the *actus reus* could be based upon D's omission to put out the fire, which omission **was** accompanied by *mens rea* (recklessness). *Actus reus* and *mens rea* coincided, therefore, **at the moment of** D's deciding not to put the fire out because here the *actus reus* was D's omission. The crime was constituted by his reckless (*mens rea*) omission in breach of duty (*actus reus*).

Another way in which the coincidence requirement has been avoided is by reference to the **continuing act** doctrine. In *Fagan* v *MPC* [1969] 1 QB 439 there appeared to be a classic example of a case where the *mens rea* and *actus reus* did not coincide, since *mens rea* was formed only after the harm-causing act had been performed. D had innocently parked his car on a police officer's foot, which he realised only after he had turned the engine off. At that moment he decided not to remove the car. D was convicted at first instance of assaulting a police officer in the execution of his duty. He argued that there had been no assault since the **act** of assault took place without *mens rea*, and when he later formed the *mens rea* there was no accompanying act. It was central to his argument that assault required an act and could not be committed by omission. The Queen's Bench Division agreed that assault required an act and could not be committed by omission. Nevertheless, it affirmed the conviction.

ACTIVITY 6.2

a. Read Wilson, Section 8.1.A.1 'Qualifications to the requirement of temporal coincidence', Section (b) 'Continuing acts'. How did the court justify affirming the conviction when it agreed that assault could not be committed by omission?

b. Read the case of *Director of Public Prosecutions* v *Santana-Bermudez* [2003] EWHC 2908 (Admin) and consider what the act was which constituted the assault in this case. Or was the conduct of S a culpable omission under the *Miller* principle (and so inconsistent with *Fagan*)?

6.1.2 The supposed corpse cases

The principles in *Miller* and *Fagan* constitute two qualifications to the rule that *actus reus* and *mens rea* should coincide in point of time. But they are not exceptions: they are ways of avoiding its application. The supposed corpse cases, however, are an exception to the rule. These are cases where the defendant has attacked the victim and, wrongly concluding the victim is dead, disposed of the body, which disposal is the actual cause of death.

The first case in which this complex scenario surfaced, *Meli* v *The Queen* [1954] 1 WLR 228, was a case involving a preconceived plan to kill the victim. Their plan was to lure V to a hut in a deserted spot, beat him to death and then roll him over a cliff to fake an accident. The plan nearly worked perfectly. The defendants lured V successfully to the spot, beat him up and then, having concluded that V was dead, they rolled him over the cliff. Actually he was not dead at the time. He died as a result of exposure from being left at the foot of the cliff. The defendants were charged with murder. They argued that the act which caused death (the disposal of the supposed corpse) was unaccompanied by *mens rea* since at that time they thought death had already occurred, and so *actus reus* and *mens rea* did not coincide. Not surprisingly the Privy Council rejected this argument.

> It appears to their Lordships impossible to divide up what was really one transaction in this way. There is no doubt that the accused set out to do all these acts in order to achieve their plan and as parts of their plan; and it is much too refined a ground of judgement to say that, because they were under a misapprehension at one stage and thought that their guilty purpose had been achieved before in fact it was achieved, therefore they are to escape the penalties of the law. (Lord Reid)

In *Church* [1966] 1 QB 59, where there was no preconceived plan, a different explanation was given which centred on the chain of causation. D panicked when, having struck V, she fell down, apparently dead. D threw the supposed corpse in the river, and V died of drowning. D was charged and convicted of manslaughter but argued that *actus reus* and *mens rea* did not coincide. The Queen's Bench Division disagreed, recommending that homicide is the appropriate verdict if the appellant's 'behaviour from the moment he first struck her to the moment when he threw her into the river' could be regarded 'as a series of acts designed to cause death or grievous bodily harm'. If that was how the jury 'regarded the accused's behaviour, it mattered not whether he believed her to be alive or dead when he threw her in the river' (Edmund-Davies J).

Put simply, D had the *mens rea* for manslaughter when he first struck V. V died following a series of further acts on D's part, none of which broke the chain of causation.

This causation account was elaborated upon in *Le Brun* [1992] QB 61. The defendant struck his wife in the course of an argument outside their front door. She fell down, struck her head and lapsed into unconsciousness. She died as a result of injuries sustained when D dragged her from the road into the house to avoid detection. In response to the argument that *mens rea* and *actus reus* did not coincide, Lord Lane CJ for the Court of Appeal said:

> It would be possible to express the problem as one of causation. The original unlawful blow to the chin was a *causa sine qua non* (but for cause) of the later *actus reus*. It was the opening event in a series which was to culminate in death: the first link in the chain of causation, to use another metaphor. It cannot be said that the actions of the appellant in dragging the victim away with the intention of evading liability broke the chain which linked the initial blow with the death. In short, in circumstances such as the present, which is the only concern of this court, the act which causes death, and the necessary mental state to constitute manslaughter, need not coincide in point of time.

Activity 6.3

Read Wilson, Sections 8.1.A 'Temporal coincidence' and 5.5.B.1 'The general framework for imputing cause' and answer the following question.

Lord Lane CJ says in *Le Brun* 'It cannot be said that the actions of the appellant in dragging the victim away with the intention of evading liability broke the chain which linked the initial blow with the death'. If, as he also states, the 'problem is (only) one of causation' why should it matter what the appellant's intentions were in dragging the victim away? What intentions would break the chain of causation and why?

6.2 Correspondence principle

Simply put, the correspondence principle requires a corresponding mental element for each aspect of the *actus reus*; that is, conduct, circumstance and consequence. The principle derives from the broader ethical principle that conviction and punishment be deserved. If a person can be punished for doing X without a mental element corresponding to X, then the punishment is undeserved and unfair.

Illustration 6.2

A person is guilty of theft if they dishonestly appropriate property belonging to another with the intention of permanently depriving the other of it. The *actus reus* of theft is appropriating property belonging to another. The correspondence principle, as a minimum, requires that:

a. **A intends to appropriate the property. So if the property is secreted in her bag without her knowing, the correspondence principle requires an acquittal.**

b. **A intends to appropriate property belonging to another. This requires her to know or believe that the property she is appropriating belongs to someone else. So if A takes an umbrella from a stand believing it is her own or has been abandoned, the correspondence principle demands an acquittal.**

Activity 6.4

If it is an offence for a person to have sexual intercourse with a person lacking mental capacity, what (corresponding) *mens rea* does the correspondence principle require?

The correspondence principle is an ethical or normative principle rather than a descriptive principle. In practice, a good many crimes can be committed without a perfect match between *actus reus* and *mens rea*. Indeed, the majority of crimes of violence bear an *actus reus* without a corresponding mental attitude. Murder is a prime example.

Activity 6.5

Read Wilson, Section 8.1.B.1 'Qualifications to the requirement of definitional concurrence', Section (b) 'Definitional non-correspondence' and answer the following questions.

a. **Which important offences breach the correspondence principle?**

b. **How does Horder justify these breaches in his article 'Transferred malice and the remoteness of unexpected outcomes' (2006) *Crim LR* 383 (available in Westlaw)?**

c. A, intending to teach V a lesson, breaks V's legs with a baseball bat. V, attempting to get up, falls over and hits his head on the pavement, which kills him. Should A be guilty of murder? Is she guilty?

6.3 Transferred malice: a qualification to the correspondence principle

No breach of the correspondence principle occurs if the defendant commits the formal *actus reus* of an offence with the relevant *mens rea* for that offence, but the subject matter of that *actus reus* was other than that intended or foreseen by the defendant.

ILLUSTRATION 6.3

D, intending to shoot B dead, misses B and kills C, an innocent bystander.

D is still guilty of murder. He has the *mens rea* for murder and he has committed the *actus reus* of murder. He has also committed the offence of attempted murder in relation to B (*R* v *Gnango* [2011] UKSC 59). The criminal law permits the *mens rea* in relation to B to be joined to the *actus reus* committed against C. This qualification is known as the doctrine of **transferred malice**.

> The effect of transferred malice … is that the intended victim and the actual victim are treated as if they were one, so that what was intended to happen to the first person (but did not happen) is added to what actually did happen to the second person (but was not intended to happen), with the result that what was intended and what happened are married to make a notionally intended and actually consummated crime. The cases are treated as if the actual victim had been the intended victim from the start.
>
> (Lord Mustill in *A-G's Reference (No 3 of 1994)* [1998] AC 245 at 262.)

The principle applies to all crimes of violence, not merely murder. So in *Latimer* (1886) 17 QBD 359 D swung a belt at X in a pub, which missed X and hit V, standing behind him. D was found guilty of assault against V although he neither intended to hit V nor even knew V was there. In each case the malice/intention D entertained with respect to the intended victim transfers to the *actus reus* of the crime committed against the real victim.

It applies even where the harm suffered by the unintended victim differs from that which the attacker intended his victim to suffer. This was made clear in in *R* v *Grant* [2014] EWCA Crim 143. D fired shots into a shop intending to kill X. The shots missed and hit V1 and V2 who were bystanders. D was charged with attempted murder (on X) and causing grievous bodily harm with intent, contrary to s.18 of the Offences Against the Person Act 1861 in relation to V1 and V2. D argued that the transferred malice principle only applied where the crime committed against the unintended victim was identical to that intended against the intended victim. Here it was not. He argued that the fact he intended to kill X meant that he did not have the intention to cause X GBH. As a result, there was no 'malice' to transfer. The court rejected this argument. If D had the intention to kill X he must also have had the intention to do him serious injury by definition.

One qualification is in order. The principle applies only with respect to crimes of the same family. In *Pembliton* (1874) D threw a stone at X in the course of a fight with X and Y. It missed X and broke a window. D was indicted for criminal damage. The Court for Crown Cases Reserved said that the intention to harm X (a crime against the person) was not sufficient to support a conviction for causing criminal damage to V's property (a crime against property). Lord Blackburn said that D could be guilty of criminal damage only if he intended or foresaw damage to the window. Since that had not been argued by the prosecution the conviction was quashed.

Activity 6.6

Read Wilson, Section 8.1.B 'Definitional concurrence' and answer the following questions.

a. **A fires a gun at B, intending to kill him. The bullet misses B and rebounds off the wall, injuring C. Can A be charged with wounding with intent?**

b. **A fires a gun at B, who is in a car. The bullet hits the car door and rebounds, killing C's dog who is on the pavement. Is A guilty of causing criminal damage to the dog?**

Am I ready to move on?

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

1. State and explain the temporal coincidence rule.
2. Give two ways in which the temporal coincidence rule can be avoided.
3. Explain the legal position relating to the supposed corpse cases.
4. State and explain the correspondence principle.
5. Give two examples of how the correspondence principle is not always adhered to.
6. Explain the doctrine of transferred malice.
7. Explain why the doctrine of transferred malice is a qualification of the correspondence principle.

NOTES

7 Criminal homicide

Contents

Introduction

Criminal homicide comprises two key forms: murder and involuntary manslaughter. Both forms involve a similar *actus reus*, namely **an unlawful killing of a human being**. They are distinguished by their respective mental elements.

- Murder requires the killing to be accompanied by an **intention** to kill, or an intention to cause grievous bodily harm. Manslaughter does not.
- Manslaughter does require proof of fault but the nature of that fault varies according to the type of manslaughter charged.
  - Reckless manslaughter requires **foresight** of death or serious injury.
  - Gross negligence manslaughter requires no foresight, but a very high degree of **negligence** as to the risk of death.
  - Constructive manslaughter requires neither foresight nor even negligence as to the risk of death (or serious injury). It requires simply the commission of a crime likely to cause harm with the relevant *mens rea* for that crime.

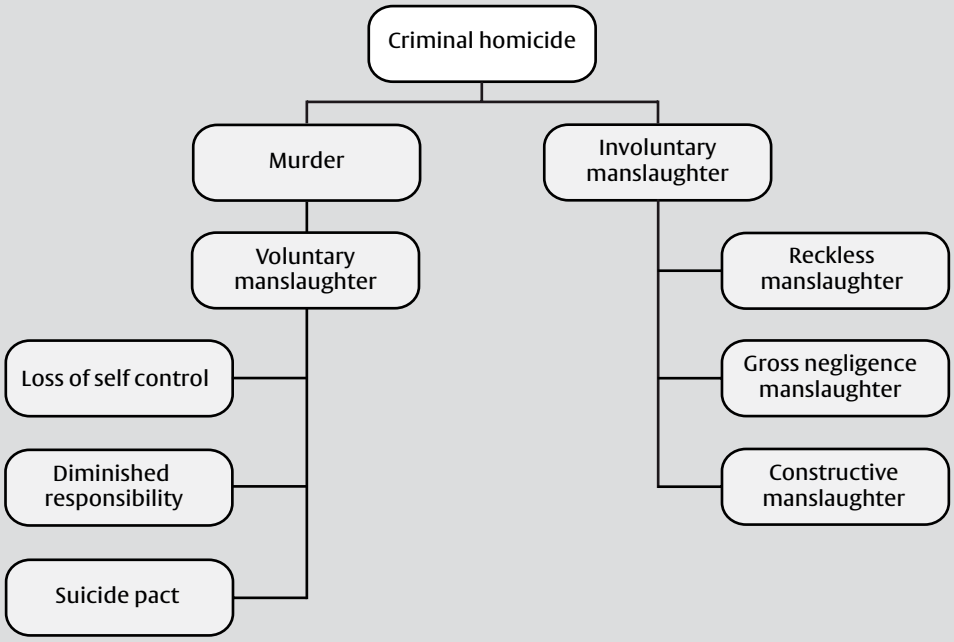

Figure 7.1

Illustration 7.1

a. **D launches a savage attack on V with fists and feet. V dies in hospital of his injuries.**

b. **D, wishing to scare V from the neighbourhood, pours petrol through V's letterbox and sets it alight. V dies in the resulting fire.**

c. **D, angry with V, delivers a single punch to V's chin. V falls over and hits his head on the pavement. V dies of the injury due to a weakness in his skull.**

d. **D, an anaesthetist, gives V who is undergoing an operation a massive overdose of anaesthetic having failed to notice a decimal point on the dosage recommended in her anaesthetist's handbook. V dies as a result.**

e. **D, aged 20, points a gun at V, her 10-year-old brother, in the course of a game and pulls the trigger. D believes it to be the toy gun given to her brother for Christmas. In fact it is the gun of her mother, who is a police officer, and the gun is loaded. V dies of the wound.**

Each of the above illustrations involves a killing of a human being. The first four involve a criminal homicide since the killing is unlawful.

a. is murder since D has the fault element for murder.

b. is reckless manslaughter. Although lacking the intention to kill or cause grievous bodily harm, there is evidence of foresight of either of these results. It is also constructive manslaughter.

c. is constructive manslaughter. Although D neither intended nor foresaw death or serious injury he did intend to cause injury to V which is sufficient *mens rea*.

d. is gross negligence manslaughter, which, depending on the jury's view of the matter, is charged when D kills V not in the course of an attack but in the course of doing something so carelessly as to justify holding D to account for the death.

e. also involves homicide but it is not a criminal homicide, since D lacks criminal fault and so the killing is not unlawful.

In this chapter we shall begin with an examination of the common elements in murder and involuntary manslaughter, namely that there should be an unlawful killing of a human being. We shall follow up by examining each individual offence in turn, beginning with murder. Murder has three partial defences which, if successfully raised, reduce murder to voluntary manslaughter. We shall look at two of them, namely loss of self-control and diminished responsibility. We shall then examine the three forms of involuntary manslaughter.

7.1 Common elements in criminal homicide

The common elements in criminal homicide are the prime conduct elements, constituted by 'an unlawful killing of a human being'. These elements comprise a killing, an unlawful killing and a human victim.

7.1.1 A killing

A killing in this context follows the general template for all criminal offences. It requires an act or, in the case of murder and gross negligence manslaughter but not constructive manslaughter, an omission in breach of duty.

Activity 7.1

Read Wilson, Section 13.3.A.2 'Unlawful killing' and answer the following questions.

a. **What are the three principal ingredients which make up a 'killing'?**

b. **If V refuses consent to a life-saving operation must his surgeon still perform the operation if she is to avoid a conviction for criminal homicide?**

c. **Under what circumstances will an omission to prevent someone from dying amount to a 'killing'? If you have forgotten, read Wilson, Section 4.5.D.3 'Circumstances giving rise to a duty to act: duty situations'.**

d. **For the purpose of criminal homicide, when will D be considered to have caused V's death? If you have forgotten, read Wilson, Section 5.5 'Causation: the legal position'.**

7.1.2 An unlawful killing

A killing is lawful if it is accidental; that is, not blameworthy (see Illustration 7.1(e)). It is also lawful if a valid defence operates, for example self defence.

Consent is not a defence to liability for criminal homicide by affirmative action: there is no defence of euthanasia or of (consensual) duelling. A recent affirmation of this principle occurred in *Nicklinson* (2014). Mr Nicklinson suffered from 'locked-in-syndrome', following a stroke, which rendered every muscle in his body below his eyelids paralysed. He sought a declaration that it would be lawful on grounds of necessity for his doctors or his wife to terminate his life, since his condition rendered his life intolerable. He claimed that a refusal would be in violation of his human rights and his autonomy since, because of his total paralysis, he was being denied the rights of all other people to take the steps necessary to kill himself in such intolerable circumstances. His claim was rejected. The appeal was rejected by the Supreme Court. The decision was later affirmed in the European Court of Human Rights case *Nicklinson* v *UK (Admissibility)* (2478/15) (2015) 61 EHRR SE7 on the ground that the matter was so morally contentious that only Parliament could properly address it. It should be noted that no such caution characterised the court decision in an equivalent challenge made in Canada (*Carter* v *Canada (Attorney-General)* 6 February 2015). The prohibition on physician assisted suicide was declared contrary to human rights by the Supreme Court of Canada. In reaching this conclusion the Court ruled that the corresponding prohibition in the Canadian Criminal Code (241(b)) infringed s.7 of the Canadian Charter of Rights and Freedoms.

United Kingdom criminal law does respect a person's autonomy to a certain degree, however. If V refuses medical treatment which will save their life, or even the life of another, doctors who accede to that refusal are not responsible for the resulting death(s). Indeed the doctors will be acting unlawfully if they override V's decision and operate. So it was unlawful for a doctor to perform an emergency caesarean on a woman without her consent, although it was necessary to save the life of both the woman and her unborn child (*St George's Healthcare NHS Trust* v *S* [1999] Fam 26).

ACTIVITY 7.2

If respect for autonomy explains the court's approach in the latter case, how can the decision in *Nicklinson* be justified?

No feedback provided.

7.1.3 A human victim

The law of criminal homicide protects only living humans. It is not criminal homicide to kill a foetus in the womb, although this may constitute the separate offence of abortion or child destruction. A criminal homicide also cannot be charged if the acts are directed against a person already dead. Therefore, two issues need considering: first, when does life begin, and second, when does life end?

ACTIVITY 7.3

Read Wilson, Section 13.3.A.3 'In being' and then answer the following questions.

a. **What test do the courts apply in deciding whether the victim's life had begun at the time of the unlawful act in question?**

b. **If D performs an abortion on herself which causes the child to be born alive but the child then dies because it is born prematurely, is a conviction for murder or manslaughter possible?**

c. **Do you agree with their Lordships' conclusion in the *A-G's Reference (No 3 of 1994)* case that, as a matter of principle, the intention necessary to convict D of murder could not be transferred from the mother to the foetus and then back again to the living child? Why did the intention not transfer between the mother and the child as soon as the child was born?**

d. **Would their Lordships' conclusion have been different if the prosecution had been able to prove that D had stabbed V for the purpose of killing the foetus rather than hurting V?**

e. **What test do the courts apply in deciding whether the victim's life had already ended at the time of the unlawful act in question?**

f. **Under what circumstances will it not result in a conviction for criminal homicide if D removes a patient from a life-support machine? You might find it helpful to reread Wilson, Section 4.5.D.1 'Acts and omissions: what's the difference?' on this question as well as the above reading.**

7.2 Murder

We have examined the *actus reus* of murder, which is an unlawful killing of a human being. All that is left to discuss, of the basic elements, is the *mens rea*.

7.2.1 Intention to kill or cause grievous bodily harm

Traditionally, the fault element in murder is described as malice aforethought. However, it is better to forget this form of words, which was coined in an earlier, less definition-driven age. Neither malice nor premeditation is required. A killing done intentionally in the heat of the moment is just as much murder as one which has been planned and premeditated. An intentional killing is murder if prompted by compassion as much as if it is prompted by greed. So, in *Inglis* [2011] 1 WLR 1110, the Court of Appeal upheld the conviction for murder of a mother whose son was suffering persistent vegetative state following a car accident and whom she had deliberately injected with heroin as an act of compassion.

The *mens rea* for murder is intention to kill (also known as express malice) or intention to cause grievous bodily harm (also known as implied malice). The mental state common to both these is intention.

7.2.2 What does intention mean?

We examined the meaning of intention in Chapter 5 of this module guide. It means, in the context of murder, having death (or grievous bodily harm) as one's objective in acting as one did such that, if death (or grievous bodily harm) did not occur, one would consider one's action a failure (Duff, 1990).

Occasionally, the judge will direct the jury that it is entitled to find intention in the absence of evidence of such 'direct' intention if, although it was not the actor's aim or objective to cause death (or grievous bodily harm), the jury considers that D knew either of these outcomes was virtually or morally certain. This is known as 'indirect' or oblique intention. As we have already covered in detail what intention means, in this chapter you will see how it is used in practice.

Much of the criminal law is about getting the right instruction for the jury. Many of the cases which you have encountered here and in Wilson, and will continue to encounter, are cases where the judge got this instruction wrong – if only slightly – which opened up the case to an appeal. I hope this makes you feel more comfortable about your own knowledge and understanding!

7.2.3 Directing the jury on the *mens rea* for murder

In the vast majority of cases the judge must give the jury the **standard** direction, which does not define intention except to say that intention is different from motive. So, on the facts in Illustration 7.2, only a standard direction should be given.

Illustration 7.2

D, a gangster, stabs V through the abdomen in the course of a fight. V dies. D is charged with murder. D denies an intention to kill or cause grievous bodily harm. He says it was an accident.

The standard direction will be something like this:

> Members of the jury, to find the defendant guilty of murder the question you must ask yourself is: 'Did D stab V with the intention of killing V?' If you are not sure that he did have this intention then ask yourselves: 'Did D stab V with the intention of causing V serious injury?' If your answer to either of these questions is yes then you must find the accused guilty of murder. If you are not sure that he had either of these intentions but are sure that he did intend some harm then you may find him guilty of manslaughter.

Now assume the following facts.

Illustration 7.3

D, a gangster, throws V, a rival gangster, off the roof of a three-storey house and is charged with murder. D claims that it was not his intention to kill or cause grievous bodily harm to V: they were rivals and he did it to 'teach him a lesson and to make him fearful of challenging D's supremacy'.

Here there is evidence that D may well have had something else in mind other than death or grievous bodily harm when he threw V off the roof. The jury will, therefore, need some guidance as to whether it is entitled to convict D of murder given the extreme likelihood that death or serious injury would result from such an act. Only where, as here, the evidence strongly supports the possibility that D acted for a purpose other than to kill (e.g. to frighten, to escape, to intimidate, to reduce pain suffered by the other) must the special direction be given. For example:

> Members of the jury, you have been told that it was not D's intention in throwing V off the roof to kill him or cause him serious injury but simply to teach him a lesson. You are entitled to disbelieve this but if you think that this claim may be true I must direct you that you may still find the necessary intention if you are convinced that, whatever else D intended, he knew that one of these consequences would almost certainly occur. If you think that, then I must also direct you that you are **not** entitled to find the necessary intention, unless you feel sure that death or serious bodily harm was a virtual certainty, barring some unforeseen intervention, as a result of the defendant's actions and that the defendant appreciated that such was the case. In deciding whether the intention is present, however, you must make your decision on the basis of all the evidence.
>
> (based on *Woollin* [1999] AC 82, per Lord Steyn at 87)

Most juries would convict of murder on the basis of such a direction as they would no doubt consider broken bones (grievous bodily harm) **at the very least** to be a virtual certainty and be prepared to impute that knowledge to the defendant on the basis that if they know it then he knew it.

There are two important things to be noted about this direction. The first is that the direction does not instruct the jury that it is bound to find intention where there is foresight of certainty, only that it is entitled to. The second is that the direction tells the jury that it may not find the necessary intention unless the defendant foresaw the death or grievous bodily harm as virtually certain. Foresight of high probability is not enough. This would be sufficient only for manslaughter.

Now consider this example.

Illustration 7.4

D is caught in a blazing fire in the third-storey bedroom of her home with V, her three-year-old son. D panics, believing that they are both doomed unless they jump out the window. She pushes her son out of the window and then jumps herself. V dies in the fall; D survives.

Again there is evidence that D had something else in mind other than causing death or grievous bodily harm when she threw V out of the window. Again, therefore, the jury

will need some guidance as to whether it is entitled to convict D of murder given the extreme likelihood that death or serious injury would result from such an act. Again the *Woollin* direction must therefore be given:

> Members of the jury, you have been told that it was not D's intention in throwing V out of the window to kill him or cause him serious injury. Far from it, it was to save him. If you think that this claim may be true I must tell you that you may still find the necessary intention if you are convinced that, whatever else D intended, she knew that one of these consequences would occur. If you think that, then I must direct you that you are **not** entitled to find the necessary intention, unless you feel sure that death or serious bodily harm was a virtual certainty (barring some unforeseen intervention) as a result of the defendant's actions and that the defendant appreciated that such was the case. In deciding whether the intention is present, however, you must make your decision on the basis of all the evidence which requires you of course to consider the context within which D threw her son out of the window.

A jury would probably not wish to convict of murder on the basis of such a direction although it would no doubt still consider broken bones (grievous bodily harm) **at the very least** to be a virtual certainty and be prepared to impute that knowledge to the defendant on the basis that if they know it then she knew it.

The jury would be entitled not to convict because of two aspects of the direction. The first, dealt with above, is that the direction does not instruct the jury that it is **bound to** find intention where there is foresight of certainty, only that it is **entitled to**. The second is that the direction tells the jury to reach its decision on the basis of all the evidence. Taking into account D's motive, this form of words sends a pretty clear message to the jury that 'foresight of certainty' is not conclusive. With this message, the jury's natural humanity can be relied upon to reach the common-sense verdict of not guilty.

Note that if D is not guilty of murder, the jury should not bring in a verdict of manslaughter either, since, in effect, they are concluding that the killing was not done recklessly (justified-risk taking), was not unlawful (no intention to harm/ no recklessness) and was not grossly negligent (reasonable conduct in the circumstances).

Of course there are other means of avoiding a conviction for murder here, namely the possibility of raising a defence of necessity, but the courts have set their face against developing a general defence of necessity to cover such cases preferring to rely on the jury's good sense via the *mens rea* requirement.

Note: If D kills using a lethal weapon, poison or extreme violence, the standard direction will almost invariably be the correct one and *Woollin* should not be used.

7.2.4 What has to be intended?

It is important to remember that the *mens rea* for murder is **either** an intention to kill the victim **or** an intention to cause grievous bodily harm to the victim. This was made clear in *Vickers* [1957] 2 QB 664 and confirmed in *Cunningham* [1982] AC 566, in which the defendant repeatedly hit the victim over the head with a chair which caused his death. The defendant appealed against his conviction for murder, arguing that *Vickers* was wrongly decided and an intention to kill was necessary. This was rejected and *Vickers* affirmed.

Activity 7.4

Read Wilson, Section 13.4.A.2 'The law post-1957' and answer the following questions.

a. **How have the courts defined 'grievous bodily harm'?**

b. **Is it a helpful definition?**

c. **Who decides whether the harm intended by D is properly described as 'grievous'?**

d. **Does 'grievous bodily harm' require the harm intended to be potentially life threatening?**

7.2.5 Directing the jury: intentional violence

So how should the jury be directed in a case where, although D causes V's death by an act of intentional violence, the injury intended was not life threatening?

Consider the following example.

ILLUSTRATION 7.5

D, a member of a criminal gang, decides to teach V, a member of a rival gang, a lesson. D takes an iron bar, smashes both V's kneecaps with it and leaves him in the street. V crawls along the pavement and tumbles on to the road where he is killed by a passing car.

In this case the prosecution has all it needs to gain a conviction for murder. It can prove both *actus reus* and causation. It also has strong evidence of a direct intention to cause V grievous bodily harm. It has no need to prove anything else. The trial judge will direct the jury as follows.

> Members of the jury, to find the defendant guilty of murder the question you must ask yourself is: 'Did D act with the intention of killing V?' If you are not sure that he did, then ask yourselves: 'Did D act with the intention of causing V serious injury?' If he did, this is sufficient to convict. It is not necessary for the prosecution to prove to you that the injury D intended was life threatening. What it has to prove is that the injury is really serious. It is up to you to decide whether smashing both kneecaps is really serious injury for this purpose but I hardly need to advise you that the consequences of such an injury, although not life threatening, are likely to be long lasting and severe.

7.2.6 Reforming murder

There is general dissatisfaction with the law relating to murder. The major problem from which all others derive is the mandatory life sentence. This means that a cold-blooded serial killer receives the same sentence as a caring spouse who performs euthanasia on a terminally ill partner, and the same sentence as someone (as in Illustration 7.5) who, intending only to cause serious injury, causes that person's death when others would have survived. Many commentators believe that the intention to cause serious injury should not be sufficient for murder since it is a form of constructive liability; that is, liability for the greater crime (murder) is constructed out of the elements of a lesser crime (causing grievous bodily harm with intent). This is a breach of the correspondence principle (see Chapter 6 of this module guide) and, given the mandatory life sentence for murder, it is a gross breach. See, for example, Lord Steyn's speech in *Powell and Daniels* [1999] 1 AC 1.

ACTIVITY 7.5

The Law Commission has recommended that murder should be divided into two degrees of gravity (Law Com 304: *Murder, manslaughter and infanticide* (2006)). You will find discussion of this and other reform proposals in Wilson, Section 13.4.B 'Conclusions: a rational *mens rea* for murder', which you should now read. What reforms are advocated here? Do you agree that murder should include certain forms of reckless killing?

No feedback provided.

7.3 Voluntary manslaughter

Apart from the general defences, murder is served by three special (partial) defences which, if successful, reduce a murder conviction to a conviction for voluntary manslaughter. It is called voluntary manslaughter because the prosecution can prove the killing was voluntary (in the sense of being intended or almost intended), but the context provides a degree of mitigation which would render the mandatory sentence unjust. We shall be covering here two of these partial defences, namely **loss of control** (known as provocation until 2010) and **diminished responsibility**.

7.3.1 Provocation

Provocation still applies in relation to killings preceding 2009 and so will be dealt with very briefly here. It is similar in structure to the defence which replaces it, namely, loss of control. Moreover, many of the principles underlying the defence are similar to those underlying the new defence so it is useful to read this section carefully.

Provocation had a subjective and an objective element. The subjective element was that the killing should result from a loss of self-control which was triggered by provocative deeds or actions. Loss of self-control which has not been triggered by another's deeds or actions is not covered by the defence (*Acott* [1996] 4 All ER 443). The requirement of loss of self-control excluded revenge, and other premeditated killings, from the coverage of the defence (*Ibrams* (1982) 74 Cr App R 154). It was long thought to mean that the defence could not be relied upon if there was a time lapse between the last piece of provocation and the killing (*Duffy* [1949] 1 All ER 932). In *Ahluwalia* [1992] 4 All ER 889 it was said that although provocation required a loss of self-control it did not necessarily follow that it should be by way of **immediate** reaction. In particular, a woman subject to cumulative domestic abuse might lose her self-control after a period of 'slow burn', simmering anger which erupts long after the last provocative event. So long as the killing was by way of loss of self-control, and not revenge or premeditation, the defence remained available.

The objective element was that the defendant's conduct should be consistent with that of reasonable people faced with a similar trigger. In deciding this question the jury was to take into account any characteristics of the defendant which **made the acts or words of the provoker provocative**, for example their race, size, weight, colour, hair colour, habits or sexuality, if this was the target of the provocation. The jury was **not** to take into account any characteristic which may have reduced the defendant's **self-control** below that of reasonable people (e.g. their intoxication, mental illness, excitable or aggressive temperament).

7.3.2 Loss of control

The Coroners and Justice Act 2009 retains the overall structure of provocation, but restricts its application considerably by limiting the kind of triggers upon which the defendant can rely to ground their loss of self-control. Under the previous law, defendants had successfully used the defence in many cases thought to be undeserving, for example loss of self-control triggered by a crying infant, a nagging partner or, most commonly, an unfaithful partner. This is no longer possible. The new defence requires the defendant's conduct to be partially justified by the context. It is not enough, in other words, that they, perhaps excusably, simply 'lost it'.

Section 54 of the act states the guiding principles of the new defence:

(1) Where a person ('D') kills or is a party to the killing of another (V) D is not to be convicted of murder if –

  (a) D's acts **and omissions** in doing or being a party to the killing resulted from D's loss of self-control, the loss of self-control

  (b) the loss of self-control had a **qualifying trigger**, and

  (c) a person of D's sex and age, **with a normal degree of tolerance and self-restraint and in the circumstances of D, might have** reacted in the same or in a similar way to D.

(2) For the purposes of subsection (1)(a), **it does not matter whether or not the loss of control was sudden** [our emphasis].

7.3.3 The subjective element

Like provocation, the defence contains a subjective hurdle requiring a loss of (self-) control, which is caused by what is termed a qualifying trigger.

7.3.4 Loss of control

The concept of loss of control is not straightforward. What is it to lose self-control? In *Duffy* [1949] 1 All ER 932, decided under the old law, Devlin J gave the classic definition as involving the accused being 'so subject to passion as to make him or her for the moment not master of his or her mind'. In other words, loss of self-control is not simply a loss of temper. It requires the defendant, literally to be rendered unable to control themselves. The fact that the killing appears frenzied or disproportionate is not in itself sufficient evidence of this (*R* v *Goodwin* [2018] EWCA 2287). It follows from the requirement that the defendant killed while out of control that a revenge killing cannot ground the defence. This is in fact made explicit in s.54(4), which states that the defence is not available if, in doing or being a party to the killing, the defendant acted in a considered desire for revenge. But, consolidating *Ahluwalia*, the loss of self-control does not have to be sudden. As *Ahluwalia* made clear, it is quite possible for a loss of control to be experienced in cases such as cumulative domestic abuse even after a significant delay between the abuser's last act and the victim's reaction. However, the judge should always direct the jury that, as a matter of pure evidence, the longer the time lag between the trigger and the killing, the less likely it is that the killing is attributable to D's loss of self-control. In *R* v *Dawes and Hatter* [2013] EWCA Crim 322, the defence was held not available where the killings, although clearly influenced by the consequences of the break-up of relationships, were premeditated and considered rather than spontaneous.

7.3.5 The qualifying triggers

As has been explained, to rely on loss of control, the trigger must be sufficiently serious to justify the loss. There are two such 'qualifying' triggers.

> Section 55(4) Where D's loss of self-control was attributable to a thing or things done or said (or both) which—
>
> (a) constituted circumstances of an extremely grave character, and
>
> (b) caused D to have a justifiable sense of being seriously wronged.

7.3.6 First qualifying trigger

The first qualifying trigger is fear of serious violence. Specifically, it operates where D's loss of self-control was attributable to D's fear of serious violence from V against D or another identified person (s.55 (3)).

A typical scenario covered by this trigger is the person who, after a period of cumulative violence, snaps and kills their tormentor (see *Ahluwalia*, above). Read together with s.54(1) and (4), the fear must trigger a loss of self-control rather than, say, a desire to be avenged or a rational decision to put an end to an ongoing source of torment. This qualifying trigger would also cover cases such as *Clegg* [1995] 1 AC 482 and *Martin (Anthony)* [2001] EWCA Crim 2245 (see Chapter 11) where the respective defendants killed wrongdoers in circumstances where there was reason for fear but no good reason for what transpired to be an (over)reaction to that fear. In both cases, the defendant's claim would be something to the effect that, 'In the heat and stress of the moment I was so fearful of the prospect of myself (or my colleagues) being killed or seriously hurt that I just lost my ability to control myself'.

As may be appreciated, the kind of scenario in which this trigger operates is the same kind of scenario that might also generate a plea of self-defence. In practice, because a successful raising of self-defence is a total defence, a person who kills in the context of violence used or threatened against them or another is likely to prefer raising this defence, either in addition to or in substitution for loss of control. If they fail with self-defence, the court may allow the evidence raised in support of this defence, if it is sufficiently compelling, to be considered by the jury in relation to the alternative defence of loss of control (*R* v *Goodwin* [2018] EWCA 2287).

Illustration 7.6

W comes across H viciously beating C, their infant child. W loses control and stabs H through the heart with a kitchen knife, killing him.

There are two defences W can run here. The first is self-defence, which is available (like loss of control) where **another person** is subject to the attack or threatened attack. The second is loss of control. By raising the evidence needed to run self-defence, W may avail herself of loss of control if, for example, the jury reject the former defence on the ground that the force used was disproportionate.

7.3.7 Second qualifying trigger

The second qualifying trigger operates

> Where D's loss of self-control was attributable to a thing or things done or said (or both) which—
>
> (a) constituted circumstances of an extremely grave character, and
>
> (b) caused D to have a justifiable sense of being seriously wronged (s.55(4).

This is the more usual trigger relied upon to raise loss of control, reflective of the kind of triggering event relied upon under the previous law of provocation. It poses two questions.

1. Is the loss of self-control attributable to things said or done which constitute circumstances of **an extremely grave character**?
2. Did these extremely grave circumstances cause D to have a **justifiable** sense of being **seriously wronged**?

The first question is designed to filter out trivial triggers such as 'nagging', crying babies and sexual jealousy because they do not constitute circumstances of an 'extremely grave character'. Sexual infidelity is in fact explicitly excluded from the range of qualifying triggers by s.55(6) (see below).

There are two components to the second question. The trigger must cause D to feel seriously wronged. If D would have killed anyway, the trigger is inoperative (see also discussion of s.55(6) below). Also, D must be **justified** in feeling that they have been seriously wronged. It will normally follow from being the subject of an extremely grave provocation that a person's sense of being seriously wronged is justifiable.

But not always. In *Bowyer* [2013] EWCA Crim 322 D, who was known to V, was discovered burgling V's flat. V, in his anger, made some extremely insulting comments about D's girlfriend whereupon D lost his self-control and killed V. The Court of Appeal confirmed that the defence was not available since D's status as a burglar blew apart his claim that he was **justified** in thinking he was being seriously wronged.

Activity 7.6

Read Wilson, Section 13.5.A.2 'The elements of the defence', Section (a) 'The subjective element' and answer the following questions.

a. A calls B a paedophile. B loses self-control and kills A. Assuming this insult constitutes circumstances of 'an extremely grave character', under what circumstances, if any, would B's sense of being seriously wronged not be justifiable?

b. V imprisons X in order to prevent X from executing his plan to harm Y. X kills V in indignant reaction to the loss of freedom. Is the defence of loss of self-control available to X?

7.3.8 Other restrictions on the use of the qualifying triggers

Section 55(6) of the Coroners and Justice Act 2009 states:

> In determining whether a loss of self-control had a qualifying trigger –
>
> (a) D's fear of serious violence is to be disregarded to the extent that it was caused by a thing which D incited to be done or said for the purpose of providing an excuse to use violence;
>
> (b) a sense of being seriously wronged by a thing done or said is not justifiable if D incited the thing to be done or said for the purpose of providing an excuse to use violence...

7.3.9 Explanation

If D is at fault in causing V to use violence, for example D strikes the first blow, or says or does something provocative (e.g. commits a sexual assault on V) which triggers a violent or otherwise abusive reaction from V, D is not disabled from using V's conduct as a qualifying trigger (*Johnson* [1989] 1 WLR 740). However, if D does so **in order to give themself an excuse** to kill V when V retaliates, then D is disabled. This was confirmed in *Bowyer* [2013] EWCA Crim 322.

7.3.10 Sexual infidelity

Under the old law of provocation, one of the most common triggers, in line with the defence's heavily gendered nature, was sexual jealousy and possessiveness. The new law seeks to remove gender bias from the defence by ensuring that emotions such as sexual jealousy and unjustified anger are no longer qualifying triggers. Only justified loss of self-control is covered.

To make sure no judge was under any illusions that sexual jealousy was a qualifying trigger, s.55(6) explicitly excludes it. Now a person who kills because they witness or hear about the sexual infidelity of their partner cannot use the defence. In *Clinton, Parker & Evans* [2012] EWCA Crim 2, an important clarification was made by the Court of Appeal. In effect *Clinton* interprets s.55(6) to mean that sexual infidelity which prompts a loss of self-control due to sexual jealousy, possessiveness or family honour is not a qualifying trigger. However, if the sexual infidelity provides the context within which another trigger operates it must be considered.

In *Clinton*, D killed his wife having found out she was unfaithful. However, the loss of self-control was not prompted by possessiveness or jealousy but by the fact that, when asked to reconsider her wish to leave D, she abused him and made several extremely wounding remarks – including that she had had enough of looking after their children – and derided him for being too weak-minded to execute his desire to commit suicide. Thus, taking the whole context into account including the infidelity, D was able to claim that he was subject to things said or done which constituted circumstances of an extremely grave character and caused him to have a justifiable sense of being seriously wronged.

Since *Clinton*, other cases have occurred in which defendants have killed following a discovery of sexual infidelity. These have not been presented as cases where the killing was triggered by jealousy, but, as in *Clinton*, have been presented as cases where infidelity was one of a number of events which cumulatively constituted circumstances of an extremely grave character. In *Dawes and Hatter* [2013] EWCA Crim 322, the Court of Appeal, while approving the decision in *Clinton*, agreed with the trial judge that the fact of the break-up of a relationship, of itself, will not normally constitute circumstances of an extremely grave character and entitle the aggrieved party to feel a justifiable sense of being seriously wronged. As a result their convictions were upheld. The following statement of the trial judge in *Hatter* explains the decision:

> To suggest that the fact of a break-up of a relationship could amount to circumstances of an extremely grave character or that it would entitle the aggrieved party to feel a justifiable sense of being seriously wronged would be to ignore the normal meaning of these words. It would also result in the defence of loss of control being left to the jury in almost every case where one partner to a relationship kills the other, which was clearly not Parliament's intention.

There must, in other words, be something , as happened in *Clinton*, **in addition** to the usual heartache and grievances accompanying the break-up of a relationship which renders the circumstances sufficiently grave to warrant a justifiable sense of being seriously wronged.

Activity 7.7

Eve discovers her husband, Adam, having sex with Ruth, her daughter and his step-daughter. Eve loses self-control and kills Adam. Is the defence of loss of self-control excluded under s.55(6)?

7.3.11 The objective element

In keeping with the old law of provocation, the new partial defence also contains an objective element. By s.54(1)(c), the reaction of the defendant must be consistent **with what might be expected of ordinary people of D's sex and age, with a normal degree of tolerance and self-restraint and in the circumstances of D**. In *R* v *Willcocks* [2016] EWCA Crim 2043 the question for the court on appeal was whether a personality or mental disorder of the defendant was one of the circumstances the jury should take into account in deciding whether the defendant's reaction was to be expected. The Court of Appeal said that the trial judge was right to refuse to allow this to be taken into account, since the only relevance of this disorder was that it reduced the defendant's powers of self-restraint. The circumstances that the jury are able to take into account are circumstances to which any ordinary person may be subject (e.g. their race, religion, gender, sexual preference, physical appearance, past events and experience).

Another way of saying this is that it disqualifies the defendant from relying on the defence if his reaction was triggered not by an external element but by a character flaw, such as being unusually intolerant or aggressive, or being intoxicated (*Asmelash* [2013] EWCA Crim 157) and so less able to control themselves. People are expected to keep to the same standards of self-control as other ordinary people. If the individual has some condition or characteristic that reduces their ability to exercise self-control, they would be better advised to rely on the defence of diminished responsibility. The only internal matters that might impact on this objective standard are age, presumably because the young are more likely to be hot-headed, and sex, for less obvious reasons.

7.3.12 Evidence and procedure

The relative functions of judge and jury are described in s.54(5) and (6) of the Coroners and Justice Act 2009.

> (5) On a charge of murder, if sufficient evidence is adduced to raise an issue with respect to the defence under subsection (1), the jury must assume that the defence is satisfied unless the prosecution proves beyond reasonable doubt that it is not.
>
> (6) For the purposes of subsection (5), sufficient evidence is adduced to raise an issue with respect to the defence if evidence is adduced on which, in the opinion of the trial judge, a jury, properly directed, could reasonably conclude that the defence might apply.

As is usual in relation to defences, the burden of (dis)proof is on the prosecution. As is also usual, this burden of proof does not kick in unless D adduces evidence capable of leading the jury to conclude that the defence applies (s.54(5)). The judge decides whether the evidence so adduced by the defendant is so capable (s.54(6)). The judge would, therefore, disallow any evidence that the defendant lost their self-control due to intoxication, sexual jealousy, their partner's nagging, their baby crying and so on. If, however, the defendant's evidence was, for example, that their partner had threatened them or the child with injury, or had been taking family money to support a lover or a business venture, or had been accused of some disgraceful act – i.e. anything capable of being viewed as extremely serious, the judge should permit the jury to consider this evidence to determine whether the defence should succeed. In each case, the judge must review the evidence before deciding whether it is strong

enough to put before the jury. As the Court of Appeal said in *R* v *Dawes*; *R* v *Hatter*; *R* v *Bowyer*, this is not a matter of judicial discretion but rather a matter of judgment that is either right or wrong. Nevertheless, as was explained in this case and reaffirmed in *Martin* [2017] EWCA Crim 1359, the Court of Appeal will be slow to interfere with the trial judge's judgment on this matter as he/she has heard the evidence first hand.

7.3.13 Diminished responsibility

Diminished responsibility originated in s.2 of the Homicide Act 1957. As with provocation, its purpose was to provide a sentencing discretion in cases of murder where serious mitigation exists. This was particularly important since, at the time, murder was a capital offence.

The defence was reconfigured by s.52 of the Coroners and Justice Act 2009. The major changes made were to clarify the type of mental abnormality which may ground the defence, and the mechanism for substantiating that abnormality. Beyond this, the defence covers much the same ground and pre-2009 cases are likely to remain of authority where consistent with the new provisions. It should be noted that unusually – and contrary to the position with loss of self-control – the burden of proof is on the defence. The standard of proof is on the civil standards; that is, on the balance of probabilities.

Section 52 of the Coroners and Justice Act 2009 amends s.2(1) of the Homicide Act 1957 as follows.

> (1) A person ('D') who kills or is a party to the killing of another is not to be convicted of murder if D was suffering from an abnormality of mental functioning which –
>
> (a) arose from a recognised medical condition,
>
> (b) substantially impaired D's ability to do one or more of the things mentioned in subsection (1A), and
>
> (c) provides an explanation for D's acts and omissions in doing or being a party to the killing.
>
> (1A) Those things are –
>
> (a) to understand the nature of D's conduct;
>
> (b) to form a rational judgment;
>
> (c) to exercise self-control.

In Sections 7.3.14–17, we look at the elements of diminished responsibility.

7.3.14 Abnormality of mental functioning arising from a recognised mental condition

First, it must be established that the defendant suffered an abnormality of mental functioning. An **abnormality of mental functioning** is not defined, but is traditionally regarded as an objectively significant deviation from what would be regarded as normal by a reasonable person. Obviously this is a rather vague test but is given focus by s.52(1A) which refers to its effect on D's ability:

> (a) to understand the nature of D's conduct;
>
> (b) to form a rational judgment;
>
> (c) to exercise self-control.

So a person who kills because their abnormality of mental functioning causes them to misinterpret V's words or actions, or causes them to interpret an innocent act as an aggressive act, or causes them to see dangers where there are none, or overestimate the danger they are facing, or because they killed at the prompting of 'internal voices', or simply because their abnormality reduced their powers of self-control, comes within the defence, so long as this results from a recognised mental condition.

7.3.15 Recognised mental condition

Under the old law, there was no requirement that the defendant's mental abnormality resulted from a recognised medical condition so long as it was caused by some 'inherent' condition. This created a degree of flexibility, which is either a good thing or a bad thing depending upon your point of view. Some of this flexibility has been removed. It is no longer possible, for example, for D to rely on the defence simply because they suffered chronic jealousy, or their powers of resistance had been worn down by the illness of a partner or child.

Recognised medical conditions can be found in authoritative classificatory lists, including the World Health Organization's *International Classification of Diseases* and the American Psychiatric Association's *Diagnostic and Statistical Manual of Mental Disorders*. It is likely that the following conditions, which grounded the old law, will continue to be accepted as recognised mental conditions.

- Arrested or retarded mental development.
- Depression (*Gittens* [1984] QB 698).
- Bipolar (*Inglis* [2010] EWCA Crim 2637).
- Paranoid schizophrenia (*Sutcliffe*, The Times, 30 April 1981).
- Brain damage.
- Psychopathy (*Byrne* [1960] 2 QB 396).
- Paranoid personality disorder (*Martin* (*Anthony*) [2001] EWCA Crim 2245).
- Postnatal depression (*Reynolds* [1988] Crim LR 679).

The new law, therefore, will require the testimony of expert witnesses in any case where the condition relied upon by the defendant is contested or ambiguous. The case of *Brennan* [2014] EWCA Crim 2387, clarifies an important procedural issue in relation to the defence. If medical evidence supporting a defence of diminished responsibility is put before the court by a medical expert and the prosecution do not contradict that evidence with evidence of their own medical expert, a charge of murder should be withdrawn from the jury. So if the prosecution do not like the expert evidence put before the court by the defence, they should appoint their own medical expert to rebut it. Examples of contested conditions which were accepted as a basis for the defence under the old law include battered women's syndrome (*Ahluwalia*; *Hobson* [1998] 1 Cr App R 31) and premenstrual syndrome (*Smith (Sandie)* [1982] Crim LR 531). Nevertheless, the decision is ultimately one for the judge. In *Osborne* [2010] EWCA Crim 547, the Court of Appeal ruled that attention deficit hyperactivity disorder (ADHD) would not afford any ground for allowing the appeal against conviction on the basis of diminished responsibility.

Activity 7.8

Read Wilson, Sections 13.6.B 'Statutory definition' and 13.6.D 'Overlap with loss of self-control' and answer the following question.

Do the defences of loss of self-control and diminished responsibility adequately address the problem of battered partners who kill their abuser such as *Ahluwalia*?

7.3.16 Alcohol and drugs

The old law distinguished between binge drinking and chronic alcoholism. This separation is likely to be continued. Intoxication is not a 'medical condition' (*Fenton* (1975) 61 Cr App R 261; it will not therefore ground the new defence. In *Dowds* [2012] EWCA Crim 281, (2012) MHLO 18, the Court of Appeal concluded that voluntary acute intoxication, whether from alcohol or another substance, is not capable of founding diminished responsibility. However, the abnormality of mental functioning does not have to be the sole cause of the killing so long as it 'provides an explanation' for D's participation in the killing. So a person who kills due to the combined effect of intoxication and a recognised mental condition may still have a defence (*Dietschmann*

[2003] 1 All ER 897, disapproving *Egan* [1992] 4 All ER 470). In *R* v *Kay* [2017] EWCA Crim 647, the fact that the defendant, who suffered with schizophrenia, was unable to provide evidence that it was his schizophrenia that provided the trigger for the killing rather than the fact that he was acutely intoxicated at the time meant he was unable to rely on the defence. In other words, just because a person is schizophrenic does not mean that they can rely on the defence unless they can establish that the schizophrenia, rather than another trigger such as intoxication, was the cause of the psychotic episode.

One exception to this rule arises where the defendant is a chronic alcoholic. Under the old law, chronic alcoholism could ground the defence as it was inherent to the defendant (*Wood* [2009] 1 WLR 496; *Stewart* [2009] 1 WLR 2507). This is still the law, since chronic alcoholism is a recognised medical condition and its effect, which is well known, is to provoke irresistible cravings for alcohol and consequently a reduced capacity for self-control and forming rational judgements. So Mr Kay could have relied upon the defence if he had been able to establish that the psychotic episode arose from a combination of schizophrenia and chronic alcoholism. Unfortunately for him, he could not. He was just drunk.

Wood is a typical case of this nature, involving a homeless alcoholic who, heavily intoxicated, killed an associate who had made a homosexual advance. The trial judge gave the misleading impression to the jury that the defendant's consumption of alcohol had to be entirely **involuntary** to count as an internal pathology capable of grounding the defence. The defendant's appeal was allowed for misdirection. The President of the Queen's Bench rejected the trial judge's proposition to the effect that 'unless every drink consumed that day by the appellant was involuntary, his alcohol dependency syndrome was to be disregarded'.

7.3.17 Which provides an explanation for the killing

The new provision requires that the abnormality must provide an **explanation** for the defendant's acts and omissions in doing or being a party to the killing. It must form part of the story as to why this killing took place: the defendant's reason was impaired, they did not fully understand what they were doing, or their self-control was lacking, and that is why – or one of the reasons why – they did what they did. A psychopath is, therefore, unlikely to be able to use this defence, since they lack neither ordinary powers of self-control nor normal cognitive abilities.

Section 52(1B) of the Coroners and Justice Act 2009 states that an explanation will be provided if 'it causes, or is a significant contributory factor in causing, D to carry out that conduct'. Whether it does provide an explanation for the killing is a question for the jury which, in cases involving multiple causes – for example depression and intoxication (see *Gittens*) or chronic alcoholism and intoxication (see *Wood*) – could prove a bit of a challenge.

7.3.18 Substantially impaired

The defence only operates if the mental abnormality substantially impaired D's ability to do one of the three things mentioned in s.52(1)(a). What does 'substantially' mean in this context? Does it mean a 'more than trivial impairment' (i.e. having substance) or does it mean weighty and important?

In *Golds* [2014] EWCA Crim 2760 the Court of Appeal preferred the second interpretation, ruling that the defendant's mental abnormality must have had a very significant effect on his ability to understand/control himself, etc. Whether the impairment crossed this threshold is a matter for the jury.

On appeal, the Supreme Court approved this ruling and dismissed Gold's appeal, stating that, for the purpose of diminished responsibility, 'substantially impaired' means 'something whilst short of total impairment is nevertheless significant and appreciable'.

Am I ready to move on?

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

1. Define murder.
2. Explain what a 'living person' is for the purpose of criminal homicide.
3. Explain the relevance of consent in cases of criminal homicide.
4. State the *mens rea* for murder.
5. Explain when the *Woollin* direction should be given to the jury and when it should not.
6. Explain what grievous bodily harm means and who decides whether harm inflicted is grievous bodily harm.
7. Explain the difference between provocation and loss of self-control.
8. State the elements of loss of self-control.
9. State and explain the two types of 'qualifying trigger'.
10. Explain what the respective role of judge and jury is in deciding whether D is able to rely on a defence.
11. State the elements of diminished responsibility.
12. State six recognised mental conditions which can ground the defence.
13. Explain what 'abnormality of mental functioning' means.
14. Explain how, if at all, intoxication is relevant in assessing whether someone is able to rely on a defence.

7.4 Involuntary manslaughter

Involuntary manslaughter can be one of three types:

- 'foresight' or 'reckless' manslaughter
- 'unlawful act' or 'constructive' manslaughter
- gross negligence manslaughter (causing death through lack of care).

One of your key tasks is to be clear about their respective areas of coverage. The three forms overlap to a certain extent but also have their own specific application.

7.4.1 Overlap between forms of involuntary manslaughter

Hyam (*Hyam* [1975] AC 55) and Smith (*Smith* [1961] AC 290) both killed in the course of doing something extremely dangerous. In the former case, Hyam threw a petrol bomb through V's letter box, while in the latter case, Smith drove his car extremely dangerously in an attempt to dislodge a police officer trying to arrest him. Both victims were killed. If these cases came to the courts today the defendants should not be charged with murder, which requires intention to kill or cause grievous bodily harm. They could, however, be charged with:

- reckless manslaughter, if the prosecution could prove foresight of death or serious injury
- gross negligence manslaughter, if, irrespective of whether the prosecution could prove foresight of death or serious injury, the jury considered their actions to be grossly negligent as to the risk of death
- constructive manslaughter, since both defendants killed in the course of doing something illegal and dangerous.

The prosecution will tend to charge the form which is most easy to establish as a matter of evidence. Here this is probably constructive manslaughter, but the prosecution would still find it relatively easy to gain a conviction charging either of the other two forms.

7.4.2 Distinctiveness

There are, however, killings where only one form should be charged. This distinctiveness should be understood. Reckless manslaughter is rarely charged. Since acting with foresight of death or serious injury will usually be a criminal offence, almost all cases of reckless manslaughter will also be cases of constructive (unlawful act) manslaughter. Reckless manslaughter comes into its own when the defendant is charged with murder and the judge directs the jury that it can find the defendant guilty of manslaughter if not convinced there was the necessary intention but if convinced that the defendant foresaw death or serious injury as probable. Examples of cases where this would be appropriate include *Hyam* (1975), *Goodfellow* (1986) 83 Cr App R 23 and *Hancock and Shankland* [1985] 3 WLR 1014. Since this explanation tells us all we need to know about reckless manslaughter, no more will be said about it in this chapter.

Constructive manslaughter is the correct charge when there is evidence that death resulted from an unlawful and objectively dangerous act of D, but there is insufficient evidence that D intended (or foresaw) death or serious injury, or was grossly negligent as to the risk of death.

ILLUSTRATION 7.7

A hits B with a single punch to the jaw. B dies as a result of a hidden weakness in his skull which implodes under the force.

This is constructive manslaughter; neither of the other two forms apply since A neither foresaw death nor grievous bodily harm, and nor was he grossly negligent as to the risk of death.

Gross negligence manslaughter is the correct charge where there is insufficient evidence that D foresaw death or serious injury resulting from their conduct and there is no unlawful and dangerous act upon which to graft liability. It is most appropriate, therefore, for those who kill in the course of performing a **lawful activity** in a criminally careless fashion, or who omit to do something they should have done. It covers, for example, parents who neglect their children, train drivers who ignore signals, electricians who forget to earth their circuits, builders who break building regulations, surgeons who perform incompetent surgery on their patients, bus drivers who fall asleep at the wheel and so on.

7.4.3 Constructive manslaughter

Constructive manslaughter is also known as unlawful act manslaughter. It is called constructive manslaughter because liability does not derive, as it usually must, from a combination of an *actus reus* and *mens rea* which match a consequence with an equivalent mental state. Rather, liability for one crime is **constructed** out of the elements of another. For example, one can be guilty of manslaughter if death results from the commission of an assault, criminal damage, burglary, robbery or even theft. The prosecution's task is to prove:

- the elements of the core offence (e.g. the assault, the criminal damage, etc.)
- the objective likelihood that harm would result from the commission of that offence, and
- a causal connection between the core offence and the death.

This offence is, in the opinion of most commentators, unjust, since – as Illustration 7.7 shows – the criminal label may seriously overstate the gravity of the defendant's wrongdoing.

7.4.4 *Actus reus*: constructive manslaughter

An act

To be guilty of constructive manslaughter the cause of death must be an act. This is one of the few crimes which cannot be committed by omission. Omissions are not sufficient even where there is a duty of care. So in *Lowe* [1973] QB 702 D was charged with the constructive manslaughter of his child whom he had badly neglected. He was convicted on the basis that he had caused his child's death through the commission of a criminal offence. That offence is wilful neglect of a child (s.1 of the Children and Young Persons Act 1933). D's conviction was quashed. The Court of Appeal ruled that an act was of the essence for constructive manslaughter. This charge would have been proper if the child had died as a result of injuries sustained through a beating. As no such acts could be established, the case should have been charged as one of gross negligence manslaughter. No doubt the prosecution chose to charge constructive manslaughter because it was easier to establish the commission of the s.1 offence than it was to establish **gross negligence** on D's part. The Court of Appeal saw through this ruse!

An act which is criminally unlawful

This is an important point. It was first established in *Franklin* (1883) 15 Cox CC 163 in which D killed a swimmer when he threw a wooden crate off a pier into the sea. D's conviction for constructive manslaughter was quashed since what he had done, if wrongful, was not a criminal wrong. In deciding whether someone has committed constructive manslaughter, therefore, the first question to ask is whether the death resulted from the commission of a crime. This crime must, moreover, be identified by the prosecution (*Jennings* [1990] Crim LR 588).

Activity 7.9

Read Wilson, Sections 13.7.B.1 'The elements of constructive manslaughter', Section (b) 'Dangerous act' and 13.7.C 'Manslaughter by breach of duty' and answer the following questions.

a. **Why was Slingsby not guilty of constructive manslaughter?**

b. **Lamb shot dead his friend. Why was he not guilty of constructive manslaughter? Could he have been guilty of gross negligence manslaughter?**

Larkin [1943] KB 174 and *Lamb* [1967] 2 QB 981 are authorities for the proposition that the prosecution must be able to prove all the elements of a criminal offence to support a conviction for constructive manslaughter. But the prosecution's task does not stop there. If D has a defence to the core offence, for example consent or self-defence, again no conviction for unlawful act manslaughter will arise. In *Scarlett* [1993] 4 All ER 629 D, a publican, ejected a drunk from a public house who then fell backwards down the steps and died following a fractured skull. D's conviction for constructive manslaughter was quashed on the basis that he feared the drunk was about to attack him and so his use of force was lawful self-defence. This meant that he had not committed the core offence that constructive manslaughter requires.

7.4.5 Constructive manslaughter and crimes of negligence: a qualification

Certain activities are lawful if done properly, but unlawful if done dangerously or negligently. The most common example of these are driving offences. If D commits a driving offence such as speeding or dangerous driving which results in V being killed, is D automatically guilty of constructive manslaughter? This is an important question because if the answer is yes it would threaten to put a lot of people, whose only fault is negligence or absent-mindedness, behind bars. It would also take over the space currently occupied by gross negligence manslaughter and render a conviction for negligent killing easier; indeed, far too easy. In *Andrews* [1937] AC 576, the House of Lords ruled that only acts which are inherently criminal can form the basis of a constructive manslaughter charge. If they are criminal only because they are performed in a careless or dangerous fashion then the prosecution must charge gross negligence manslaughter,

which will necessitate the prosecution proving not merely the carelessness or dangerousness required by the core crime but also gross negligence as to death.

ACTIVITY 7.10

Lord Atkin said in *Andrews*: 'There is an obvious difference in the law of manslaughter between doing an unlawful act and doing a lawful act with a degree of carelessness which the legislature makes criminal'.

In other words, you cannot charge constructive manslaughter if the only criminal wrong committed by the defendant is speeding, driving while intoxicated, dangerous driving or driving without due care.

Now invent an examination question in which it would be right to charge constructive manslaughter arising from a piece of dangerous driving. If you can do this, you have gone a long way towards understanding constructive manslaughter. Read Wilson, Section 13.7.B.1(b)(ii) 'The unlawfulness of an act must be constituted independently of its dangerousness', if you have difficulty but try it yourself first!

7.4.6 The criminal act must be dangerous

'Dangerous' is a term of art here. It does not mean threatening to life or limb; it means simply of a nature to cause harm. A punch then is dangerous because punches often result in harm, albeit not serious harm. A punch was the core activity which resulted in a manslaughter conviction in the leading case of *Church* [1966] 1 QB 59. In this case, Edmund Davies LJ gave the following authoritative definition of what counts as a dangerous act.

> the act must be such that all sober and reasonable people would inevitably recognise must subject the other person to, at least, the risk of some harm resulting therefrom, albeit not serious harm.

ACTIVITY 7.11

The principle in *Church* should be committed to memory. It is brief and very helpful. Now try applying it to the following problem.

Jack lets the tyres down on Jill's car. Jill does not notice this when she returns to the car and drives off. She soon notices the problem, panics and brakes suddenly. Humpty, who is driving too closely to stop in time, crashes into the back of Jill's car, killing her. Is Jack guilty of constructive manslaughter? To answer this question, your job is to analyse the facts to ensure that all the elements of the offence are present, including in particular the dangerousness requirement as defined by Edmund Davies LJ in Church.

No feedback provided.

The phrase 'the other person' in the *Church* quotation does not mean that the dangerous act need be directed against the deceased specifically. It could be directed against a third party, as happened in *Mitchell* [1983] 2 All ER 427 (the altercation in the Post Office queue case, see Chapter 4), but it must be of a nature to cause harm to someone. So in the above problem, it would make no difference to Jack's potential liability, if the deceased was Jill, Jill's baby who was in the front baby seat, or Humpty.

Two cases involving different outcomes from similar actions illustrate this meaning of 'dangerous acts'. In *Dawson* (1985) 81 Cr App R 150 D pointed a replica gun at V in the course of a robbery. V had a history of heart conditions and died of a heart attack: D was convicted of constructive manslaughter. On appeal, his conviction was quashed because the judge had not made clear to the jury that it could convict only if **pointing the gun** was objectively dangerous. And it would be objectively dangerous only if it was known that V had a heart condition – this had not been established.

In *Watson* [1989] 1 WLR 684, D committed burglary on a house occupied by V, an 87-year-old man who suffered from a heart condition. The encounter between D and V resulted in V being disturbed and upset, and a little later he suffered a heart attack and died. D was convicted of manslaughter. Although his appeal was successful on other grounds, the Court of Appeal made clear, on the basis of the *Church* definition, that D's

encounter with V was objectively dangerous, as soon as it became clear that V was old and frail. Continuing with the burglary after this realisation would therefore satisfy the dangerous act requirement.

Activity 7.12

Would it make any difference if D had pointed: (a) a real gun that was not loaded; or (b) a real gun that was loaded? In the latter case, would it make any difference in *Dawson* if the gun toter did not have his finger on the trigger? Again, to answer this question you must apply the *dicta* in *Church*.

7.4.7 The dangerous act must cause death

Establishing causation is not generally a problem for the prosecution, as was seen in Chapter 4. It will normally follow from the fact that **but for D's act** the death would not have occurred, although this is not always the case. D's act must be the substantial and operating cause, which it will not be if, independently of D's action, another cause intervenes which rids D's initial act of all causal potency. (For a good example, see the discussion of *Rafferty* in Wilson, Section 5.6.A.4 'Breaking the chain of causation–intervening cause supersedes defendant's act'). A particular causal sequence in which this routinely happens involves the supply of dangerous drugs. Supplying drugs is a criminal act and it is dangerous in the *Church* sense. However, if V self injects and this causes V's death, D (who supplied the drugs) is not guilty of manslaughter. V's free and informed act breaks the chain of causation (*Kennedy (No 2)* [2007] UKHL 38).

If, however, D does the injecting then D will be liable for constructive manslaughter if this results in V's death. Here, however, it is not the act of supply which will form the basis of the charge, but the administration of the drug (an offence under s.23 OAPA 1861). D will remain liable because no subsequent act or event intervenes, following this administration, to break the chain of causation (*Cato* [1976] 1 WLR 110).

Another knotty problem concerns acts of the defendant towards V, which triggers V's suicide. What test of causation is to be applied here? Is it 'take your victim as you find them?' as in *Blaue*; a reasonable foresight test as in *Roberts*; a daft or disproportionate reaction test as in *Williams*; or a voluntary act test as in *Kennedy*? In *Wallace* (see Section 4.3), the Court of Appeal sidestepped this question, ruling that the question to be considered in all cases where more than one cause contributed to the death is whether 'the accused's acts can fairly be said to have made a significant contribution to the victim's death'.

7.4.8 *Mens rea*

As has been explained, constructive liability involves the defendant being held liable for crime A on the basis of their liability for committing crime B. If, therefore, D is being charged with constructive manslaughter (crime A) on the basis of having committed an assault (crime B), all the prosecution has to establish is that V's death was caused as a result of the assault (crime B). Setting aside proof of causation, which is a given, its first task is to prove the *actus reus* of assault (e.g. a punch). Its second task is to prove the *mens rea* for assault, that is intending or foreseeing (recklessness) unlawful physical contact with V.

Activity 7.13

Read Wilson, Section 13.7.B.1(b) 'Dangerous act' and answer the following questions.

a. **Read the discussion of *DPP* v *Newbury and Jones* (1977). Is it necessary for the prosecution to prove that the defendants foresaw harm resulting from their criminal action?**

b. **What was the relevance of the defendants' age in this case?**

c. **Do you think the defendants' age should have been taken into account in deciding whether they were guilty of the crime?**

d. **What exactly was the crime which formed the substance of the charge and subsequent conviction for constructive manslaughter?**

e. Read *R* v *F* [2015] EWCA Crim 351. Does this case add anything new to the law as propounded in *DPP* v *Newbury and Jones*?

f. What was the important point of law proposed by the Court of Appeal in *Jennings* (1990)?

g. Under what circumstances, if any, can a person be guilty of constructive manslaughter for having caused V to commit suicide?

No feedback provided.

7.4.9 Reform proposals

The Law Commission recommended the abolition of the rule in *Newbury and Jones,* which permits liability in the absence of foresight of harm. Under its proposals, manslaughter will encompass 'killing through a criminal act intended to cause some injury, or in the awareness that the act posed a serious risk of causing some injury'. These proposals were considered by the Court of Appeal in *R* v *F* (see above).

7.4.10 Gross negligence manslaughter (manslaughter by breach of duty)

People whose gross carelessness results in death may be charged with gross negligence manslaughter, the essence of which is a breach of a legal duty to be careful. Such duties do not exist in a vacuum. As we have seen in Chapter 3, for example, **where death is caused by an omission** such a duty exists only where it has been voluntarily assumed, or where there is a contract, special relationship and so on. So a lifeguard may be guilty of gross negligence manslaughter for failing to save a child drowning in their swimming pool, but not an expert swimmer who is in attendance and witnesses the whole affair.

Whether a duty exists **in cases of affirmative action** causing death is a matter of law to be decided by the trial judge. In the civil law of negligence, such duties tend to arise by virtue of the duty holder being in a position where their actions are likely to cause harm to another if care is not taken. The criminal law follows this pattern to a large extent, but the fact that a duty is not recognised in the civil law does not mean that it will not be recognised in the criminal setting. In *Wacker* [2002] EWCA Crim 1944 a lorry driver transported illegal immigrants in an airless container which led to the deaths of most of them. He was held properly convicted of manslaughter for his failure in this regard. Although in the civil law such a duty would probably not have arisen due to the immigrants' complicity in an illegal enterprise, no such stricture applied in the criminal law where deeper considerations of public policy applied. A similar result was seen in *Willoughby* [2004] EWCA Crim 3365 where D and V torched D's building for the purpose of committing an insurance fraud, during which V died. Again, although no duty of care would have arisen in the civil law, a duty did arise in the criminal law and D was guilty of manslaughter.

The modern law of gross negligence manslaughter derives from the leading case of *Adomako* [1995] 1 AC 171, in which an anaesthetist was charged with manslaughter for failing to supervise properly a patient who was given a general anaesthetic in the course of an eye operation: the patient died when, unnoticed by the defendant, his oxygen supply was cut off. The House of Lords made a number of important statements of principle in the course of this case. In particular, it deprecated the trial judge's use of the term recklessness to describe the fault element and said that trial judges should direct the jury in terms of gross negligence **only** in cases where a lack of care is alleged to be the cause of death.

It stated that the elements of this form of manslaughter were threefold. The prosecution must show:

- D owed a duty of care
- D was in gross violation of this duty
- death occurred as a result of this breach of duty.

7.4.11 Duty of care

As explained above, it is a matter of law for the judge to decide whether the defendant owed a duty of care to the victim. The jury's function is to decide whether the duty was broken and if the death was caused by the breach. This principle was affirmed in *Evans* [2009] EWCA Crim 650 in which the Court of Appeal introduced a new duty situation in cases of manslaughter by omission – namely one arising where the defendant is responsible for contributing to circumstances of extreme danger for the victim. This was an extension of the principle in *Miller* in which the House of Lords had limited this duty to cases where the dangerous situation was caused by the defendant (see Chapter 3). Now it is enough that they simply contributed to the danger. In the words of Lord Judge CJ:

> When a person has created or contributed to the creation of a state of affairs which he knows, or ought reasonably to know, has become life threatening, a consequent duty on him to act by taking reasonable steps to save the other's life will normally arise.

Activity 7.14

Read Wilson, Sections 13.7.C 'Manslaughter by breach of duty' and 4.5.D.3 'Circumstances giving rise to a duty to act: duty situations' and find authorities for, and illustrations of, the duty of care in the following contexts.

a. **Trades (e.g. building, plumbing, electricity).**
b. **Driving a car (motor manslaughter) or crossing a road.**
c. **Caring roles (e.g. parents).**
d. **Carers.**
e. **Professionals (e.g. doctors, nurses, dentists).**
f. **The service industry (e.g. hotels, restaurants, sporting venues).**
g. **Contractual roles.**
h. **Other non-specific activities.**

No feedback provided.

7.4.12 Breach of duty

How negligent does a person have to be to breach their duty of care? Very! In *Adomako* the standard of care was described as follows.

> [Responsibility] will depend on the seriousness of the breach of duty committed by the defendant in all the circumstances in which the defendant was placed when it occurred... [The jury must consider] whether, having regard to the risk of death involved, the conduct of the defendant was so bad in all the circumstances as to amount in their judgment to a criminal act or omission.
> (*Adomako* [1995] 1 AC 171 per Lord Mackay)

Note here that liability for gross negligence manslaughter requires there to be a **risk of death**. There is no liability if the risk is simply of harm/serious harm (compare constructive manslaughter).

Moreover, the risk of death has to be apparent at the time of the breach of duty. This is an important qualification and was made clear in *R* v *Rose* [2017] EWCA Crim 1168. An optometrist failed to conduct a full examination of the deceased's eyes during a sight test. If the optometrist had done so, she would have discovered that the deceased had a life-threatening condition and would have sent her for urgent specialist attention. Her conviction for gross negligence manslaughter was quashed. The Court of Appeal agreed that her failure to conduct a full examination was very negligent. However, the fact that a proper examination might have revealed a serious life-threatening problem did not mean that there was a 'serious and obvious risk of death' if such an examination was not carried out. This was, after all, a simple routine eye test. It might have been different if the patient had presented with symptoms that themselves had either pointed to the risk

of a potentially life-threatening condition or provided a sign that alerted a competent optometrist to that risk. Consistent with *Rose* is *R* v *Kuddus* [2019] EWCA Crim 837. The new owner of a takeaway restaurant was held not to have committed manslaughter when a customer died due to a peanut allergy that had been disclosed to the former owner but not to him. Although he was at fault in not complying with health and safety regulations concerning allergies, a risk of death would only be objectively apparent if he had cause to believe that a customer had such an allergy, which he did not.

It has been argued that the offence of gross negligence manslaughter breaches Article 7 of the European Convention on Human Rights which proscribes retrospective criminalisation. This is because the line between mere negligence and gross negligence is not precisely drawn. Whether a person's conduct amounts to gross negligence, therefore, cannot be assessed in advance but only by a jury deciding *ex post facto*. This argument was rejected in *Amit Misra* [2004] EWCA Crim 2375.

ACTIVITY 7.15

a. **Read Wilson, Chapter 13 'Homicide' and identify, make notes on and commit to memory all the Law Commission's major reform proposals concerning murder and manslaughter. Do you agree with them?**

b. **Invent for yourself an examination problem which involves a person committing each of the three forms of manslaughter which could not be charged as one of the other forms (you will find reckless manslaughter the most difficult). Below is an example in relation to constructive manslaughter.**

   Constructive manslaughter: A hits B with a single punch to the jaw. B dies as a result of a hidden weakness in his skull which implodes under the force. What crime has A committed?

   Now invent your own.

No feedback provided.

7.4.13 Causation

The final element that must be shown to establish gross negligence manslaughter is **causation**. We have already covered this in Chapter 4, which you should look at now, but there are two particular aspects of causation that warrant treatment here. The first is that the prosecution must prove not only that death would not have occurred but for the defendant's conduct, but that it was the defendant's breach of duty that caused the death. This was the point made in *Dalloway*. The prosecution could show that the boy would not have died but for the cart driver's driving – but what they could not prove was that it was his negligent driving specifically that was the cause. For this to be established, they had to prove that the accident would not have occurred had the cart driver been driving carefully. They could not do this. The evidence left open the possibility that the death might have occurred however carefully he had driven. In other words, it might have been just one of those unavoidable accidents. That he was driving negligently could have been simply a coincidence.

The second related point concerns cases where the conduct element relied on is an **omission**. Here, the prosecution must also show not only that, had the defendant acted as he should have done the death **might have been** prevented, but that it **would have been** prevented: *R* v *Morby* (1882) (see Chapter 3). This is a heavy burden for the prosecution, as was shown recently in *R* v *Broughton* [2020] EWCA Crim 1093. Here the defendant supplied the deceased, his girlfriend, with Class A drugs at a pop festival. She experienced a bad reaction to the drugs. Although the defendant stayed with her throughout, he did not seek any form of medical assistance. The appellant appealed to the Court of Appeal against his conviction for gross negligence manslaughter. The key question for the Court was whether it had been established to the criminal standard that his failure in breach of duty to seek medical help caused the victim's death. The expert witness at trial testified that the victim stood a 90 per cent chance of survival with medical intervention. On this evidence, the defence made a submission of no case to answer on the basis that the criminal standard required proof of causation beyond reasonable doubt and a 10 per cent chance of death was a small chance but not so

small that it put causation beyond (reasonable) doubt. The defendant's appeal against conviction was allowed. It was not enough, as the prosecution had alleged, that the victim was deprived of a 'significant and substantial chance of survival'. The question to ask is whether the medical assistance **would have** saved her life. Given that there was a time lag between taking the drug and her reaction, it was not certain to the criminal standard that it would.

Am I ready to move on?

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

1. Identify the elements of reckless manslaughter.
2. Identify the elements of constructive manslaughter.
3. In relation to constructive manslaughter, explain what the *mens rea* is, and if it is necessary that D foresaw harm – and if so what kind of harm – to V by what D was doing.
4. Identify the elements of gross negligence manslaughter.
5. Explain what the relevant function of judge and jury is in relation to gross negligence manslaughter.
6. Answer the question **as to what** D must be grossly negligent of.
7. Explain the difference in coverage between the various forms of manslaughter.
8. Explain their points of overlap.
9. Outline the major Law Commission proposals for reforming criminal homicide.

Notes

8 Rape

Contents

Introduction

The law of rape is contained in the Sexual Offences Act 2003 (SOA 2003). This Act reordered and restructured all sexual offences, whose rationale and structure reflected their piecemeal development through the common law, the Sexual Offences Act 1956 and the later amendments thereto. The overall philosophy is to

> provide coherent and clear sex offences which protect individuals, especially the more vulnerable, from abuse and exploitation, enable abusers to be appropriately punished, and be fair and non-discriminatory in accordance with the European Convention on Human Rights and the Human Rights Act 1998.

Part 1 of the SOA 2003 enacts the newly constituted structure of sexual offences that includes rape, assault by penetration, sexual assault and causing a person to engage in sexual activity without consent. It deals with the issue of consent and, in particular, seeks to simplify the process of establishing absence of consent by the use of presumptions. It also covers child sex offences including those taking place within a family context. Part 2 is largely a re-enactment of the Sex Offenders Act 1997 containing measures for the protection of the public. In this chapter we will be examining just one sexual offence, namely rape.

8.1 Sexual Offences Act 2003, s.1 – rape

(1) A person (A) commits an offence if—

(a) he intentionally penetrates the vagina, anus or mouth of another person (b) with his penis,

(b) B does not consent to the penetration, and

(c) A does not reasonably believe that B consents.

(2) Whether a belief is reasonable is to be determined having regard to all the circumstances, including any steps A has taken to ascertain whether B consents.

(3) Sections 75 and 76 apply to an offence under this section.

(4) A person guilty of an offence under this section is liable, on conviction on indictment, to imprisonment for life.

8.2 Conduct elements

The *actus reus* of rape involves the non-consensual penetration of the mouth, anus or vagina of a man or a woman by a man's penis. Penetration by the penis is key to the *actus reus* of rape. Penetration of the vagina, anus or mouth with the tongue or finger or with objects such as broom handles, bottles or dildos is not rape. Where the orifice penetrated in this way is a vagina or anus, the penetration constitutes the separate offence of (sexual) assault by penetration (SOA 2003, s.2). In the case of the mouth, it is the offence of sexual assault.

By SOA 2003 s.79(2), 'Penetration is a continuing act from entry to withdrawal.' This enshrines the pre-SOA 2003 decision in *Kaitamaki* [1985] AC 147 that a man who continues to have intercourse after consent is withdrawn commits the *actus reus* of rape. Rape is an offence which can only be committed by a man, but, since the Criminal Justice and Public Order Act 1994, it can be committed on either a man or a woman. Any non-consensual penetrative vaginal, oral and anal sex constitutes rape. Ejaculation is not necessary (*R (on the application of F)* v *DPP* [2013] EWHC 945 (Admin)). By s.79(3), 'vagina' includes surgically constructed vaginas following gender reassignment surgery.

Rape has, since 1992, been possible between man and wife. Before this, the consent of the wife was presumed unless the marriage had terminated. Henceforth, the consent of the wife must be forthcoming and all the provisions of the SOA 2003 apply to determine whether it is.

8.3 Absence of consent

In most cases of rape the main problem for the prosecution is proving absence of consent. The problem has been described as linked with the 'infinite circumstances of human behaviour, usually taking place in private without independent evidence, and the consequent difficulties of proving this very serious offence' (*Bree* [2007] per Hallett J at [36]). Until the passing of the Act, the difficulty of proving lack of consent to a standard of beyond reasonable doubt, created substantial problems for the victims of rape. These problems were compounded by inflexible and insensitive rules of procedure and evidence by which the victim, as the prime prosecution witness, was routinely forced to defend themselves against intrusive questioning designed to portray the victim as a woman of loose morals who was unlikely to have refused consent. This led to the charge that the criminal justice system did not take rape seriously, and tended to prioritise the rights of the accused over those of the victim.

The SOA 2003 has sought to address that charge and to ease the burden of the prosecution by having a number of conclusive presumptions (s.76) and evidential presumptions (s.75). The effect of these is that, where these apply, there will rarely be any need for the victim to be cross-examined on the question of consent; it will be presumed absent. If neither s.75 nor s.76 applies the prosecution are required to prove absence of consent in the usual way by way of reference to s.74. The prosecution will, therefore, be anxious to establish that a presumption does apply if possible since it will

ease its burden considerably. **As a student you should follow the same route. First consider whether a presumption applies and only if it does not consider whether s.74 is satisfied.**

8.4 The presumptions

The SOA 2003 imposes two types of presumptions:

- Conclusive presumptions, s.76. These cannot be rebutted.
- Evidential presumptions, s.75. These can be rebutted by raising evidence that, notwithstanding the circumstance relied upon, the victim nevertheless did consent.

8.4.1 Conclusive presumptions

By s.76 it is conclusively presumed **both** that V did not consent and D did not reasonably believe V to consent in the following circumstances:

The job of the prosecution, therefore, is to try to establish beyond reasonable doubt either of these two circumstances. If it succeeds the case is won without having to establish anything else.

(2)...(a) the defendant intentionally deceived the complainant as to the nature or purpose of the relevant act;

(b) the defendant intentionally induced the complainant to consent to the relevant act by impersonating a person known personally to the complainant.

Section 76(2)(a)

A pre-SOA 2003 example of the first presumption is *Williams* [1923] 1 KB 340. D, a singing teacher, told V, his pupil that it was necessary to perform an act in order to improve her singing. She agreed, not knowing or understanding that the act she was engaging in was sexual intercourse. It was held that her consent was vitiated by fraud as to the **nature and quality** of the act. What V was consenting to and what she thought she was consenting to were completely different in their nature. Compare *Linekar* [1995] QB 250, where it was held not to be a deception as to the nature and quality of the act for a person to trick a prostitute into having intercourse without payment. What she agreed to is what she got. It is possible that this case might be decided differently under the SOA 2003 since V could plausibly argue that although she consented to the nature of the act, she did not consent to its **purpose**. The purpose for her after all was financial not sexual. However, in *Jheeta* [2007] EWCA Crim 1699 the Court of Appeal stated that where this presumption is raised it should be the subject of 'stringent scrutiny' since, if accepted, **it is conclusive on the question of guilt**.

ACTIVITY 8.1

a. In *Newland* (2015) (unreported) a woman, pretending to be a man, had penetrative sex with another woman who believed her lover to be a man. Is this a case where the conclusive presumption will apply?

After you have considered your answer, read Wilson, Section 12.7.A.2 'Fraud – conclusive presumptions' to find out if you are right.

b. Read the summary and explanation of *Devonald* in the above section of Wilson. Is it consistent with *Linekar*? If *Linekar* were decided today would it be decided any differently?

No feedback provided.

Section 76(2)(b)

Before the SOA 2003, a man who induced a person to have sexual intercourse with him by impersonating their partner committed rape. So it was rape when the defendant, the twin brother of V's boyfriend, had intercourse with V by pretending to be the brother: *Elbekkay* [1994] EWCA Crim 1. The SOA 2003 extends the old rules on

impersonation in that consent is vitiated not only when it is the complainant's partner or spouse who is impersonated but also when it is any person 'known personally to the complainant'. No doubt there will be some interesting cases arising out of social networking friendships concerned with establishing exactly what 'known personally to the defendant' means. The key point to remember is that the presumption only applies where the person impersonated is known personally to the complainant.

Illustration 8.1

D tells V he is Brad Potts, a famous film star in order to secure her consent to sexual activity. He is not Brad Potts although he looks a lot like him. V engages in sexual activity with him believing him to be Brad Potts.

This is not a case where the presumption applies because, although V believes D to be Brad Potts, her mistaken belief is not about the person she is having sex with but about his name and attributes. This is because Brad Potts is not known personally to her. This is not to say that V does consent to the activity but only that, if she does not consent, it is not by virtue of the conclusive presumption. To secure a conviction, the prosecution will need to establish that s.74 applies, i.e. that, given the deception, the activities engaged in were not 'freely chosen' See *Jheeta*, below.

Section 76: questions of procedure

The procedure, where there is an issue that consent may be vitiated by one of the circumstances in s.76, is that the prosecution will seek to establish the existence of that circumstance. If that fails, the prosecution will then seek to negate consent by relying on s.74. This is what occurred in *Jheeta* (2007). D began a sexual relationship with C. Whenever C tried to end her relationship with D, he sent her text messages purportedly from different 'police officers' telling her it was her duty to sleep with him, otherwise she would receive a fine. D was arrested and admitted sexual intercourse had taken place.

The prosecution sought to rely on s.76(2)(a) arguing that C was deceived as to the nature and purpose of the Act. The Court of Appeal ruled that s.76 was inapplicable. C had not been deceived as to the nature or purpose of the sexual intercourse but only as to the situation she was in. This did not mean that she was consenting. Rather, the prosecution were compelled to do their job properly, i.e. to prove her absence of consent by reference to s.74, which it succeeded in doing. The effect of the deception was that the complainant had not exercised a free choice as to whether to have intercourse or not. He was convicted of rape.

8.4.2 The evidential presumptions

By s.75, where one of six different circumstances occur, it is a **rebuttable** evidential presumption that the complainant did not consent to the relevant act, and that the defendant did not believe that the complainant consented to the relevant act.

The key difference between these presumptions and the presumptions in s.76 is that the evidential presumptions can be rebutted by the raising of relevant evidence. This will generally not be easy but it is possible.

(3) The circumstances are that—

(a) any person was, at the time of the relevant act or immediately before it began, using violence against the complainant or causing the complainant to fear that immediate violence would be used against him;

(b) any person was, at the time of the relevant act or immediately before it began, causing the complainant to fear that violence was being used, or that immediate violence would be used, against another person;

(c) the complainant was, and the defendant was not, unlawfully detained at the time of the relevant act;

(d) the complainant was asleep or otherwise unconscious at the time of the relevant act;

(e) because of the complainant's physical disability, the complainant would not have been able at the time of the relevant act to communicate to the defendant whether the complainant consented;

(f) any person had administered to or caused to be taken by the complainant, without the complainant's consent, a substance which, having regard to when it was administered or taken, was capable of causing or enabling the complainant to be stupefied or overpowered at the time of the relevant act.

All these situations involve circumstances where it is unlikely, without being impossible, that V consented and that D had reasonable grounds for believing that. If you think about it, it would be quite a rare circumstance for someone to have intercourse with a sleeping person who actually consents to the act. Rare but not impossible. The example often given is that of a couple who have got into the habit of having sex at night when the woman is asleep.

The procedure to be followed is that the prosecution must prove beyond reasonable doubt that the circumstance existed (e.g. that V was asleep when D had intercourse with V). V is then presumed not to have consented and that D is presumed to have known that. Another example of an evidential presumption is where D used force or threat of force before or at the time of the relevant act. Again, upon proof of this, the prosecution will win its case without having to specifically prove absence of consent unless D is able to offer plausible evidence in rebuttal (e.g. by raising plausible evidence that sleeping sex was a regular consensual occurrence or, in the violence case, by raising plausible evidence that both parties were fetishists and were role playing with consent). If D does this successfully the prosecution are back to square one and must prove absence of consent by reference to the statutory definition which appears in s.74. If D does not, he is convicted.

Section 75(2)(f) typically covers cases where D secretly introduces a 'date rape' drug such as rohypnol into V's drink or 'spikes' V's soft drink with alcohol. Section 75(2)(f) does not require that V is stupefied or overpowered by the substance only that the substance was capable of producing this effect. If the prosecution can prove that this substance was administered or caused to be taken it is presumed that V did not consent to intercourse and that D had no reasonable grounds for believing that she did. Again, however, the defendant can rebut the presumption by raising plausible evidence that notwithstanding D's subterfuge V did consent to the act of intercourse (see Illustration 8.2). If he is successful the prosecution must prove absence of consent by reference to s.74.

8.4.3 Section 74 – the statutory definition of consent

All the standard sexual offences, including rape, require the prosecution to prove the victim did not consent. The presumptions, as have been explained, make the prosecution's task considerably easier in this respect, where applicable. Where the presumptions are not applicable, the prosecution must prove absence of consent by reference to s.74, which provides the nearest thing to a statutory definition. Prior to 2003, the very concept of consent was fragile. What is it to consent to sex? Does it require wholehearted acceptance? Does one consent to sex when one reluctantly acquiesces to avoid a big argument? This conceptual fragility led to huge problems in establishing its absence. In *Olugboja* [1982] QB 320 the victim's case was simple: 'I didn't consent, although I did not struggle. I was terrified and could do nothing to resist'.

The defendant's case was equally simple: 'I did not threaten or use force on her. She consented'. The Court of Appeal was forced to duck the issue by relying on the 'good sense of the jury'. Dunn LJ said that:

> the dividing line ... between real consent on the one hand and mere submission on the other may not be easy to draw. Where it is to be drawn in a given case is for the jury to decide, applying their combined good sense, experience and knowledge of human nature and modern behaviour to all the relevant facts of that case.

Section 74 does little to improve the situation. It defines consent, but in a very loose way, stating that 'a person consents if he agrees by choice, and has the freedom and capacity to make that choice'. The concerns are that 'freedom' and 'choice' are:

> ideas which raise philosophical issues of such complexity as to be ill suited to the needs of criminal justice – clearly those words do not refer to total freedom of choice, so all the questions about how much liberty of action satisfies the 'definition' remain at large.
>
> (Temkin, J. and A. Ashworth 'The Sexual Offences Act 2003: (1) Rape, sexual assaults and the problems of consent' (2004) *Crim LR* 328–46, 336.)

In *Doyle* [2010] EWCA Crim 119, a case involving the rape of the defendant's ex-partner, the defence noted the Judicial Studies Board Specimen Direction, no. 53, which embodied the direction given by Pill J in the trial of Mohammed Zafar:

> A female partner may not particularly want sexual intercourse on a particular occasion, but because it is her husband or her partner who is asking for it, she will consent to sexual intercourse. The fact that such consent is given reluctantly or out of a sense of duty to her partner is still consent.

Although the SOA 2003 provides a statutory definition of consent, its indeterminacy has led to the *Olugboja* model continuing to be heavily influential in terms of jury directions in cases where consent is an issue. In *Kirk* [2008] EWCA Crim 434 the Court of Appeal upheld the conviction of a defendant who had made sexual intercourse the condition of a gift of money needed by the young homeless victim to buy food. In so doing it approved the distinction drawn by the trial judge between consent and 'mere submission', without clarifying it, which formed the basis of the decision in *Olugboja*. In *R* v *Ali and Ashraf* [2015] EWCA Crim 1279 the Court of Appeal ruled that in the case of a vulnerable, immature complainant, who had been groomed by the defendants, the mere fact that from the evidence presented the latter appeared to consent to intercourse did not necessarily mean the jury were bound to accept that this apparent consent was freely chosen.

Intoxication and consent

The case of *Bree* [2007] EWCA Crim 804 illustrates another of the circumstances rendering proof of consent problematic, namely intoxication. The fact of intoxication may affect both a person's capacity to consent and their freedom of choice. It may also disinhibit, which is perfectly consistent with consent. The defendant was a 25-year-old man of excellent previous character. After a very heavy evening drinking together, he had sexual intercourse with a young woman aged 19 years. He was charged and convicted of rape. The victim stated in evidence that having lost consciousness she awoke to find the defendant engaging in sex with her. The prosecution case was that although the complainant was not so drunk as to lack the capacity to consent, she did not in fact consent to intercourse. She knew that she did not want to have sexual intercourse, and so far as she could, made that clear. The trial judge failed to put this case clearly to the jury and so the Court of Appeal quashed the conviction. How should the case have been put? The position appears to be as follows.

If the alcohol renders the victim unconscious or prevents the victim from knowing what is happening, then the victim does not consent due to lack of **capacity**. If the effect of the alcohol prevents the victim from communicating their lack of consent, they do not consent due to lack of **free choice**. Questions of proof will be paramount. If the effect of the alcohol is to cause the victim to engage in sexual activity, which they would not have done if sober, they still do consent. In this latter case, as was stated controversially in *Dougal* (Unreported, 2005), 'a drunken consent is still consent'.

In *Kamki* [2013] EWCA Crim 2335 the Court of Appeal approved the following direction of the trial judge in another case involving sexual activity while intoxicated raising questions of consent. The full quotation is given here as it is very helpful.

> A woman can have the capacity to make a choice to engage in sexual activity, even when she has had a lot to drink obviously. Alcohol can make people less inhibited than they are when they are sober and obviously everyone is free, we are all free to decide how much to drink and whether to have sex or not. However, if through drink a woman has temporarily lost her capacity to choose whether to have sexual intercourse or to engage in sexual activity of another sort, she would then not be consenting. Clearly as I have said, a person who is unconscious through the consumption of alcohol cannot give consent,

> and it may well be there is before that complete loss of consciousness, a state of incapacity to consent which can be reached.
>
> So there are of course, and this is common sense again, various stages of consciousness, are there not, from being wide awake to having a dim awareness of reality. In a state of dim and drunken awareness, a person may not be in a condition to make choices, so you will need to consider the evidence carefully in this case as to what was M's state of consciousness or unconsciousness at the time of penetration, and decide firstly was she in a condition in which she was capable of making a choice one way or the other. If you are sure that she was not, then she was obviously not consenting. If you conclude, however, that she was or may have been able to make a choice, you must decide whether she was or may have been consenting to sexual intercourse in relation to count one, penetration of her vagina in relation to count three and the touching of her breast in relation to count two.

Deception and consent

Does a person who agrees to sexual activity as a result of a deception, not falling within s.75 or 76, 'agree by choice'? This depends, of course, on whether consent means informed consent. If A has intercourse with B concealing from her that he is HIV positive, does he commit the *actus reus* of rape, given that consent would not have been granted had B known of his condition? The presumptions do not apply – A does not deceive B as to the nature or purpose of the act. Guilt depends therefore on whether consent is vitiated. In *B* [2006] EWCA Crim 2945 the Court of Appeal ruled that it was not vitiated for the purpose of the offence of rape but it was for the purpose of s.20. The transmitter of the disease would therefore be guilty under s.20.

In *R (Monica)* v *DPP* [2018] EWHC 3508 (Admin) the consent of a woman to intercourse was held not to be vitiated by the fraudulent representation of her partner that he was a fellow environmental activist when in fact he was an undercover police officer attempting to infiltrate her organisation. Although it was accepted by the court that she would not have consented had she known his true identity, the judge ruled that deception did not generally vitiate consent except where s.76 applied, or where, as in *Jheeta*, other pressure was brought to bear. This is a puzzling decision, which puts into question the cogency of the 'free choice' concept at the heart of consent. It certainly fits ill with cases such as *Kirk*, and *Ali and Ashraf*. If those complainants did not exercise genuine free choice, why did this complainant?

The Court of Appeal has gone some way to accepting this reasoning in the recent case of *R* v *Lawrence* [2020] EWCA Crim 971. On the basis of the defendant's deception that he had had a vasectomy and so was not fertile, the complainant agreed to sexual intercourse. The defendant was charged with rape. The question for the Court was whether his deception vitiated her consent. At first instance, the Court found that it did. Quashing the conviction, the Court of Appeal ruled that

> unlike the woman in *Assange and R (on the application of F)* v *DPP,* the complainant agreed to sexual intercourse with the appellant without imposing any physical restrictions. She agreed both to penetration of her vagina and to ejaculation without the protection of a condom. In so doing she was deceived about the nature or quality of the ejaculate and therefore of the risks and possible consequences of unprotected intercourse. The deception was one which related not to the physical performance of the sexual act but to risks or consequences associated with it.

8.5 Procedure: relationship between s.1, s.75 and s.74

It is important to understand the procedure to be adopted when there is an issue concerning the applicability of s.75. The following illustration concerns s.75(2)(f) but the procedure to be adopted is the same whichever of the circumstances is being relied on.

Illustration 8.2

D spikes V's drink with alcohol for the purpose of disinhibiting V. V then has intercourse with D, as D planned. V then discovers the deception and calls the police. D is prosecuted for rape.

The prosecution must normally prove:

a. that V did not consent, and

b. that D did not reasonably believe that V did consent.

In this case, however, the s.75(2)(f) presumption may apply. The procedure will be that if the prosecution can prove beyond reasonable doubt that D, or someone else, had spiked V's drink/food with an intoxicant and that the amount was capable of or sufficient to stupefy V or permit her to be overpowered, then D will be convicted, **unless he can rebut the presumption**. He will seek to do this by raising plausible evidence that, although V was under the influence, she nevertheless consented, and/or that he reasonably believed V to be consenting. D will attempt to discharge this evidential burden, typically, by claiming that V said or did certain things which implied willingness. If this evidence is plausible, particularly if the alleged words or deeds of V were witnessed by another person, the burden of proof shifts back onto the prosecution to prove absence of consent (and absence of reasonable belief) in the ordinary way, that is, by reference to s.74. If this is what happens the prosecution will try to discharge the burden of proof that has now returned to them by convincing the jury that a person who has intercourse with another, having been involuntarily intoxicated, does not consent in the sense of having a 'free choice', however willing they may have appeared to be. Equally, it will argue that any belief that D had that V's choice was free would be unreasonable given that he knew and indeed possibly relied on the fact that V had been drugged/intoxicated. The trial judge is entitled to withdraw the question as to whether D's belief was reasonable if there was insufficient evidence (*Ciccarelli* [2011] EWCA Crim 2665).

Activity 8.2

Read Wilson, Sections 12.7.A.1 'Relevance of fraud or force – presumptions', 12.7.A.2 'Fraud – conclusive presumptions' and 12.7.A.3 'Evidential presumptions', and answer the following questions.

With particular reference to the presumptions in the SOA 2003, is there consent in the following situations? And how, if at all, could the presumption be rebutted?

a. **Donald and Vera have sexual intercourse. Donald had promised Vera money for doing so, but left without paying.**

b. **Donald tricks Wendy into having sexual intercourse with him by pretending to be George Clouseau, a famous film actor.**

c. **Frank is Beatrice's facebook friend. They have been friends for several months. They have sent each other photographs. Donald, Franks's twin brother, finds out about their relationship and, pretending to be Frank, arranges to meet Beatrice in a pub. Later that evening he invites her to his apartment where, still pretending to be Frank, he proposes intercourse which she agrees to.**

d. **Donald, who is happily married to Xenia, comes home to find her asleep and starts having sexual intercourse with her. She wakes up and tells him to stop.**

e. **In a bar, Donald buys Yvonne an alcoholic cocktail rather than the non-alcoholic drink she asked for. Yvonne does not notice the difference and, not being used to alcohol, becomes drunk. Donald drives Yvonne back to her flat where they have sexual intercourse.**

f. **Donald meets Violet in a singles bar. He invites her back to his apartment, where, after having a few drinks, he takes out a pair of hand cuffs. He says to Violet, 'We are going to have sex now and I am going to put these on you'. He does so and they have sex.**

8.6 *Mens rea*

At common law the prosecution were required to prove that the defendant lacked an honest belief that the victim was consenting. The defendant could escape liability even if his honest belief was not based upon reasonable grounds: *DPP* v *Morgan* [1976] AC 182. This created serious problems for victims in court. Under the SOA 2003 s.1(1)(c), the *mens rea* requirement has changed. Honest belief in consent is not enough. The defendant's belief that the victim consents must be reasonable.

8.6.1 Intention to penetrate

An obvious, if under-remarked, aspect of the *mens rea* for rape is that the defendant's non-consensual penetration of the complainant's vagina, anus or mouth is intentional. It follows that, if in the course of consensual sexual foreplay involving genital contact, the defendant effects penetration unintentionally, the rape is not committed even though the complainant did not consent to such penetration. A variation upon this scenario occurred in *R* v *Gabbai* [2019] EWCA Crim 2287 where the defendant engaged in consensual vaginal intercourse with the complainant in the course of which he penetrated her anus with his penis without her consent. On appeal against conviction for rape, the Court of Appeal, allowing the appeal, held that the trial judge erred in not directing the jury that it would not be rape if, when penetrating the complainant's anus, the defendant mistakenly thought he was penetrating the vagina.

8.6.2 Fault in regard to consent

At common law, the fault element in rape was, as with most serious crimes, subjective. The prosecution was required to prove that the defendant lacked an honest belief that the victim was consenting. The defendant could escape liability even if his honest belief was not based upon reasonable grounds: *DPP* v *Morgan* [1976] AC 182. This created serious problems for victims in court. Under s.1(1)(c) SOA 2003, the *mens rea* requirement changed. Honest belief in consent is not enough. The defendant's belief that the victim consents must be reasonable. This aspect of the fault element is now objective. Further, when s.75 or 76 applies such a belief will be presumed, conclusively or evidentially, **absent**. Otherwise, whether a belief in consent is reasonable is a matter for the jury. However, the trial judge may withdraw the issue from the jury if there is insufficient evidence. In *Ciccarelli*, the accused had sexually assaulted the complainant while she slept. The s.75 presumption applied that she did not consent as she was unconscious and this presumption was not rebutted. The accused's defence rested on the fact that while he knew the complainant was asleep, he believed she would have consented because of a sexual advance made by her to him earlier on the evening in question. The trial judge in that case addressed s.75 and ruled that whether or not the accused believed the victim was consenting, there was insufficient evidence that the accused's belief was reasonable. The judge said that she would direct the jury accordingly. As a result of this ruling, the accused changed his plea to guilty. He appealed against conviction on the ground that the judge's ruling was wrong and that the jury should have been allowed to consider whether his belief was reasonable. In dismissing the appeal the Lord Chief Justice said that the appellant's reasonable belief in the complainant's consent,

> either when she was asleep or in any other of the situations identified in section 75(2) (in what we describe as a position of disadvantage) will be considered by the jury provided that there is evidence which is sufficient to raise that issue.

He agreed with the trial judge that there was no evidence upon which a reasonable person could possibly come to the conclusion that the victim would consent. The parties hardly knew each other and had never had any form of sexual contact.

Reasonableness has to be assessed, according to s.1(2) of the SOA 2003,

> having regard to all the circumstances including any steps [the defendant] has taken to ascertain whether [the person] consents.

Whether a defendant's belief is reasonable or not is assessed objectively. It matters not that the defendant thought his belief was reasonable, if it was not. In *B* [2013] EWCA Crim 3 the defendant obliged his partner to have intercourse with him, having a delusion that he was a healer with special powers and that this would prevent his partner taking an improper interest in other men. The Court concluded that delusional beliefs such as he undoubtedly had would not in law render reasonable a belief that his partner was consenting when in fact she was not. A delusional belief in consent is, by definition, an unreasonable one.

Am I ready to move on?

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

1. Define the offence of rape.
2. State whether penetration of a woman's vagina with a man's tongue is rape.
3. State whether a man can be guilty of raping another man.
4. State whether a woman can be guilty of rape.
5. State whether it is rape if a man has intercourse with a transgender woman who has a surgically created vagina.
6. Define consent.
7. Explain the meaning and significance of the conclusive presumptions.
8. Explain the meaning and significance of the evidential presumptions.
9. State the circumstances which create the conclusive presumptions.
10. State the circumstances which create the evidential presumptions.
11. Explain and illustrate the court procedure in cases where a conclusive presumption is relied upon.
12. Explain and illustrate the court procedure in cases where an evidential presumption is relied upon.
13. Explain the fault element for rape and the relevance, if any, of the presumptions to that fault element.

NOTES

9 Non-fatal offences against the person

Contents

Introduction

Non-fatal offences against the person take two forms. The first and most obvious form involves **crimes of violence**. The criminal wrongdoing for such crimes is the causing of physical harm to another. Proof of physical harm is, therefore, an essential ingredient of these offences and, equally importantly, the offences may be committed irrespective of the victim's consent. The state takes the view that causing people physical harm is inherently wrong and, with some obvious exceptions such as surgery, the consent of the victim does not make it right.

The second form involves **crimes against autonomy**. The criminal wrongdoing for such crimes is the undesired interference with the victim's autonomy or freedom of action. The essence of these crimes is that the victim does not consent to the contact, rather than any harm which may have resulted. So, for example, if A (an adult) kisses B (another adult), this will be an offence **only if B does not consent** to the kiss. However, If A (an adult) punches B (another adult) in the course of an informal fight, **breaking B's nose**, this will be an offence **even though B does consent** to the punch since physical harm has occurred which cannot be consented to.

9.1 Crimes against autonomy

We shall start with crimes against autonomy. Autonomy means freedom to control one's own life, body and actions. The most common criminal interferences with autonomy include common assault, false imprisonment and rape. In this chapter we shall examine only common assault.

Common assault

Common assault comprises two separate offences: assault and battery (also known as assault by beating). The difference between the two is simple. Battery (assault by beating) involves an unconsented-to application of **force**; assault (simple assault) involves the unconsummated threat thereof. Punching someone is a battery; threatening to do so is an assault. Usually, both offences will be committed at the same time, e.g. by A threatening to hit B before they deliver the blow. It is possible, however, for the offences to be committed singly (e.g. by threatening to hit someone without consummating the threat or by hitting someone from behind).

Failure to charge the right offence will result in the case being thrown out (*R (Kracher)* v *Leicester Magistrates' Court* [2013] EWHC 4627 (Admin)).

Assault and battery are offences in their own right as well as being ingredients in other offences, such as assault occasioning actual bodily harm and assault with intent to rob. They were originally common law offences but have been made statutory offences by s.39 of the Criminal Justice Act 1988. The principles governing the offences are still to be found in case law. This includes both the criminal law and the law of tort (trespass to the person). They are triable only summarily with a maximum sentence of six months' imprisonment.

Do not allow yourself to be confused over terminology. The phrase 'common assault' refers to both assault and battery. So to say 'A assaulted B' can mean either that A hit B or that A threatened to hit B. However, it is always best to identify the type of common assault you are dealing with for purposes of clarity. You may wish to follow the lead of Glanville Williams (*Textbook of criminal law.* (London: Stevens & Sons,1983) second edition [ISBN 9780420468604]) who distinguishes the two forms by referring to battery as 'physical assault' and assault as 'psychic' assault.

9.1.1 Assault

The first form of common assault is assault, properly so called, or – as Williams calls it – 'psychic' assault or simple assault. It requires no physical contact with the person of the victim. It was defined in *Venna* [1975] 3 All ER 788 as:

> A person is guilty of assault if he intentionally or recklessly leads someone to apprehend the application to his body of immediate unlawful force.

Actus reus: assault

Causing apprehension

The *actus reus* of simple assault is acting so as to lead another to apprehend an immediate unlawful contact. To apprehend means simply to 'expect'. It does not specifically require 'fear' although fear will normally be present. In *Savage and Parmenter*, the House of Lords, approving *Venna*, underlined the fact that the offence was constituted by the fact of V apprehending the application to his body of immediate unlawful force.

Activity 9.1

Read Wilson, Section 11.3.A.1 'Assault' and answer the following questions.

a. A points a gun at B and threatens to shoot B. B, but not A, knows the gun is not loaded. Is there an assault?

b. A points a gun at B and threatens to shoot B. A, but not B, knows the gun is not loaded. Is there an assault?

Immediacy

The definition refers to the apprehension of 'immediate force'. Until recently, immediacy was of the essence; in short, some form of physical confrontation was necessary. For this reason it was not an assault if D threatened V with future harm (*Halliday*), or threatened V from afar, or otherwise was unable to put their threat into immediate execution. So in *Thomas* v *NUM* [1986] Ch 20, a civil case, it was not an assault when picketing mineworkers made threatening gestures to strike-breaking colleagues who were being brought to the colliery in vehicles under police escort, as there was no immediate prospect of converting the threat into action. It would have been different if the picketing miners had thrown stones or produced guns.

In recent years, this requirement of immediacy has been gradually attenuated, largely on the ground that the wrongdoing component of an assault is the effect the threat has on the victim rather than the reasonableness of the victim's fear. Fear, after all, often produces irrational thoughts. So in *Smith* v *Chief Constable of Woking* (1983) 76 Cr App R 234, D, late one night, peered through the curtains of V's apartment. This frightened V considerably and she called the police. D argued that he was not guilty of an assault as he had done nothing which would put V in fear of **immediate** personal violence. This argument was rejected on the basis that D's action was likely to instil fear of potential violence, even though objectively his position outside the apartment made this physically impossible. Kerr LJ said:

> What else, other than some form of immediate violence, could [V] have been terrified about?...When one is in a state of terror one is very often unable to analyse precisely what one is frightened of as likely to happen next. When I say that, I am speaking of a situation such as the present, where the person who causes one to be terrified is immediately adjacent, albeit on the other side of a window…It was clearly a situation where the basis of the fear which was instilled in her was that she did not know what the defendant was going to do next, but that, whatever he might be going to do next, and sufficiently immediately for the purposes of the offence, was something of a violent nature.

This kind of behaviour is now a separate statutory offence under the Protection from Harassment Act 1997. But the effect of the case may well have been to change the application of the law in cases such as *Thomas* v *NUM*. The leading authority on the matter is *Ireland* [1998] AC 147. In this case D made a number of phone calls to V: some included threats, others were silent. The House of Lords concluded, consistently with *Smith* v *Woking*, that the ingredients of assault were present, whether or not words were used, so long as the jury was convinced that D's phone calls led V to expect immediate personal violence and this did not require a face-to-face confrontation between D and V. Another important consequence of this case is to rid the law of any doubt that assault could not be committed by words alone. It can. Indeed, even a silent telephone call is an assault if it leads V to apprehend immediate personal violence.

The effect of this House of Lords' decision is to relax the immediacy requirement quite considerably. In *Constanza* [1997] 2 Cr App R 492, the Court of Appeal held that even sending threatening letters could form the subject matter of an assault. On the question of immediacy, it sufficed that D's actions provoked a fear of violence **at some time not excluding the immediate future**.

ACTIVITY 9.2

Read question (b) in Activity 9.9. Do you understand why Adam was not guilty of assault occasioning actual bodily harm? The answer is that Adam did not provoke a fear of violence in Eve and so did not commit (psychic) assault. Clearly there was no battery either.

Unlawful force

The force or threat of force must be unlawful, so no offence is committed if D is acting in self-defence, or if the show of force was done to effect a lawful arrest (s.3(1) of the Criminal Law Act 1967 (CLA 1967)) or the approach is consented to. So in *Cousins* [1982] 2 All ER 115, it was said that a threat to kill was capable of being a lawful exercise of self-

defence in discouraging a threatened attack and so would not be an assault. So also, if A permits B (a circus knife thrower) to throw a knife at her, which he does, no assault is committed due to A's consent, even though A apprehends the possibility of being struck.

Mens rea: assault

The *mens rea* for common assault of this kind is intention or common law recklessness; that is, foresight that V will apprehend the application of unlawful force. In *Spratt* [1990] 1 WLR 1073, D fired an air pistol through the window of his flat for no particular reason. Two pellets hit a girl playing in the forecourt, whom D had not known was there. D was charged with assault occasioning actual bodily harm (s.47 OAPA 1861). The Court of Appeal quashed his conviction. To be guilty of assault occasioning actual bodily harm the prosecution had to prove **both** the bodily harm **and** an assault that had caused it. It could prove the former but not the latter, since to be guilty of an assault it had to be proven that D intended to hit the girl (battery) or cause her to fear being hit (assault), or foresight of either these two alternatives. It could do this only if D had known the girl was there.

9.1.2 Battery or assault by beating

Battery can be defined as:

> any act by which D, intentionally or recklessly, inflicts (non-consensual) unlawful force upon P.

Actus reus: battery

Force

As has been explained, the wrongdoing in common assault, including battery, otherwise known as 'assault by beating', is not causing physical harm but causing unwanted interference with the person of the victim whether or not physical harm is caused. In battery this takes the form of someone applying force to the victim, or – putting it another way – making physical contact with them. So examples of battery include restraining a person (*Collins* v *Wilcock* [1984] 1 WLR 1172), digging them in the ribs, spitting on them (*Commonwealth* v *Cohen* 55 Mass App Ct 358 (2002)), cutting their hair (*DPP* v *Smith* (2006)), even, it appears, cutting (*Day* (1845) 1 Cox CC 207) or feeling a person's clothes while on their person.

The physical contact does not have to be painful or hurtful but it does have to involve force. So it is not battery to drug, poison or gas someone: such interferences should be charged as an offence under s.23 OAPA 1861.

A battery requires an act. In other words it may not be committed by omission. So a tree surgeon who, without fault, allows a tree branch to fall, pinning a passer-by to the ground, does not commit battery by failing to remove the branch. One qualification to this rule is the continuing act doctrine. This refers to cases where the defendant's failure to act can be construed as continuing an earlier act. In *Fagan* v *MPC* [1968] 3 All ER 442, it was an assault for a driver to fail to remove his car from a policeman's foot, having first parked it there without fault. The court ruled that this was not an omission but a continuation of the initial act of parking. Put another way, F was not 'omitting' to remove the car from the foot. He was 'keeping' the car on the foot just as he would have been doing if, having stepped on the policeman's foot by mistake, he then refused to step off again. The requirement that there be an act was reaffirmed in *Dunn* (2015) which was considered in Chapter 3 of this module guide.

Activity 9.3

If F had only learned about the plight of the policeman having left the car, would his refusal to remove the car still be a continuation of the initial act of parking the car? Would the tree surgeon, considered above, be guilty of battery on this basis?'

No feedback provided.

Is direct contact necessary?

It is not necessary for there to be direct contact between D and V. In the old case of *Scott* v *Shepherd* (1773) 95 ER 1124, D was found guilty of battery when he had thrown a lit firework into a crowded marketplace. The firework exploded in V's face, but only after it had passed through several hands before it arrived there. The court ruled that this did not affect D's liability. Again, it was a battery for a practical joker to shout 'Fire!' at a theatre production, resulting in injuries to members of the audience trapped in the resulting crush (*Martin* (1881) 8 QBD 54).

So also in *Mitchell* [1983] 2 All ER 427, D assaulted V by pushing T roughly, who then fell on top of V. However, it is arguably not a battery if A digs a pit for B to fall into, as B's fall is not the result of A applying any force. The case of *DPP* v *K* (*A Minor*) (1990) 91 Cr App R 23 runs counter to this conclusion. K, a schoolboy, loaded a hand dryer in the school lavatories with acid. The next user, V, was injured when it discharged on to him. The Queen's Bench Division was satisfied that this was a battery. But what force did K apply directly or indirectly to V? Presumably the force of the acid hitting his person.

Activity 9.4

Read Wilson, Section 11.3.A.2 'Battery' and answer the following question.

What was the act of assault relied upon in *DPP* v *Santana-Bermudez* (2003)? What problem does the case create?

Unlawful force

The force or threat of force must be unlawful; so, as with assault, no offence is committed if D is acting in self-defence, or the contact is consented to (*Slingsby* [1995] Crim LR 570) or if the show of force was done to effect a lawful arrest (s.3(1) CLA 1967). So in *Kenlin* v *Gardiner* [1966] 3 All ER 931, police officers were suspicious of the activities of two boys and took hold of them to prevent them running away. They struggled and punched the officers. The boys appealed against their convictions for assault at the Magistrates' Court. The Queen's Bench Divisional Court held that, since the boys were not arrested, the taking hold of them was an assault by the officers. The boys were allowed to use reasonable force in self-defence against an assault, and their convictions were quashed.

Compare this case with *Donnelly* v *Jackman* [1970] 1 All ER 987, 134 JP 352 where, on similar facts, the officer tapped D on the shoulder with the intention of stopping him. D then punched the officer. On appeal against conviction, the Divisional Court upheld D's conviction. Tapping D on the shoulder was a trivial interference with his autonomy and did not take the officer outside the exercise of his duty. This case shows that not every unconsented-to contact is a battery. Unconsented-to contacts issuing from the ordinary rough and tumble of everyday life do not count as batteries so long as the force used was not excessive (*Collins* v *Wilcock* [1984] 1 WLR 1172). This will include such contacts as taps on the shoulder to attract another's attention, slaps on the back in greeting, jostling, knocking and bumping in queues, on trains and while running for the bus.

However, contrary to some earlier authorities, there is no requirement that the touching be hostile. If V makes clear that they refuse a particular kind of contact, D will commit battery if they ignore the refusal, however well intentioned. A surgeon who discovers cancer in the womb of an anaesthetised woman on whom he is a performing a dilation and curettage acts unlawfully if, without gaining the woman's consent, he performs a hysterectomy.

Mens rea: battery

The *mens rea* for battery, as with assault, is intention and recklessness as to the unlawful contact. It is not intention or recklessness as to any resulting harm. It is for this reason that in *Slingsby* (1995) D was not guilty of manslaughter, because, although he may have foreseen some injury to his partner, he did not have the *mens rea* for battery. The *actus reus* of battery is the application of unconsented-to force: the *mens rea* is the intention to apply (or foresight regarding) unconsented-to force.

9.1.3 Charging common assault

We have seen that actual physical harm is not of the essence of battery. However, most cases of battery will inevitably result in some physical harm. The question for the prosecuting authorities is, therefore, whether to charge such a case as common assault or the aggravated version, assault occasioning actual bodily harm (s.47 OAPA 1861). The Crown Prosecution Service (CPS) has published charging standards for the guidance of prosecutors. These state that batteries causing minor bruises and cuts, abrasions, swellings, broken nose, loss or breaking of teeth and black eyes are appropriately charged as common assaults. More serious injuries, such as also appear in the charging standards, are chargeable under s.47 and s.20 OAPA 1861. The charging standards do not have the force of law but do help to explain why cases are charged as they are. Why do you think a prosecutor may 'undercharge' in this way?

9.2 Crimes of violence

The crimes of violence dealt with in this module guide are those appearing in the OAPA 1861. These offences form a ladder of relative seriousness starting from, at the bottom of the ladder, assault occasioning bodily harm (s.47), to malicious wounding (s.20), up to wounding with intent to cause grievous bodily harm (GBH) (s.18). We shall deal with these in ascending order of gravity, starting with the least serious.

9.2.1 Assault occasioning actual bodily harm

Section 47 OAPA 1861 makes it an offence to commit an assault **occasioning actual bodily harm**. To support a conviction for s.47 the prosecution must therefore establish:

- a common assault
- actual bodily harm
- a causal connection (occasioning) between the assault and the harm.

Common assault

The elements of common assault have been dealt with above. You will remember that an assault comprises two alternative forms of wrongdoing. The first is an unconsummated threat of unlawful force to another person ('psychic' or 'simple' assault). The second is the actual application of unlawful force to the body of another. This is known as a battery, assault by beating or 'physical' assault. The prosecution can establish the s.47 offence, therefore, if it can prove actual bodily harm was caused as a result of **either** D threatening an unlawful contact or actually making such contact.

Illustration 9.1

a. A punches B (battery), breaking B's nose (causing actual bodily harm).

b. A, intending to throw beer at V, accidentally lets go of the glass (causing), which hits (battery) and cuts C (actual bodily harm) (*Savage* [1992] 1 AC 699).

c. A makes an unwelcome advance to V, a passenger in the back of B's car (simple assault). V, in fear, jumps out of the car, breaking her leg (causing actual bodily harm) (*Roberts* (1972) 56 Cr App R 95).

Actual bodily harm

Actual bodily harm was defined rather loosely by Swift J in *Donovan* [1934] 2 KB 498 as:

> any hurt or injury calculated to interfere with the health or comfort of the [victim]. Such hurt or injury need not be permanent, but must...be more than merely transient and trifling.

The jury is the arbiter of fact as to whether the 'hurt' suffered by V is 'actual bodily harm'. Any injury which is not trivial is theoretically 'bodily harm'. In practice, s.47 is unlikely to be charged unless the degree of injury is fairly substantial. Assaults causing minor scratches and bruises tend to be charged as common assault. Actual

bodily harm does not, however, require injury to living tissue. The Divisional Court has included the cutting of a woman's ponytail as actual bodily harm, although the hair is technically 'dead tissue' (*DPP* v *Smith* [2006] EWHC 94 (Admin)).

Activity 9.5

Read Wilson, Section 11.4.A 'Assault occasioning actual bodily harm' and complete the following activity.

List examples of actual bodily harm to be found in the Crown Prosecution Service charging standards. These standards do not have the force of law but they are influential in practice. You can use them to guide your own choice of which crimes to charge in problem answers.

Actual bodily harm has been defined to include psychiatric injury. In *Chan Fook* [1994] 1 WLR 689, the Court of Appeal ruled that this did not include simply shock, pain or panic; a recognised psychiatric illness is necessary. In *Ireland* and *Burstow*, two women who suffered panic disorder (chronic panic attacks) and depressive illness as a result of being persistently stalked by the defendants were ruled to have suffered 'bodily' harm for the purposes of both s.47 and s.20 (see below). *Ireland* is authority for two separate propositions.

- A telephone call, even a silent telephone call, can constitute a common assault.
- If psychiatric injury is suffered as a result the assault can be charged as assault occasioning actual bodily harm.

If the psychiatric injury suffered is severe, the assault can be charged, under s.20, as the malicious infliction of grievous bodily harm. See *Burstow*, below.

The causal connection

Section 47 refers to assault 'occasioning' actual bodily harm. 'Occasioning' simply means 'causing'. To secure a conviction for s.47, as opposed to common assault, therefore, the prosecution must prove an unbroken causal chain linking the victim's injury with the defendant's assault (or battery). The test for causation requires simply that the victim's actions were a factual and legal cause of the common assault. The factual cause will be the legal cause if it substantially contributed to the resulting harm and if there was no *novus actus interveniens* (see Chapter 4).

So in *Roberts* (1972) 56 Cr App R 95, D touched V on the knee. Fearing a sexual attack, V jumped out of the car. Was D guilty of a common assault only or of the s.47 offence? D argued that he should not be guilty of the aggravated offence, only the common assault because he did not cause the victim's injury; she did by jumping out of the car. The court ruled that, since her reaction was not abnormal, the causal chain linking assault and physical harm remained intact. *Roberts* was approved in *Savage* [1992] 1 AC 699, in which D threw a pint of beer in V's face. The glass slipped and cut V. The House of Lords held that it was not necessary for the prosecution to prove actual foresight of harm for D to be guilty under s.47:

> The verdict of assault occasioning actual bodily harm may be returned upon proof of an assault together with proof of the fact that actual bodily harm was occasioned by the assault.

Mens rea: s.47

The *mens rea* for s.47 requires, therefore, only an intention to cause apprehension of physical contact or an intention to apply (unlawful) force to the victim (or foresight of either). It is not necessary to prove D intended or foresaw the injury. So in *Roberts* it was not necessary for the prosecution to prove that D foresaw any injury, as long as he intended to touch V or foresaw her apprehension. Proving culpability requires proof of foresight: proving cause does not. Again, in *Savage*, where V was injured by a beer glass, the offence was made out upon proof that D intended to throw beer at V. It was not necessary to show further any foresight that the beer glass might slip from her grasp and cause the resulting cut.

Activity 9.6

Read Wilson, Sections 11.3 'Offences protecting personal autonomy' and 11.4 'Crimes of violence' and answer the following questions.

a. **Adam and Eve are partners. One day Eve starts tickling Adam. He asks her to stop but she refuses and so Adam jumps over the sofa and falls awkwardly, breaking his ankle. Has Eve committed assault occasioning actual bodily harm?**

b. **Eve is an asthmatic. Adam, who knows this, steals her inhaler. He then telephones her to tell her what he has done. Eve asks for its return but Adam refuses, although he foresees that this might cause her to have a panic attack, which in turn would precipitate an asthma attack. This is indeed what happens and Eve is rushed to hospital. In attempting to remedy her condition an overdose of a palliative drug is given which sends Eve into a coma. She regains consciousness a few days later with no ill effects. What offence(s), if any, has Adam committed?**

Hint: In question (b), Adam cannot be guilty under s.47. Do you know why? If you do, and you understand what he may be guilty of, you are a long way down the road to a good understanding of this area.

9.2.2 Malicious wounding/infliction of grievous bodily harm

Malicious wounding is on the next rung up in the hierarchy of gravity. Under s.20 of the OAPA 1861, an offence is committed where D:

> unlawfully and maliciously wound[s] or inflict[s] any grievous bodily harm, upon any other person, either with or without any weapon or instrument.

Actus reus: s.20

It is important to understand that there are two different conduct elements in s.18 (and s.20). The first is a wounding; the second is causing grievous bodily harm. These are by no means synonymous. It is possible to wound someone without them suffering grievous bodily harm. And it is possible to inflict grievous bodily harm on someone without wounding them. **It is key to your proper understanding of this offence and section 20 below that you understand and remember this point**.

Illustration 9.2

a. **D, wanting to seriously hurt V, takes a carving knife and thrusts it towards V's abdomen. V sidesteps and the knife catches him on the arm, causing significant bleeding.**

b. **D smashes V over the head with an iron bar. This causes a fracture to V's skull.**

Both these cases support a conviction under s.20. In the first case, there is a wounding **without grievous bodily harm**, whereas in the second there is an infliction of grievous bodily harm **but no wounding**. In practice, trivial wounds such as Illustration 9.2(a) tend to be charged under s.47 in the absence of an intention to cause serious injury.

The way this offence has been fashioned, therefore, encompasses an enormous potential range of degrees of injury, from a trivial wound to a life-endangering beating. Both are subject to the same maximum punishment of five years. In the next two sections we will examine what is meant by a wounding and what is meant by grievous bodily harm together with their points of overlap and difference.

Wounding

A wound requires more than a scratch or a graze, even though blood may show. It requires a penetration of both layers of skin – namely the dermis and epidermis. Internal ruptures do not count as a wound, nor does bruising, despite the blood loss (*McLoughlin* (1838) 173 ER 651). In *Eisenhower* [1984] QB 331, D shot V with an air gun and the pellet hit V near the eye, resulting in a bruise below the eyebrow and a bloodshot eye. D was charged under s.20, whose *actus reus* is similar to that of s.18. The injury

satisfied neither form of the *actus reus* of s.20: it was insufficiently serious to count as grievous and nor did it count as a wound, because a wound is a break in the continuity of the skin. In short, an internal rupturing of the blood vessels, as here, is not a wound. This should have been charged as a s.47 offence.

Note that there is one exception to the rule that internal ruptures do not count as a wound; this is where the internal membrane ruptured takes the form of skin, as in the lining of the mouth and the urethra (*Waltham* (1849) 3 Cox 442).

9.2.3 Grievous bodily harm

Most commentators believe it is time to dispense with words such as 'grievous' with which the 1861 Act is littered. It really is not helpful to clarity. *DPP* v *Smith* [1961] AC 290 defined grievous bodily harm as 'really serious bodily harm or injury'. I think you will agree that this is not a particularly helpful elaboration. No more helpful is *Janjua* [1999] 1 Cr App R 91, in which the Court of Appeal ruled that 'serious harm' is a good enough paraphrase of grievous bodily harm to be given to the jury. Whether an injury counts as 'really serious' or 'serious' is a question of fact for the jury. In *Bollom* [2003] EWCA Crim 2846, the Court of Appeal said that, in deciding whether harm was serious or not, the jury should take into account the age and state of physical fitness of the victim, as well as the extent and nature of the injury. It is fair to say therefore that what would be 'serious injury' for one person might not be for another. Breaking an office worker's index finger may not be considered a serious injury but the jury may consider it differently if the victim was a concert pianist.

In practice, the jury's task is made easier by the filtering mechanism of the Crown Prosecution Service charging standards. These offer guidance to the prosecution as to what kind of injuries count as grievous for the purpose of deciding which offence to charge. Serious wounds count as grievous bodily harm; so does breaking an arm or leg, savage beatings, knocking someone unconscious for more than a brief period, injuries involving permanent disfigurement or long-term treatment and those involving serious loss of blood or requiring surgery. Grievous bodily harm also includes sexually transmitted diseases such as HIV (*Dica* [2004] EWCA Crim 1103) and serious psychiatric injury (*Burstow* [1997] 1 Cr App R 144).

Grievous bodily harm must be 'inflicted'

Until recently 'inflict' was thought to be narrower than 'cause' (the *actus reus* element in s.18). 'Inflicting grievous bodily harm' conjures up the vision of some form of application of force that delivers the harm, just as a knife or gun delivers a wound. This is supported by the presence in s.20 of the words 'either with or without any weapon or instrument', which implies some form of harm-delivering blow or application of force. This was the view taken in *Clarence* (1888) 22 QBD 23 where it was held that a husband who gave gonorrhoea to his wife during consensual intercourse was not guilty under s.20; he had caused GBH but not inflicted it. He had not inflicted GBH because he had not assaulted her, and he had not assaulted her because she consented to the intercourse. *Clarence* also stood for the proposition that for s.20 the harm must be delivered by force in the manner of a shot from a gun, a thrust with a knife or a blow from a stick. In *Burstow*, *Clarence* was disapproved. In this case, D had stalked his victim over a long period: he had made silent telephone calls, sent hate mail, followed her around and stolen clothing from her washing line. V suffered serious clinical depression as a result. The House of Lords held that serious depression counted as grievous bodily harm, just as depression counted as actual bodily harm. Such harm could be inflicted in the absence of the application of force. It is not that kind of harm. It was said that there was no meaningful difference between inflicting harm and causing harm. If this is the case then if *Clarence* were decided today, the husband would be guilty under s.20. In *Dica* this was confirmed. D had intercourse with V without informing her that he was HIV positive. V contracted the virus. It was held that a serious sexually transmitted disease counted as serious bodily injury and that D had inflicted it. There was no requirement that the harm be delivered by any unlawful force as *Clarence* had supposed. To inflict harm means simply to cause it, which D had done.

One distinction between 'cause' and 'inflict' may, however, remain. Cause is possibly slightly wider in that one can cause someone serious harm by omission, say by omitting to put out a fire that one has accidentally started, which results in injury to the victim (see *Miller*). It is not yet clear whether one can inflict serious harm by omission. In *Burstow* it was said that it is simply a matter of correct linguistic usage. If so, it is arguable that, although it is certainly correct linguistic usage to say that D 'caused' V serious injury by failing to put the fire out, it is not so obviously correct usage to say that D 'wounded' or 'inflicted serious harm' on V (her son) by failing to stop V from injuring himself on a barbed wire fence. The words 'wound' and 'inflict', in other words, seem to imply the need for some form of action. However there is no authority in support of this proposition so it should be treated with caution.

Mens rea: s.20

The *mens rea* for s.20 OAPA 1861 is malice; that is, intention or subjective recklessness. In *Mowatt* [1968] 1 QB 421, the Court of Appeal ruled that it was necessary to prove that D intended or foresaw harm befalling V but it was not necessary to intend or foresee the degree of harm actually sustained. In *Parmenter* [1991] 2 WLR 408 the House of Lords approved *Mowatt*, concluding that the prosecution need prove only that D intended or foresaw the risk of some physical harm resulting from his shaking of his child for a conviction under s.20. It was not necessary to show that D intended or foresaw that the child would suffer serious injury.

9.2.4 Wounding with intent

By s.18 of the OAPA 1861 it is an offence to:

> unlawfully and maliciously by any means whatsoever wound or cause any grievous bodily harm to any person, with intent to do some grievous bodily harm to any person, or with intent to resist or prevent (arrest)...

The major difference between this offence and that of s.20 OAPA 1861 lies in the *mens rea*. Section 18 is a crime of specific intent whereas s.20 can be committed either intentionally or recklessly.

Actus reus: s.18

It is again important to understand that there are two alternative conduct elements in s.18. The first is a wounding; the second is an infliction of grievous bodily harm (see the discussion on s.20 above).

Wounding

A wound requires more than a scratch or a graze, even though blood may show. It requires a penetration of both layers of skin – namely the dermis and epidermis. Internal ruptures do not count as a wound, nor does bruising, despite the blood loss (*McLoughlin* (1838) 173 ER 651). In *Eisenhower* [1984] QB 331, D shot V with an air gun and the pellet hit V near the eye, resulting in a bruise below the eyebrow and a bloodshot eye. D was charged under s.20, whose *actus reus* is similar to that of s.18. The injury satisfied neither form of the *actus reus* of s.20: it was insufficiently serious to count as grievous and nor did it count as a wound, because a wound is a break in the continuity of the skin. In short, an internal rupturing of the blood vessels, as here, is not a wound. This should have been charged as a s.47 offence.

Note that there is one exception to the rule that internal ruptures do not count as a wound; this is where the internal membrane ruptured takes the form of skin, as in the lining of the mouth and the urethra (*Waltham* (1849) 3 Cox 442).

9.2.5 Grievous bodily harm

Grievous bodily harm

For the meaning of 'grievous bodily harm', see Section 9.2.3.

The cases referred to above in relation to the transmission of sexually transmitted diseases (*Dica)* and serious psychiatric injury (*Burstow*) were decided in the context of the s.20 offence. It will be rare for such transmissions to be charged under s.18 because of the difficulty of proving to prove the intent necessary.

Causing grievous bodily harm

We have dealt with the concept of cause before. Again, to remember what it is to cause harm means you may need to revisit Chapter 4 of this module guide. Harm can be caused by an act, or an omission in breach of duty (e.g. *Pittwood* (1902) 19 TLR 37, *Instan* [1893] 1 QB 450, *Evans* [2009] EWCA Crim 2243). The reference in s.18 to 'any means whatsoever' does not add anything to the normal rules of causation.

Activity 9.7

Return to Chapter 4 of this module guide and remind yourself of the principles governing causation. In particular, you must remember how not all 'but for' causes of a harm are the legal causes. Then answer the following question.

Jaz and Deepak attack Ali when he calls them names at a football match. Jaz hits the first blow which causes Ali to fall down. Jaz then loses interest and returns to watching the game. Meanwhile Deepak kicks Ali several times, causing him to suffer a ruptured spleen. Has Ali's (serious) injury been caused by both Jaz and Deepak or only by Deepak?

Mens rea: s.18

Section 18 is a crime of ulterior intent. What makes it so serious is that, accompanying the wounding or the causing of grievous bodily harm, is an intention matching or **exceeding** the simple causing of the injury that is to cause GBH or resist or prevent an arrest.

Activity 9.8

Read Wilson, Section 11.4.C.2 '*Mens rea*', Section (b) 'Maliciously' and then answer the following question.

Is D guilty of the s.18 offence in the following two illustrations?

a. **P, a police officer, is chasing D for the purpose of arresting her. While crossing a road, P grabs hold of D. D pushes P away, causing P to fall over. He is hit and seriously injured by a passing car.**

b. **As above, except that D does not push P, who trips over before being hit by the car.**

Intending grievous bodily harm

Whether the conduct element relied upon is a wound or GBH the prosecution must also prove that the defendant intended to cause the victim GBH, or, if that cannot be proved, the alternative intention of resisting or preventing an arrest. In other words, if D wounds V but not seriously the prosecution will fail on a s.18 charge unless they can prove that it was D's intention to cause a serious wound, that is a wound amounting to GBH. In the case of D causing V GBH in some other way, the prosecution must prove that this level of injury was intended. The jury should not normally be given a Woollin direction, but should simply be asked to consider whether, on the basis of all the evidence, D not only intended to do what they did but specifically intended to cause V really serious injury, etc. (see *Belfon* [1976] 1 WLR 741, *Purcell* (1986) 83 Cr App R 45).

A jury which is not convinced that D had the necessary intention to cause grievous bodily harm can bring in the alternative verdict under s.20 (malicious infliction of GBH) (*Mandair* [1994] 2 All ER 715). In *Banton* [2007] EWCA Crim 1847, the trial judge refused to allow the jury this option on a charge of s.18, when D had smashed a bottle in V's face. He told the jury that this could only mean one thing, namely that D intended grievous bodily harm. Do you agree?

Activity 9.9

a. Read Wilson, Sections 6.6.B 'Intention in the criminal law: intention, purpose and motive' and 6.6.C 'The meaning of intention in the criminal law'. Then create an examination-style question in which a *Woollin* direction would be necessary in a case of causing GBH with intent.

b. Read Wilson, Section 11.4 'Crimes of violence' and answer the following questions.

i. Identify two similarities and two differences between s.18 and s.20.

ii. Identify two similarities and two differences between s.20 and s.47.

No feedback provided.

9.3 Consent and offences against the person

We have already seen that absence of the victim's consent is one of the elements of common assault. This means that if D is charged with battery and the prosecution proves that D intentionally punched V in the stomach, and nothing more, the defence can make a submission of 'no case to answer'. This is because an essential element in the offence of common assault has been left unproven, namely that the force applied to V's body was not consented to.

This explains the decision in *Slingsby*, in which D was charged with manslaughter when his partner died of septicaemia following consensual, although extremely vigorous, sexual activity. The validity of the conviction depended upon whether the sexual activity involved an unlawful battery. The prosecution argued that it was because it was extremely rough and had caused the victim harm. This argument was rejected on the basis that the activity was consensual. Since there was no battery, there could be no liability for constructive (unlawful act) manslaughter.

Different principles apply where D causes harm deliberately. The deliberate causing of physical injury is considered inherently unlawful and, being inherently unlawful, victim's consent cannot make it lawful (*Donovan* (1931)). Before exploring this aspect of consent, let us examine the actual concept of consent.

What is consent?

This is not an easy question to answer since there is vast range of responses possible between, at one end of the consent spectrum 'Oh yes, please!' and the other 'Not over my dead body!' Clearly, if V submits to physical contact only due to force or the threat of force, this is not consent. However, the use of force or threat of force is not the only way consent can be vitiated. For example, deception or threats of financial or social harm or other non-violent threats might invalidate consent. In *Olugboja* [1982] QB 320, a rape case, the Court of Appeal drew a distinction between reluctant acquiescence (consent) and mere submission (not consent).

Whether consent is present or not is a question of fact for the jury on the basis of its own common sense and experience of life. In *Kirk* [2008] EWCA Crim 434, the Court of Appeal upheld a conviction for rape of a destitute and hungry girl who submitted to intercourse so as to be able to buy food. This was decided under the definition of consent provided by s.74 of the Sexual Offences Act 2003, but the basic principles should be comparable. This was interpreted as a case of submission (I had no real choice) rather than reluctant acquiescence.

Consent may be express or implied. Obvious examples of implied consent occur in cases of everyday physical contact between people who know each other. Punching a friend in jest will usually be treated as impliedly consented to. As we shall see below, participants in sports are also deemed to consent to the ordinary 'rough and tumble' involved in the relevant sport, even where such rough and tumble falls outside the rules of the game.

Consent must be effective

Apparent consent can be rendered ineffective in a number of ways. In particular, the consent of those who do not understand exactly what they are consenting to – for example, the young or those who lack mental capacity – may be ineffective. For this reason a tattooist was guilty of common assault for tattooing youths of 12 and 13, consent notwithstanding (*Burrell* v *Harmer* [1967] Crim LR 169).

More generally, certain types of fraud may vitiate consent. Consent is not vitiated simply because a person would not have agreed to the contact had they known all the relevant facts. It is vitiated only if the nature of the fraud prevented the victim from understanding what they were consenting to.

Since 2003, the position on consent in relation to sexual assaults, including rape, is regulated by the Sexual Offences Act 2003. It enacts that two deceptions vitiate consent, namely deception as to identity and deception as to the nature and purpose of the act. The pre-2003 Act law is still authoritative in relation to non-sexual assaults which is essentially similar. In *Bolduc* v *Bird* [1967] SCR 677, D asked V's consent to conduct a medical examination on her in the presence of his 'medical student', who in fact was not his medical student but a friend. It was held that her consent was not vitiated and there was no assault. A similar decision was reached in *Richardson* [1999] QB 444, in which V submitted to dental treatment by a dentist who had been struck off. It was held that V's consent was not vitiated by the fact that her choice was not fully informed. In both cases the deception was as to the quality of the contact rather than its nature, and to status rather than identity. Compare *Melin* [2019] EWCA Crim 557 where the appellant claimed falsely to be medically qualified before administering Botox injections. The Court of Appeal ruled that such a misrepresentation could vitiate consent if the fact of being medically qualified was a condition of the complainant giving consent. If so, the deception would go to the question of the appellant's **identity** and the legal validity of their consent.

Activity 9.10

If Richardson had never been a qualified dentist, but was a charlatan, would this have vitiated V's consent?

A comparable conclusion was reached in *Tabassum* [2000] 2 Cr App R 328, in which the defendant induced women to submit to breast examinations by misrepresenting his medical qualifications. The Court of Appeal held that such mistakes could vitiate consent since the victims were consenting to one thing (medical examination) and were getting another (indecent assault).

Judges are increasingly requiring consent to be fully informed for it to be operative. This is certainly the case in relation to the transmission of sexually transmitted diseases. In *Dica* (2004) and *Konzani* [2005] EWCA Crim 706, the Court of Appeal ruled that consent to the act of intercourse is vitiated for the purpose of common assault, ss.47 and 20 OAPA 1861, if – unknown to V but known to D – D is suffering from a sexually transmitted disease. **Please note** that consent to the act of intercourse for the purpose of the **crime of rape** is not vitiated in this case, since the act of intercourse was what the victims consented to and was what took place.

Consent and violence

The final limitation on consent must now be elaborated upon. This is that, although (absence of) consent is an essential element in common assault, it is not an essential element in crimes of violence such as ss.47, 20 and 18 OAPA 1861. This means, in effect, that the victim's consent is not normally a defence to a crime of violence. So consent is a defence to a kiss, a tap, a tickle or a slap, but it is not a defence to a private physical fight to settle an argument (as occurred in *A-G's Reference (No 6 of 1980)* [1981] QB 715). In this case Lord Lane CJ said:

> It is not in the public interest that people should try to cause, or should cause, each other actual bodily harm **for no good reason**. Minor struggles are another matter.

In reaching this decision, the Court of Appeal approved the case of *Donovan* [1934] 2 KB 498. The appellant was charged with indecent and common assault upon a girl whom he had beaten with a cane, with her consent, for his own sexual gratification. Explaining his decision, Swift J said at 507:

> If an act is unlawful in the sense of being in itself a criminal act, it is plain that it cannot be rendered lawful because the person to whose detriment it is done consents to it. No person can license another to commit a crime...As a general rule, although it is a rule to which there are well established exceptions, it is an unlawful act to beat another person with such a degree of violence that the infliction of bodily harm is a probable consequence, and when such an act is proved, consent is immaterial.

Illustration 9.3

a. Alan has an informal boxing match with his friend, Brenda. In the course of the match Alan and Brenda land several blows to the body. These do not result in any significant harm.

b. Stephen and Richard have an informal boxing match. In the course of the match Stephen and Richard land several blows to the body and the face. Stephen suffers a broken nose and cuts and bruises as a result.

In the first case, if Alan and/or Brenda were prosecuted for common assault, they would have an absolute defence, namely consent.

In the second case, if Richard were prosecuted for assault occasioning actually bodily harm, he would have no defence. Consent is not a defence to informal fighting causing actual bodily harm.

Note that if Richard were charged, as he could be, only with common assault he would have a defence as per the first case since common assault, unlike assault occasioning actually bodily harm, requires proof that V did not consent.

Let us examine more closely the claim that consent is ineffective where physical injury has been sustained. It is more accurate to say that, in the case of deliberately inflicted harm, consent will be ineffective unless the activity from which the harm derives is privileged as being in the public interest. In the case where the harm is not deliberately inflicted, consent will usually be effective because of the presumption that people should be free to take risks of physical harm.

Deliberate infliction of harm

A-G's Reference (No 6 of 1980) is authority, in effect, for the proposition that where injury is inflicted deliberately it cannot be consented to, unless the context within which the injury is inflicted is specially privileged on public interest grounds. Causing injury for sexual gratification is not deemed to be in the public interest. In *Brown* [1994] 1 AC 212, a case involving a consensual homosexual orgy in which quite serious injuries involving the genitals were deliberately inflicted, Lord Templeman for the House of Lords put it:

> In my view the line properly falls to be drawn between assault at common law and the offence of assault occasioning actual bodily harm created by s.47 of the 1861 Act, with the result that consent of the victim is no answer to anyone charged with the latter offence or with a contravention of s.20 unless the circumstances fall within one of the well-known exceptions such as organised sporting contests and games, parental chastisement or reasonable surgery.

In *Emmett*, The Times, 15 October 1999, consent was similarly not available where a heterosexual couple engaged in consensual sado-masochistic activities of a particularly dangerous nature designed to enhance sexual pleasure, including the burning of the woman's chest with lighter fuel and partial suffocation.

No decision has yet been made on the legality of sado-masochistic activity involving a low level of violence, for example biting and scratching. In principle, *Brown* and *Emmett* notwithstanding, this should be treated as lawful. Although such activities cannot be presented as being in the public interest, it can certainly be argued that it would be contrary to the public interest to proscribe them, if only on grounds of

privacy and the principle of minimal criminalisation (see *R* v *Wilson*, below). Biting and scratching is a not uncommon incident of sexual relations even among those who would disapprove of the practice of sado-masochism. As we have already seen, victim's consent does render vigorous sex lawful even if it is of a nature to cause physical injury.

ACTIVITY 9.11

Read Wilson, Sections 2.2.B.2 'Liberal objections to the enforcement of morality' and 2.2.B.3 'Is there a meaningful difference between legislating to enforce morality and legislating to prevent harm?' On the basis of the arguments presented there do you agree with their Lordships' decision in Brown?

No feedback provided.

Exceptions

Surgery, tattooing and body alteration

Other exceptions to the rule that deliberately inflicted harm cannot be consented to include, as Lord Templeman remarks, 'reasonable surgery'. The implication behind the use of the word 'reasonable' is not clear, but probably does not require the surgery to be clinically necessary but, rather, reasonable according to the ethical standards informing surgery at the relevant time. Sex change operations and cosmetic surgery are therefore capable of being consented to, subject always to the requirement that the consent is informed. In the case of minors, the consent of both parents is necessary for non-clinically necessary procedures such as circumcision (*Re J (Prohibited steps order: circumcision*) [2000] 1 FLR 571.

Tattooing, ear piercing and other forms of body piercing and body alteration may also be consented to if reasonable (*Brown*). In *Wilson* [1997] QB 47, the Court of Appeal ruled that it was not unlawful for a man to brand his partner on the buttocks with a hot knife when it was consensual and done for purposes of adornment rather than simply to cause injury. The Court said that the criminal law should be slow to interfere with what people do in private. This does not affect the decisions in *Brown* and *Emmett*. The rather fragile distinction to be drawn between these cases and *Wilson* is that in the latter the consensual hurt suffered by V was incidental rather than the point of the exercise. The Court drew an analogy between this case and a case of tattooing, which is also lawful where consented to. Compare also the recent case of *R* v *BM* [2018] EWCA Crim 560. The Court of Appeal ruled that consent would not render lawful the removal by a tattoo artist of a customer's ear, of another customer's a nipple or the division of a tongue into two to produce an effect similar to a snake. There was no possible public benefit attached to such a procedure and, involving gratuitous mutilation, the procedure was too far removed from tattooing and piercing to sustain the argument that to criminalise would be an unreasonable interference with personal liberty.

ACTIVITY 9.12

Read Wilson, Section 11.5.A.3 'What can be consented to?'. On the basis of what you read there do you agree with the decision in *R* v *BM*? Do you think a similar approach should be taken in relation to full facial tattoos?

No feedback provided.

Boxing, wrestling and martial arts

Boxing is a genuine exception to the rule that consent is ineffective in the case of deliberately inflicted injuries. It attracts a special privilege in that even acts intended to cause serious injury can be consented to. This is a peculiar exception, given that informal fighting attracts no such privilege and that the only positive public interest benefit discernible is the enjoyment spectators receive in watching the spectacle – hardly a 'good reason', one would suppose, for permitting it. It certainly sits ill with the position with respect to consensual sado-masochism where the participants themselves experience the enjoyment.

Wrestling and martial arts are probably not an exception because these sports, unlike boxing, do not have the intentional infliction of injury as the point of the activity.

Consent to incidental injuries is probably effective for the same reason as other contact sports, as will now be discussed.

Non-deliberate infliction of harm

Games and sports

The other privileged activities referred to by Lord Templeman include lawful sports and games. Consent is effective in relation to this category for a different reason than that for boxing – namely that the taking of risks and engaging in dangerous pursuits is normal human activity and should be criminalised only if the risk-taking is contrary to public policy. Injuries inflicted in the course of contact sports such as football and rugby will therefore be *prima facie* lawful unless deliberately inflicted, in which case consent, even were it to be present, is ineffective.

This is the conclusion to be drawn from *Barnes* [2004] EWCA Crim 3246 where the Court of Appeal said that resort to the criminal courts in cases of sporting injury should be exceptional. Most sports have their own codes of discipline which can properly be deployed in the face of dangerous play. An instinctive error, reaction or misjudgement in the heat of a game was not to be treated any differently. However, intentionally caused injuries give no immunity:

> In making a judgment as to whether conduct is criminal or not, it has to be borne in mind that, in highly competitive sports, conduct outside the rules can be expected to occur in the heat of the moment, and even if the conduct justifies not only being penalised but also a warning or even a sending off, it still may not reach the threshold level required for it to be criminal. That level is an objective one and does not depend upon the views of individual players. The type of the sport, the level at which it is played, the nature of the act, the degree of force used, the extent of the risk of injury, the state of mind of the defendant are all likely to be relevant in determining whether the defendant's actions go beyond the threshold.
> (*Per* Lord Woolf CJ at [15])

In principle, the same reasoning applies to wrestling and martial arts. Although potentially dangerous, participants are deemed to validly consent to injuries sustained as a result of contacts, whether or not they are explicitly covered by the rules of the sport, so long as they are of a nature to be expected of the sport as it is played at the relevant level.

Horseplay

The decision in the *A-G's Reference (No 6 of 1980)* case must be distinguished from cases of rough and undisciplined horseplay. The essence of the former was that the blows landed by the accused were intended to cause injury. Play fighting and other expressions of high spirits which result in physical injury are not so treated and consent may therefore be a defence. In *Jones* (1986) 83 Cr App R 375, D (a schoolboy) and others, to celebrate V's birthday subjected V to the 'bumps' (a procedure involving throwing the subject into the air and allowing them to drop on the ground). This caused V to suffer a broken arm and a ruptured spleen. D's appeal against a conviction under s.47 was allowed. Given the context there was evidence of either express or implied consent to the 'bumps' procedure. In any event even if consent were absent such that the *actus reus* was established, the defendants' belief that V was a willing participant meant that they lacked the *mens rea* for the crime charged.

Sexual relations

Consent, express or implied, is effective in relation to harms committed during sexual activity, so long as these are not deliberately inflicted for their own sake (see *Brown*, above). In *Slingsby* (1995), D inserted his hand into V's vagina and rectum with her consent. A ring which he was wearing caused internal cuts, and V later died

of septicaemia. In the subsequent trial for manslaughter, D was held not to have committed an assault and so could not be liable for manslaughter.

In cases involving the transmission of sexually transmitted diseases, informed consent will be effective to prevent liability under s.47 or s.20. Authority for this is *Konzani* (2005), in which the Court of Appeal made clear that so long as the transmittee of the disease knew of the disease at the time of intercourse, she consented both to the intercourse and to the risk of transmission of the disease.

ACTIVITY 9.13

Read Wilson, Section 11.5.A.3 'What can be consented to?' and answer the following questions.

a. **Is it possible to reconcile the decision in *Slingsby* with that in *Emmett* and *Brown*?**

b. **Is it possible to reconcile the decision in *Konzani* with that in *Emmett* and *Brown*?**

c. **Read the case of *Aitken* (1992). Do you think this case was rightly decided?**

d. **The Law Commission published a consultation paper entitled *Consent and Offences against the Person* in 1994. In it the suggestion is made that individuals should have the right to consent to any non-serious injury. Do you agree with this?**

e. **Do you think consent should be a defence to harm caused while boxing, where the purpose of the competition is to cause harm, possibly life-threatening harm, to the other?**

f. **Can the exception in the case of boxing be reconciled with the absence of an exception in the case of sado-masochistic sexual relations between consenting adults? If not, should they both be criminal or neither?**

Am I ready to move on?

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

1. State the s.18 OAPA 1861 offence.
2. State the s.20 OAPA 1861 offence.
3. State the s.47 OAPA 1861 offence.
4. Explain what actual bodily harm means and comprises.
5. Explain what grievous bodily harm means and comprises.
6. Explain the points of difference and the points of overlap between s.18, s.20 and s.47 OAPA 1861.
7. Explain what the *mens rea* is for s.47 OAPA 1861.
8. Explain what the *mens rea* is for s.20 OAPA 1861.
9. Define common assault (both forms), ensuring you are word perfect.
10. Explain the difference between assault and battery, and how one can be committed without the other.
11. Explain what the immediacy requirement in (psychic) assault means in practice.
12. Explain when consent can be vitiated by fraud.
13. Explain the legal position governing consent in respect of common assault.
14. Explain the legal position governing consent with regard to crimes of violence.

NOTES

10 Defences 1: failure of proof

Contents

Introduction

So far we have discovered that the prosecution bears the burden of proving that all the elements of the offence are present. It also bears the burden of disproving any defence for which D adduces evidence in support. In Chapters 11 and 12 we shall examine the core general defences. These are of two types.

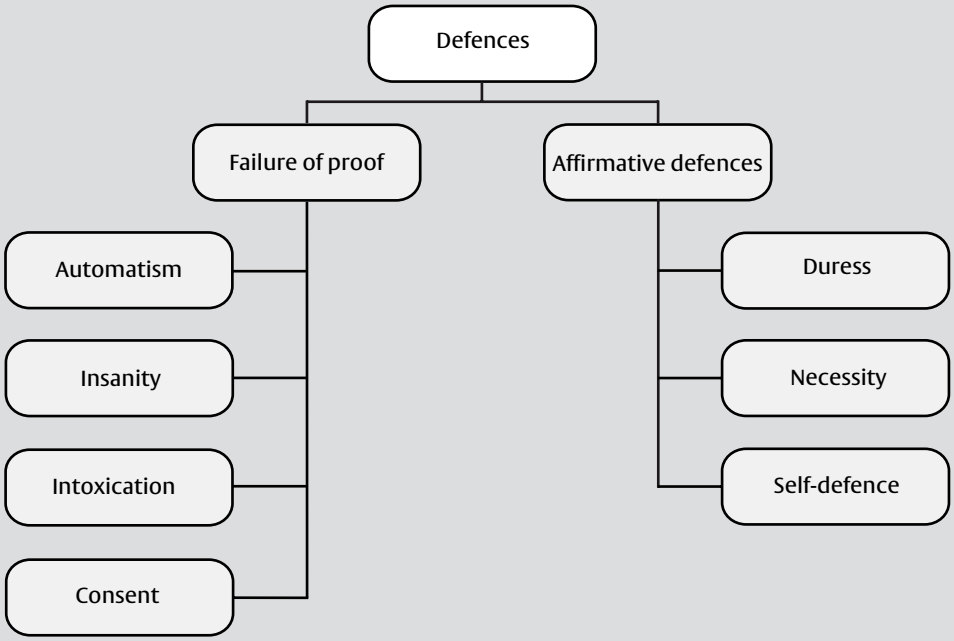

Figure 10.1

10.1 The two types of defences

There are two categories of defences – affirmative defences and failure of proof defences. The former defence blocks criminal liability although D has performed the *actus reus* of the offence with *mens rea*. The essence of such defences is that D is not denying that the elements of the offence are present. Rather D is seeking to excuse or justify what would otherwise be punishable conduct on the basis of the particular circumstances which led them to do what they did. For example, D may wish to adduce evidence that they shot V under coercion by a third party, or that they were acting in self-defence to prevent V shooting them or another person, or that they had lost their self control, having come upon V committing rape upon a child. Such defences are known as **affirmative defences** or defences of confession and avoidance, and we shall examine these in Chapter 11.

The type of defences we shall be dealing with in this chapter, **failure of proof defences**, do not act outside the elements of the offence; rather they provide the evidential basis for a claim that one of these elements is lacking.

Illustration 10.1

D, witnessed by a crowd of onlookers, aims his gun at V and shoots him dead.

To gain a conviction for murder, the prosecution bears the burden of proving:

- that D's act caused V's death
- that D's shooting of the gun was actuated by an intention to kill V or cause him serious injury.

As you may appreciate, this should not be too difficult, given that there are:

- witnesses who saw D aim the gun and pull the trigger
- witnesses who saw V fall down immediately after the gun was fired
- doctors who will confirm that V's death was caused by the blood loss occasioned by the bullet entering V's body.

Indeed in a case like this, D's counsel will no doubt recommend that D plead guilty because the chances of an acquittal are next to nothing.

Occasionally, however, D may be able to deflect a finding that all the elements of offence are present despite the most compelling of physical evidence. For example, in this case D might adduce evidence suggesting that, although it might have appeared to the witnesses that he intended to kill V, in fact he did not. For instance, D might adduce evidence that he was intoxicated and that he thought V was a scarecrow, or that he was insane and thought V was the devil, or that he was sleepwalking and that he was quite unaware of what he was doing. If these claims may have been true, D is entitled to be acquitted since they amount to a plausible claim that one of the elements of the offence is missing (*mens rea*).

There are a number of defences whose function is to regulate the conditions under which a defendant is permitted to adduce evidence of this nature. The defences in question are known as **failure of proof** defences. They include intoxication, mistake, automatism and insanity. The scope of these defences is strictly controlled in order to ensure that a finding of accountability is not too easily deflected.

For both types of defences it is not enough for D simply to claim that they were sleepwalking or acting under duress to require the prosecution to prove otherwise. This would be too much of a burden on the prosecution. In order to ensure that D's claim is worthy of being taken seriously by the jury, D is required to adduce some evidence strong enough to introduce some reasonable doubt into a juror's mind as to whether the prosecution's case is as strong as it makes out. This might include, in connection with the claims raised by D in Illustration 10.1, medical evidence – for example a doctor's report that D was a serial sleepwalker. Or evidence from a witness that V had been seen lying drunk in a ditch an hour before the shooting. Or, in the

case of an affirmative defence, evidence from a witness that V was a man known to exact compliance through violence and had been witnessed talking to D prior to the shooting.

In this chapter we will cover three failure of proof defences, namely involuntary conduct, insanity and intoxication.

10.2 Involuntary conduct

Involuntary conduct is the prime example of a failure of proof defence, since it can be used to negate either *actus reus* or *mens rea*. This may be of considerable importance to the defence since it may be used to escape liability, even for strict liability crimes which do not require *mens rea*. The essence of the defence is that the criminal conduct complained of was not done by D: rather, it happened to them. In *Hill* v *Baxter* [1958] 1 QB 277 the defendant was charged with dangerous driving, having blacked out at the wheel. Although D's defence was disallowed by the Court of Appeal, it accepted, in the following famous statement of principle, that voluntariness of action was central to criminal responsibility even for strict liability offences.

> there may be cases where the circumstances are such that the accused could not really be said to be driving at all. Suppose he had a stroke or an epileptic fit, both instances of what may properly be called acts of God; he might well be in the driver's seat even with his hands on the wheel, but in such a state of unconsciousness that he could not be said to be driving. A blow from a stone or an attack by a swarm of bees I think introduces some conception akin to *novus actus interveniens*.

You will understand from the above statement that the defence may take one of two forms.

- A loss of physical control over one's conduct.
- A loss of mental control due to a trigger such as a stroke or epileptic fit.

The criminal law has traditionally called both instances 'automatism'. In the words of Lord Denning in *Bratty* v *A-G of Northern Ireland* [1963] AC 386:

> No act is punishable if it is done involuntarily: and an involuntary act in this context – some people nowadays prefer to speak of it as 'automatism' – means an act which is done by the muscles without any control by the mind...

ACTIVITY 10.1

Learn Lord Denning's statement by heart: it is a good summary of the law.

In this chapter we shall deal with the two forms of automatism separately, since certain biological or mental conditions which trigger involuntary behaviour may lead to distinct case outcomes.

10.2.1 Physical involuntariness

We have come across the concept of involuntary action already in the context of causation (see Chapter 4). You will remember that a person's conduct is causally effective only when it is voluntary. It is for this reason that in *Mitchell* (1983) it was Mitchell who was deemed to be the cause of the elderly woman's death rather than the man whom Mitchell caused to fall on top of her. In *Hill* v *Baxter* (1958) above, an attack by a swarm of bees or blow on the head was said to be comparable.

Similar principles occur where something goes wrong with a car. For example, in *Burns* v *Bidder* [1967] 2 QB 227 a driver was charged with the offence of failing to accord precedence to a pedestrian on a crossing. His defence was that his action was involuntary as he had suffered brake failure. The court held that if this had happened without any fault on the part of the driver – for example because the defect was not the result of poor maintenance – then he was entitled to an acquittal. Even a strict liability offence, which this was, requires voluntary action to constitute the *actus reus*.

10.2.2 Automatism

The other form of involuntary behaviour, also known as automatism, occurs where the accused is effectively unconscious while committing the offence. Again, successful raising of this defence means that the accused is entitled to an absolute acquittal. There are, however, dangers attached to raising this defence; namely that the judge may treat the mental condition relied upon to support the defence as involving a 'disease of the mind'. This is dangerous because it may trigger the special verdict of not guilty by reason of insanity. Although the verdict is an acquittal, it is not an unqualified acquittal since it affords the judge a number of powers of disposal, including mandatory hospitalisation.

So in *Bratty* the defendant killed a young woman by strangling her with her own stockings. D pleaded automatism relying on evidence that he suffered from psychomotor epilepsy at the time of the offence, and had blacked out and knew nothing of what he had done. Lord Denning in the Court of Appeal ruled that the trial judge was correct in his ruling that D's mental condition was due to disease of the mind and could only be presented to the court as insanity. Although receiving the special verdict of not guilty by reason of insanity, D was committed indefinitely to a secure mental hospital. From his point of view, at least, a conviction might have been preferable.

In *Quick* [1973] QB 910, D was a psychiatric nurse working in a mental hospital. He was a diabetic. On the day in question he had taken insulin, had also taken alcohol and had eaten little food. For a diabetic this is a dangerous regime because it will induce hypoglycaemia, a deficiency of blood sugar which can impair consciousness and cause aggressive outbursts. And so it transpired. In this condition D attacked a patient, causing him injury, and was charged with assault.

In his defence D claimed that he lacked *mens rea* due to being in an automatic state brought on by hypoglycaemia. The judge refused to allow this defence to go to the jury, ruling that it was one of insanity. D changed his plea to guilty. He appealed on the ground that the judge was wrong to refuse to allow his condition to be presented as automatism as opposed to insanity. The Court of Appeal allowed his appeal on the basis that his hypoglycaemia was a condition that had been triggered by the taking of insulin, and so not a mental condition caused by a disease of the mind, but – like blows on the head or an attack by a swarm of bees – was caused by an external factor which deprives the actor temporarily of control over his actions. Lawton LJ explained it as:

> …a malfunctioning of the mind of transitory effect caused by the application to the body of some external factor such as violence, drugs (including anaesthetics), alcohol or hypnotic influences.

Activity 10.2

Read Wilson, Section 9.8.C 'Conditions of automatism' and answer the following questions.

a. **Why did Quick change his plea to guilty?**

b. **Make a note all of the examples of conditions which have been successfully used to support a defence of automatism.**

c. **Why was the defendant in *T* (1990) able to use her condition to support her claim of automatism but not the defendant in *Rabey* (1978)?**

d. **Search the term 'confusional arousal' on the internet. Can you think of an example of how experiencing this condition might cause someone to perform a prohibited act?**

Success rates in using automatism as a defence are relatively poor. There are three reasons for this.

- Automatism can be used for all crimes, even crimes of strict liability where the prosecution does not need to prove fault on the part of the defendant. Driving offences are prime examples. As we know, the policy behind such offences is that it would be counterproductive to require proof of fault. If society wants to stop

bad driving, the best way is to make it known that whatever the excuse bad driving will be punished. In deference to this policy, the courts have shown a marked reluctance to allow no-fault liability to be undermined by a claim of automatism.

- The defence cannot be relied upon if the defendant was at fault in inducing the condition.
- The courts insist upon medical evidence to support the claim and, as can be seen from *Bratty* and *Quick*, even then the danger is that the defence will be construed as involving a disease of the mind. Underpinning such decisions is a judicial reluctance to allow an unqualified acquittal to those whose mental condition may reoccur, particularly if violence was involved.

These three reasons will now be explored.

10.2.3 Strict liability offences

We have seen that automatism can be used even for strict liability offences. This is because automatism is not simply a denial of *mens rea*; it is also a denial of *actus reus*. In *Burns* v *Bidder*, the accused escaped liability on the basis that he was not 'driving' his car, not on the basis that he was not at fault in driving it badly.

The courts have kept strictly to this idea that automatism can only operate to negate voluntary action not fault in strict liability offences. In *Neal* v *Reynolds* [1966] Crim LR 394, D was charged with failing to accord precedence to a pedestrian on a crossing. Like the defendant in *Burns* v *Bidder*, D's defence was that this was involuntary; he could not avoid failing to give precedence to the pedestrian because that same pedestrian had dashed out without warning and without giving him the chance to stop. The court refused the defence on the basis that D, despite the action of the pedestrian, was fully in control of his vehicle and so was not acting involuntarily.

Comparable decisions were reached in *Broome* v *Perkins* (1987) 85 Cr App R 321 and *A-G's Reference (No 2 of 1992)* [1994] QB 91, in both of which cases the defendant was charged with driving dangerously when their mind was not fully conscious due to matters outside their control – hypoglycaemia in the former, a trance-like state induced by the defendant's concentrated attention to the lines separating the motorway carriageways in the latter. Their defences of automatism failed on the ground that it was available only where there was a complete loss of conscious control.

10.2.4 Prior fault

The defendant in *Quick* was a touch fortunate in having his conviction quashed. If the trial judge had directed the jury as he ought, D would probably have been properly convicted at first instance. What the judge should have told the jury was that it should acquit if it thought D may not have been aware of what he was doing due to his hypoglycaemia **unless** he was at fault in getting himself into that condition. The jury may well have concluded that D was at fault, since a diabetic would usually know that after taking insulin it was important not to drink alcohol on an empty stomach. Lawton LJ made this clear when hearing the appeal: 'A self induced incapacity will not excuse... nor will one which could reasonably have been foreseen'.

In *Bailey* [1983] 1 WLR 760, on similar facts, the Court of Appeal ruled that what was important was not what 'could reasonably have been foreseen' but **what was foreseen** by the accused. Only if the accused foresaw that his failure to eat and drink properly might cause him to become 'aggressive, unpredictable and uncontrolled with the result that he may cause injury to others' would a conviction be proper.

These were not cases of self-induced automatism but preventable automatism. Cases of self-induced automatism are treated slightly differently. Where the defendant's automatism is the result of voluntary intoxication with drink or drugs, they are disabled from using it as a defence for all crimes except crimes of specific intent; that is, crimes where the prosecution has to show that the accused specifically intended the consequences of their act. For all other crimes voluntary intoxication is treated as a basis in itself for a conviction.

In *Lipman* [1970] 1 QB 152 the defendant went on an 'acid trip' (took the hallucinogenic drug, LSD) with his girlfriend. He awoke some time later to find her dead of suffocation; he had stuffed a sheet in her mouth while hallucinating that she was a snake. He was charged with manslaughter. D's defence of automatism was rejected on the basis that his condition was self-induced. If he had been charged with murder, which requires proof of a specific intent to kill or cause serious injury, he could have used the evidence of his acid trip to negate his *mens rea*. No such relief was available for manslaughter, however.

The rule that self-induced automatism is not a defence applies only where the defendant's intoxication was voluntary. If in *Lipman* the LSD tablet had been introduced into D's food without him knowing, or if his hallucination was caused by drugs taken under medical prescription, the intoxication would be involuntary and he would have been able to rely on it. In *Hardie* [1985] 1 WLR 64, the Court of Appeal added a further qualification, comparable with the decision in *Bailey*, that the voluntary consumption of a drug (here Valium) not known to result in unpredictable and aggressive behaviour could be relied upon in support of the defendant's claim (on a charge of arson) that he lacked awareness of what he was doing.

Both *Bailey* and *Hardie* are authorities for the broader proposition that, for crimes of *mens rea*, only those who are at fault in permitting themselves to lapse into aggressive and unpredictable behaviour are denied the defence. For crimes of negligence, automatism will not be a defence if the condition could have been prevented by the taking of reasonable care. In *Kay* v *Butterworth* (1945) 61 TLR 452, for example, it was affirmed that falling asleep at the wheel, or brake failure due to not servicing a car properly, is no defence to careless or dangerous driving. This is consistent with the point that taking a sedative would be no answer to a charge of dangerous or reckless driving. Indeed, if it resulted in the defendant falling asleep at the wheel, it would provide the prosecution with all the evidence it needed to secure the conviction!

10.2.5 Insanity (insane automatism)

As we have seen, automatism can be the result of loss of physical control or loss of mental control over one's actions. In the latter case, the defendant is relying upon a mental condition which rendered them unaware of what they were doing. By raising such evidence before the court, the defendant is, of course, putting their sanity at issue. In a number of cases a plea of automatism has been rejected by the court and construed as one of insanity. It is therefore important to be able to distinguish insanity (or insane automatism) from simple automatism. In the next section we will examine insanity in detail.

10.3 Insanity

The defence of insanity is unusual in a number of ways. First, if successfully raised it will not result in an unqualified acquittal, but rather a special verdict of not guilty by reason of insanity. Upon such verdict, the court has a wide-ranging dispositive discretion which includes hospital order, guardianship, absolute discharge and supervision (Criminal Procedure (Insanity and Unfitness to Plead) Act 1991). Before 1991 the only power available was mandatory indefinite committal to a mental hospital at the Home Secretary's discretion (Criminal Procedure (Insanity) Act 1964, s.5 and Schedule 1; see R.D. Mackay *Mental condition defences in the criminal law*. (Oxford: Clarendon Press, 1995) [ISBN 9780198259954] pp.106–8). As a result, the defence was understandably unpopular with defendants who might otherwise have wished to avail themselves of it (R.D. Mackay 'Fact and fiction about the insanity defence' [1990] *Crim LR* 247). The case law contains a number of instances of defendants relying upon non-insane automatism, who changed their plea to guilty upon the trial judge ruling that their defence was properly one of insanity (see, for example, *Hennessy* below). Even a 'life' sentence for murder may be preferable to an indefinite committal – which might really mean life (although as Mackay's research shows (1990, pp.254–5), judges did not always implement the mandatory hospital order). Although the defence has not gained significantly in popularity since the change in the law, it seems likely to

do so, given the wide-ranging discretion now available (R. Mackay and G. Kearns 'The continued underuse of unfitness to plead and the insanity defence' [1994] *Crim LR* 576; plea of not guilty by reason of insanity used in only five cases in 1992).

A second unusual characteristic is that, unlike other defences, it may be raised by either defence or prosecution (although in *Price* [1963] 2 QB 1, Lawton J appeared to dissent from this view). The prosecution may raise it when the defendant puts his sanity at issue, for example by pleading diminished responsibility (Criminal Procedure (Insanity) Act 1964, s.6) or non-insane automatism (*Bratty* v *A-G for Northern Ireland* [1963] AC 386 at 411–12 per Lord Denning; *Dickie* [1984] 3 All ER 173 at 180 per Watkin LJ). When this occurs the standard of proof is the criminal standard (beyond reasonable doubt: *Podola* [1959] 3 All ER 418; *Robertson* [1968] 3 All ER 557; see also though *Bratty* at 411–12 per Lord Denning). When raised by the defence, the burden of proof is with the defendant rather than, as is usual, the prosecution. A right of appeal exists against a special verdict even though technically the defendant has been found not guilty (Criminal Procedure (Insanity) Act 1964, s.2). See the fascinating account of the interplay of substantive and procedural aspects of the insanity defence in A. Loughnan 'Manifest madness: towards a new understanding of the insanity defence' (2007) *MLR* 379.

10.3.1 The *M'Naghten* rules

The legal notion of insanity is captured and defined in a statement of principle which derives from a famous case in 1843 when Daniel M'Naghten, in an attempt to assassinate the prime minister, instead succeeded in killing his private secretary. M'Naghten was found not guilty by reason of insanity on the grounds that he was suffering an insane delusion that the prime minister and his constituents were conspiring against him at the time of his act. So incensed were the public at M'Naghten's acquittal that the House of Lords asked a panel of judges to establish rules governing the defence of insanity. These rules are known as the *M'Naghten* rules.

On the precise issue in the case, namely insane delusions, their Lordships concluded that an insane delusion would act as a defence only if, assuming the delusion was true, it would have entitled the defendant to do as he did. In *R* v *Oye* [2013] EWCA Crim 1725 the defendant attacked police officers under the insane delusion that they were evil spirits attacking him. His defence of self-defence was rejected by the Court of Appeal. The correct defence was that of insanity. Assuming his delusion to be true he would have been justified in using force to defend himself. So also, if M'Naghten's insane delusion was that Sir Robert Peel was about to kill him, the defence would have stood, since killing in self-defence is permitted. On the facts, however, M'Naghten's insane delusion was insufficient; that someone is conspiring against you does not excuse or justify killing the conspirator. The body of the *M'Naghten* rules is as follows.

> [E]very man is presumed to be sane, and to possess a sufficient degree of reason to be responsible for his crimes, until the contrary be proved…and…to establish a defence on the ground of insanity, it must be clearly proved that at the time of committing the act the party accused was labouring under such a defect of reason, from disease of the mind, as not to know the nature and quality of the act he was doing, or as not to know that what he was doing was wrong.

ACTIVITY 10.3

Learn the *M'Naghten* rules by heart: they represent the law and must therefore be known.

As can be appreciated from this statement, insanity like automatism is not simply a denial of *mens rea*. An insane person may intend what they are doing without appreciating its true quality or that it is (legally) wrong. In *Loake* the defendant sent a very large number of text messages over a period of time to her husband, from whom she was separated. She was convicted of harassment contrary to s.2 of the Protection from Harassment Act 1997 in the magistrates' court. L appealed against her conviction and sentence on the basis that she was not guilty by reason of her insanity. At Crown Court, the judge ruled that the defence of insanity was not available for an offence of harassment as the offence did not require proof that she knew that what she was doing was wrongful. Her further appeal was successful. Insanity is a defence to all crimes

including crimes of strict liability and crimes of objective fault. In other words, like automatism, it is not simply a denial of *mens rea*. A person may know what they are doing but may not realise, because of a disease of the mind, that it mounts to harassment. This is what happened here. Her defect of reason prevented her from understanding the nature and quality of her act and that what she was doing was wrong.

As may also be appreciated from this statement, there is a considerable overlap between insanity and automatism. A defendant who suffers from a defect of reason, which renders them unaware of what they are doing or its nature and quality, can be in either a state of sane or insane automatism. The difference between them lies in the cause of that disorder. With insanity, the defect of reason results from a disease of the mind. So what exactly is a disease of the mind?

10.3.2 Disease of the mind

The notion of a disease of the mind owes nothing to the current state of knowledge regarding mental illness: it is a matter of legal rather than medical definition. The current legal position is that many who would not be considered to have a disease of the mind by any ordinary measure are so treated by the criminal law.

The ruling test for a disease of the mind is that of Devlin J in the case of *Kemp* [1957] 1 QB 399. The defendant attacked his wife with a hammer, causing her grievous bodily harm. The medical evidence showed that D suffered from arterial-sclerosis, a condition which restricts the flow of blood to the brain, and this caused a temporary lapse of consciousness. D sought to raise the defence of automatism. Devlin J rejected this defence, ruling that it was one of insanity.

> …The condition of the brain is irrelevant and so is the question of whether the condition of the mind is curable or incurable, transitory or permanent... Hardening of the arteries is a disease which is…capable of affecting the mind in such a way as to cause a defect, temporarily or permanently, of its reasoning, understanding and so on, and so is in my judgment a disease of the mind...within the meaning of the rules.

The deceptively simple result of this test is that defects of reason are treated as insanity if triggered by an internal condition, but as (simple) automatism if triggered by an external cause.

Activity 10.4

Read Wilson, Section 9.9.A.3 'Disease of the mind' and make a note of the three different tests of 'disease of the mind'.

a. **Do you prefer the *Devlin* test or one of the other two?**

b. **Why have the courts ignored medical definitions in deciding the meaning of a disease of the mind?**

c. **Learn the *Devlin* test by heart: it is the current law governing the meaning and scope of disease of the mind.**

No feedback provided.

Although a simple test, the *Devlin* test is by no means a convincing one. Consider for example, the medical condition of diabetes. Diabetes can produce defects of reason involving loss of conscious awareness in two separate ways. It can produce hypoglycaemia (low blood sugar) where the person takes insulin but does not compensate its effects with an appropriate dietary regime. It can also produce hyperglycaemia (excess blood sugar) where the person fails to take their insulin as instructed. Both conditions can result in the kind of mental confusion, unconscious action and/or aggression which can trigger criminal activity.

As we have seen (*Quick*), if D suffers hypoglycaemia (without fault on their part) induced by the taking of insulin (external trigger), the condition is treated as one of simple automatism and they receive an unqualified acquittal (*Bingham* [1991] Crim LR 433, in which a conviction for theft was quashed). If, however, D suffers hyperglycaemia as a result of **not** taking insulin (internal cause), the condition is treated as one of insanity (insane automatism) (*Hennessy* (1989) 89 Cr App R 10). In short: similar condition, totally different outcome.

On the basis of this internal/external test, acts of violence committed while sleepwalking (*Burgess* (1991) 93 Cr App R 41; *Lowe* (2005)); while suffering an epileptic seizure (*Sullivan* [1984] AC 156) or while suffering clinical depression (*Rabey* (1980) DLR 193) have all been designated the result of conditions of insanity rather than of simple automatism. In the case of sleepwalking, this is particularly ironic given that this was traditionally proposed as the classic example of automatism (see *Bratty* quotation in Section 3.1.2 of this module guide). This is no longer the case, at least if (as it usually will) it stems from an internal susceptibility.

ACTIVITY 10.5

Read Wilson, Section 9.9.A.3 'Disease of the mind' and note down as many difficulties associated with the 'internal/external cause' test of insanity/automatism as you can find. Concentrate particularly on the discussions relating to diabetes and sleepwalking. When you have done this, consider whether Hennessy would have been in a stronger position to claim automatism if he had forgotten or failed to take his insulin due to:

a. **the sudden death of his child**

b. **a fire at his home**

c. **an unlawful attack on his person**

d. **theft of the insulin.**

10.3.3 Second limb of the *M'Naghten* rules

The *M'Naghten* rules also permit the insanity defence for those who know what they are doing but do not 'know that it is wrong'. This has subsequently been construed to mean 'legally' wrong, so is not available to a person who believes that they have God's consent to commit the relevant crime or whose disordered mental state convinces them that the criminal law is overridden by the demands of morality. So in *Windle* [1952] 2 QB 826, D, a husband who killed his suicidal wife at her request believing, in his mentally disordered state, that it was right to do so, was unable to raise the defence. When he was arrested, D had said to the police, 'I suppose they will hang me for this'. In saying this, D signalled his understanding that what he was doing was legally wrong. That was unfortunate enough. More unfortunately, however, at that time murder was a capital offence.

10.4 Intoxication

Intoxication, like other failure of proof defences, is not a defence in itself. Indeed, it is more like an anti-defence. If a person kills another, inflamed by drink, or drives a car dangerously due to the influence of alcohol, this exacerbates rather than excuses or mitigates the wrong. Intoxication operates, like automatism, to provide an evidential basis for a claim of no *mens rea*. Consider again the case of *Lipman* above. Without the evidence of D having taken LSD, the jury would have had no reason to believe his action was not deliberately undertaken and so, in the absence of such evidence, would no doubt have convicted him of murder. People do not tend to stuff sheets into the mouths of others unless they want to kill them; and the jury would know this. As it was, the evidence was forthcoming and so it could convict only of manslaughter. So something, at least, went right for Lipman!

It is easy to forget this aspect of the so-called defence of intoxication, namely that it is of evidential value only and that its value is not by way of excusing D's wrongdoing but rather to substantiate D's claim that they lacked the *mens rea* (i.e. the intention, knowledge or foresight) of the crime charged. It is for this reason that intoxication – even involuntary intoxication – is not a defence to crimes of negligence or strict liability **unless it can be presented as one of automatism**. So in *Blakely and Sutton* [1991] RTR 405, D spiked B's soft drink with alcohol at a party. B, unaware of this, drove home and was stopped by police on the way and breathalysed. B was properly found guilty of driving with excess alcohol. The fact that he was unaware of his condition is no answer to a strict liability crime which does not require proof of fault.

Activity 10.6

Read Wilson, Sections 9.8.A 'Automatism and crimes of *mens rea*', 9.8.B 'Automatism, negligence and strict liability' and 9.8.C 'Conditions of automatism'.

How might a person be able to avoid liability for a strict liability crime or crime of negligence by pleading involuntary intoxication?

Hint: Think of a strict liability driving offence and a possible neurological outcome of involuntary intoxication which prevents that offence from taking place.

No feedback provided.

For crimes of *mens rea*, if D has the *mens rea* for the crime charged they will remain guilty **even though they would not have committed the offence if sober**. This important point of law was confirmed in *Kingston* [1995] 2 AC 355. D committed a sexual assault on V, an underage boy, under the influence of drugs which had been given to him secretly by X. (X's plan was to photograph the event and use it to blackmail D.) D was charged and convicted of indecent assault. He appealed on the ground that it was an excuse that his intoxication was involuntary and that he would not have committed the offence if sober.

The House of Lords, reversing the decision of the Court of Appeal who had surprisingly ruled in his favour, said that D was properly convicted since the effect of the alcohol was to disinhibit D rather than to prevent him from forming the *mens rea* for the assault. Although D would not have committed the assault if sober, he knew exactly what he was doing and intended to do it. There was no excuse known to the criminal law that D was unwittingly induced to commit an offence he would not have committed otherwise, by the deceitful stratagem of another.

So the first question which must always be asked in a question involving an intoxicated offender is:

'Was the effect of the intoxication to prevent D from forming *mens rea* or simply to remove D's inhibitions or otherwise inflame D's anger or desires?'

Only in the former case will it avail D to adduce evidence of intoxication.

Activity 10.7

Read Wilson, Sections 9.11.A 'Intoxication: its effect on criminal liability' and 9.11.B 'Distinguishing voluntary and involuntary intoxication' and answer the following questions.

a. **Do you agree with the decision in *Kingston*? Now consider the next question.**

b. **Adam, a placid man, does not drink alcohol. Cain is a practical joker. He secretly adds vodka to Adam's orange juice at a party to see what Adam is like when drunk. Adam, who is unused to alcohol, feels strange and starts to act in a silly fashion. Cain taunts him for being drunk. Adam is indignant, loses his temper and punches Cain. Is Adam guilty of assaulting Cain? Should he be?**

10.4.1 Restrictions on the use of evidence of intoxication

We have discovered that adducing evidence of intoxication is of use only if the crime charged requires proof of *mens rea* and the effect of the intoxication is to deprive the defendant of *mens rea*. If it does not, the defence will, if anything, be counterproductive, providing the prosecution with clear evidence of motivation.

An important qualification to this rule must be added; namely that if the intoxication is voluntary it cannot be used, **even for this purpose**, with respect to a substantial class of crimes of *mens rea*. These crimes are known as crimes of basic intent. A crime of basic intent, it will be remembered, refers to those crimes of *mens rea* where the definition of the offence requires no proof that D had any special or specific intent in doing what they did beyond performing the actions which form the *actus reus* of the crime (see Chapter 4). For example, the crime of arson requires proof that D intended to light the match used to start the fire. It does not require proof that D specifically intended to damage or destroy property by fire. D's foresight that this consequence might result from their action is enough.

By contrast, murder requires the defendant not merely to intend to do the act which results in the victim's death, but also intend the consequence thereof – death or serious injury, as the case may be. This subtle distinction was first drawn in *DPP* v *Beard* [1920] AC 479. While drunk, D raped a young girl, who died of suffocation as a result of him putting his hand over her mouth to prevent her screaming. D's conviction for murder was quashed and a verdict of manslaughter substituted. Lord Birkenhead explained the legal position as follows.

> Under the law of England as it prevailed until early in the nineteenth century voluntary drunkenness was never an excuse for criminal misconduct; and indeed the classic authorities broadly assert that voluntary drunkenness must be considered rather an aggravation than a defence. This view was in terms based upon the principle that a man who by his own voluntary act debauches and destroys his will power shall be no better situated in regard to criminal acts than a sober man…[However] where a specific intent is an essential element in the offence, evidence of a state of drunkenness rendering the accused incapable of forming such an intent should be taken into consideration in order to determine whether he had in fact formed the intent necessary to constitute the particular crime. If he was so drunk that he was incapable of forming the intent required he could not be convicted of a crime which was committed only if the intent was proved...
>
> In a charge of murder based upon intention to kill or to do grievous bodily harm, if the jury are satisfied that the accused was, by reason of his drunken condition, incapable of forming the intent to kill or to do grievous bodily harm...he cannot be convicted of murder. But nevertheless unlawful homicide has been committed by the accused, and consequently he is guilty of unlawful homicide without malice aforethought, and that is manslaughter.

Voluntary intoxication, therefore, can support the defendant's claim that they lacked *mens rea* for a specific intent crime, such as murder. It cannot be so used for crimes of basic intent such as manslaughter, as *Lipman* later confirmed, where it is no part of the prosecution's case to show that the defendant had anything specifically in mind when acting as they did.

10.4.2 'Dutch courage' crimes

One small qualification needs to be added to the principle that voluntary intoxication may be used to negate the *mens rea* for a crime of specific intent. This is that if the defendant becomes intoxicated in order to gain the courage to commit a specific intent crime, they will not be able to rely on that intoxication. Authority for this proposition is *A-G of Northern Ireland* v *Gallagher* [1963] AC 349. In this case D decided to kill his wife. Before killing her, and to give himself the courage to do so, he drank a bottle of whiskey. The House of Lords, affirming D's conviction for murder, held that so long as he harboured the intention to kill his wife prior to becoming intoxicated, this was enough. It was not necessary to prove that D had the necessary intention at the time of the actual killing.

ACTIVITY 10.8

Go to Chapter 6 of this module guide. Insert *Gallagher* into the text at an appropriate place to give another exception, along with the supposed corpse cases, to the rule that *mens rea* and *actus reus* must coincide in point of time.

10.4.3 Voluntary and involuntary intoxication distinguished

To summarise: intoxication can result from either drink or drugs. **Involuntary** intoxication can be used to negate the intention, foresight, knowledge or belief of all crimes which have this mental element. Voluntary intoxication cannot be used to negate the *mens rea* of all such crimes: it can be used only in respect of crimes of specific intent. The leading case of *Majewski* [1977] AC 443 characterises voluntary intoxication as:

> the intoxication of a person by an intoxicant which he takes otherwise than properly for a medicinal purpose (and according to medical instruction), knowing that it is or may be an intoxicant.

Activity 10.9

Learn the *Majewski* test by heart: it tells you most of what you need to know about the difference between voluntary and involuntary intoxication. The bit it does not tell you is dealt with below in relation to *Hardie*.

Involuntary intoxication may therefore result from:

- an intoxicant taken under medical supervision
- an intoxicant secretly administered to A without their knowledge (e.g. *Kingston*)
- an intoxicant voluntarily taken by A, who mistakes its properties. An example is where A takes what they think is a painkiller when in fact it is an intoxicant.

A further qualification was introduced in *Hardie* [1985] 1 WLR 64, in which D, having been jilted by G, his girlfriend, was advised by G to take some of her Valium to calm himself down. D later set fire to a wardrobe in G's flat. Giving evidence, D claimed that he did not remember starting the fire due to his intoxicated state but conceded that he must have started it as he was alone in the room at the time. Although the Valium was taken wittingly by D, the Court of Appeal quashed his conviction. In effect, the case was treated as one involving involuntary rather than voluntary intoxication, as there was no suggestion that the taking of Valium was a reckless course of conduct.

Activity 10.10

Read Wilson, Section 9.11.A 'Intoxication: its effect on criminal liability' and answer the following question.

If Hardie, instead of setting fire to the wardrobe, had left the house and, driving home, had fallen asleep at the wheel, would this have been a case of voluntary or involuntary intoxication?

10.5 Crimes of basic intent and specific intent contrasted

There is no consistently applied test to separate crimes of basic and specific intent. However, the usual test used, which is consistent with the explanation given above at Section 10.4.1, is that a crime of basic intent is one which does not require the defendant to have intended the consequences of his action. It can be committed by recklessness. Accordingly, in *Majewski* it was no defence to a charge of assaulting a police officer in the execution of his duty, that D was oblivious to what he was doing when he attacked the officer in a public house due to the effects of drink and drugs. Assault is a crime of basic intent because it can be committed by recklessness. A crime of specific intent, by contrast, is a crime which requires the defendant to have a consequence in mind when acting. Murder is a crime of specific intent because the prosecution must prove D acted with the intention of killing, or causing grievous bodily harm. It cannot be committed by recklessness.

Activity 10.11

Read Wilson, Section 9.11.C.2 'The rationale for restricting the exculpatory scope of voluntary intoxication' and answer the following questions.

a. **What is the rationale for not allowing evidence of intoxication to be used to negate *mens rea* in crimes of basic intent such as assault? Do you agree with it?**
b. **Which crimes are crimes of specific intent?**
c. **Which crimes are crimes of basic intent?**
d. **Most crimes of specific intent have a basic intent crime of lesser gravity which can still be charged in cases of voluntary intoxication. What are the basic intent counterparts of murder, and s.18 of the Offences Against the Person Act 1861?**
e. **Give an example of a specific intent crime which has no basic intent counterpart.**

10.5.1 Intoxicated mistakes as to a defence

Most criminal defences remain available to the defendant even if they are mistaken as to the facts. So, for example, a person who honestly believes they are about to be attacked may lawfully use reasonable force to defend themselves although the belief was entirely without foundation.

This does not apply where the mistake is induced by voluntary intoxication. By s.76(4)(b) of the Criminal Justice and Immigration Act 2008, for the purpose of self-defence, D may not rely on any mistaken belief attributable to intoxication that was voluntarily induced. In *O'Grady* [1987] QB 995, D killed his friend, V, with whom he had been drinking throughout the day believing, on waking up from sleep, that V was attacking him. The Court of Appeal ruled that, where a mistake either as to the need to use force in self-defence or the degree of force necessary to defend oneself is made due to voluntary intoxication, self-defence cannot be relied upon. D's conviction for manslaughter was upheld, and the following statement of principle was forthcoming.

> We have come to the conclusion that where the jury are satisfied that the defendant was mistaken in his belief that any force or the force which he in fact used was necessary to defend himself and are further satisfied that the mistake was caused by voluntarily induced intoxication, the defence must fail. We do not consider that any distinction should be drawn on this aspect of the matter between offences involving what is called specific intent, such as murder, and offences of so called basic intent, such as manslaughter.

In *O'Connor* [1991] Crim LR 135, on similar facts, the Court of Appeal adopted this approach, holding that where a defendant, because of self-induced intoxication, formed a mistaken belief that the use of force was necessary to defend himself, a plea of self-defence failed even in relation to the specific intent crime of murder. Evidence of self-induced intoxication could be used to negate the *mens rea* for the crime but **not** to support the defence of self-defence. In the context of this defence, it appears that it is not necessary for the defendant to actually be intoxicated to be disentitled from relying on his mistaken belief. It is enough that the mistaken belief was attributable to voluntary intoxication, as where recent alcohol abuse has resulted in a temporary, short-term psychotic episode (*R* v *Taj* [2018] EWCA Crim 1743). In *R* v *Taj* the defendant's long-term alcohol abuse had led to a state of psychosis that caused him to mistakenly believe V was a terrorist who was about to kill him. The Court of Appeal ruled that s.76(4)(b) applied although the defendant was not intoxicated at the time. His mistaken belief was induced by a psychosis caused by alcohol abuse and so it was attributable to voluntary intoxication. Compare *R* v *Oye* [2013] EWCA Crim 1725.

Illustration 10.2

Adam goes to sleep very intoxicated. He wakes up, still drunk, to see Eve standing over him with what appears to be a knife in her hand. It is in fact a cigarette. Adam throws a knife at Eve which kills her.

If Adam relies on self-defence, he cannot use his intoxication to substantiate his claim that he believed he was being attacked with a knife and so was defending himself. The jury will be told to ignore Adam's intoxication and consider only whether he would have made the mistake if sober.

If, however, Adam claims that he only intended to frighten Eve away, he can use his intoxication to explain why, although he threw a knife at her, he had no lethal intent.

Activity 10.12

Now read Wilson, Section 9.11.D 'Intoxicated mistakes' and answer the following question.

Does it make sense that intoxicated beliefs may be taken into account for the purpose of (negating) *mens rea* but not for the purpose of raising a defence?

The defence of duress, similarly, cannot be relied upon if D, because of intoxication, mistakenly believes they are being coerced into committing a crime (*Graham* [1982] 1 WLR 294).

No feedback provided.

In one situation, and inconsistently with *O'Connor*, an intoxicated belief can be relied upon to support a defence. This is in relation to s.5(2)(a) of the Criminal Damage Act 1971 which enacts that it is a lawful excuse to a charge of criminal damage that the defendant believed they would have the consent of the owner. In *Jaggard* v *Dickinson* [1980] 3 All ER 716 D, stranded with no money after a night's drinking, went round to a friend's house and, having failed to rouse her, broke into the house believing she would have her friend's consent. Unfortunately she chose the wrong house. The Queen's Bench Division accepted D's defence of lawful excuse. Section 5(2)(a) required only that the belief in consent was honestly entertained. There was no requirement that the belief be reasonable. This case was considered to be of doubtful authority in *Magee* v *Crown Prosecution Service* [2014] EWHC 4089 (Admin). A was charged with failing to stop after an accident on a road, as required by s.170(1) and (2) of the Road Traffic Act 1988. D's defence was that he did not realise that he had had an accident. The Divisional court ruled that this did not afford a defence where, as here, D's lack of awareness was the result of his self-induced intoxication. The offence charged was not a crime of specific intent and so *DPP* v *Majewski* [1977] AC 443 applied.

Activity 10.13

Read Wilson, Section 9.11.E 'Conclusion' and consider whether the present law relating to intoxication is acceptable and whether the Law Commission proposals for reform would improve the situation.

No feedback provided.

We discussed earlier the need to have a template for answering problem questions and gave some examples. Here is an example of a past examination question, testing understanding of intoxication, and the method to be adopted in answering it.

Sample examination question

Alison, Bertha, Charles and Desmond meet in a pub for a reunion. Alison does not drink alcohol but Bertha puts vodka in her lemonade for a joke, without Alison noticing. Later Bertha suggests to Alison that Alison should drop her glass on the floor to see if it will bounce. Alison does so and the glass breaks. Bertha, who has been drinking beer all evening, later rides off on the landlord's bicycle. When stopped by John, a police officer, Bertha says that she thought the bicycle had been abandoned. When John tries to arrest her, Bertha aims a punch at him which misses and hits Phoebe, a bystander. What offences have been committed and by whom?

Advice on answering the question

There are a number of possible offences committed here. In each case begin with the offence to be charged.

Alison: method

Identify harm/crime = criminal damage

1. Define the crime and identify the elements.
2. Then consider what elements are at issue.
3. Here there is only one issue. Has Alison *mens rea*? Her problem is that if we don't take into account her drunken state, the jury will inevitably conclude that she has, because everybody knows glasses don't bounce: they break. If we do take intoxication into account, she has a chance. How can Alison use the evidence to support her claim of lack of *mens rea*? By claiming that, due to her intoxicated state, 'I honestly did not think the glass would break.'
4. State the governing rules. If the intoxication is involuntary, Alison can use it. If it is voluntary she cannot, if criminal damage is a basic intent crime.
5. Discuss whether criminal damage is a crime of specific or basic intent.
6. Discuss whether Alison's is a case of voluntary or involuntary intoxication.
7. Conclude.

Bertha: method

Identify harm/crime = punch = assault

1. Define the crime and identify the elements.
2. Then consider what elements are at issue.
3. Again, the issue is whether Bertha lacks *mens rea*.
4. Only if she does lack *mens rea* can Bertha use evidence of intoxication to support her claim.
5. State the relevant rules. If the intoxication is voluntary it can be raised in evidence to negate *mens rea* for a crime of specific intent but not for a crime of basic intent.
6. Discuss whether it is a crime of specific or basic intent.
7. Discuss whether it is voluntary or involuntary intoxication.
8. Conclude. Bertha will not be able to rely on intoxication with regard to the punch since
    i. she has the *mens rea* for assault, and
    ii. even if she lacked the *mens rea* for assault, the intoxication is voluntary and assault is a basic intent crime.

Identify harm/crime = theft

1. Use same method as above.
2. Conclude. Bertha will be able to rely on her voluntary intoxication on the theft charge as she does not have the *mens rea* for theft and theft is a specific intent crime.

Am I ready to move on?

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

1. State what automatism and insanity have in common.
2. State how they differ.
3. State the test which differentiates insanity and automatism.
4. Decide whether the following conditions or events affecting *mens rea* are examples of insanity or automatism.
    a. post-traumatic stress syndrome
    b. heart attack
    c. sleepwalking
    d. depression
    e. brain tumour
    f. diabetic hypoglycaemia
    g. diabetic hyperglycaemia
    h. carbon monoxide poisoning
    i. anaesthetic
    j. hypnosis.
5. Explain the relevance of intoxication to proof of *mens rea* and to the defence of automatism.
6. Explain the difference between basic and specific intent crimes.
7. Explain what the relevance of 'involuntary intoxication' is to criminal liability.
8. Explain why theft is an example of a specific intent crime.

NOTES

11 Defences 2: affirmative defences

Contents

Introduction

By contrast with failure of proof defences, affirmative defences operate outside the elements of the offence. The moral core of these defences is that the particular context within which the defendant was acting rendered their action permissible or excusable, although contrary to a criminal prohibition. In essence they adduce to the claim that the defendant reacted reasonably, or as reasonably as could be expected in the situation in which they were placed, either to allay the unjust threat of harm or otherwise to promote the common good. The defences we shall cover in this chapter are duress, duress of circumstances, necessity and self-defence. It is how these defences are distinguished which can cause difficulty.

11.1 Relationship between the defences

It is easy to mix up the various affirmative defences as they all generally involve the claim that the defendant's action was necessary to avoid harm befalling them or someone else. It is important not to confuse them, however, not least because their scope is different. Duress, for example, is not a defence to murder but self-defence is. A brief outline of the usual coverage of these defences follows to show their essential points of difference.

Consider the following hypothetical case.

Illustration 11.1

D threatens V with death unless V helps him to beat up X.

a. **If V succumbs to D's threat and does beat up X he may raise the defence of duress. Obedience to the criminal law does not demand a disproportionate personal sacrifice. Note the action taken by V is a wrong committed against an innocent person, which is excused as a concession to human frailty.**

b. **If V resists the threat and attacks D, he may raise the defence of self-defence. The law permits people to protect themselves from those who would harm them. Note the action taken is not a wrong but a justified act of self-defence against the wrongdoer.**

c. **If V escapes the threat by driving off at high speed the wrong way down a one-way street, he may raise the defence of duress of circumstances to a charge of dangerous driving. Again, the law does not demand a disproportionate personal sacrifice. Note the action taken is a wrong but this time it involves no victim. This wrong is excused.**

d. **If V pushes X to the ground to prevent D delivering the first punch on X he may raise the defence of necessity. The criminal law accepts the moral imperative that people, faced with a crisis demanding immediate action, may embrace the lesser of two evils, even if that evil is non-conformity to the law. Note the action taken is not a wrong but a justified act designed to advance X's good and the common good.**

In short, in response to the same threat, four different possible responses are available which may act as a defence to the charge levelled against V. These defences will now be looked at in turn.

11.2 Public and private defence including self-defence

The criminal law permits the use of reasonable force for the purpose of public or private defence. Section 3 of the Criminal Law Act 1967 provides the basic template for both public and private defence. Section 3(1) reads:

> (1) A person may use such force as is reasonable in the circumstances in the prevention of crime, or in effecting or assisting in the lawful arrest of offenders or suspected offenders or of persons unlawfully at large.

Private defence, which is a subset of public defence, similarly permits the use of reasonable force in self-defence, defence of another or defence of property. To constitute defensive force, D must be acting defensively (i.e. not in retaliation or revenge) and the force used must be directed against a person posing an unjust threat and it must be used for the purpose of resisting that threat, in the case of private defence, or of preventing crime or making a lawful arrest in the case of public defence. So, in *R* v *Wilkinson* [2018] EWCA Crim 2154, the appellant, a taxi driver, was convicted of false imprisonment for having returned a passenger to where he had picked her up after she had informed him she was not intending to pay. He relied upon s.3 of the Criminal Law Act 1967, arguing that he had used reasonable force to prevent the passenger from committing a crime. His appeal was dismissed on two grounds. First,

refusing to pay, although wrongful, was not a crime. Secondly, even if it were a crime, his use of force in taking her back to the start of the journey did not prevent it from occurring. In effect, it was a retaliatory rather than a preventive measure. Similar reasoning informed *R* v *Demario Williams* [2020] EWCA Crim 193. The Court of Appeal refused leave to appeal against conviction of a youth who had killed in the course of trying to recover property that had been stolen from him. The Court said that the reasonable force was justified by s.3 where it was used to prevent a crime, such as theft or robbery, from occurring. It could not be utilised, as here, where it was used to recover property once that robbery or theft was completed. This was not within the coverage of s.3 of the CLA 1967.

Again, it is not available as a defence to a person **resisting** a lawful arrest since the arrest is not unjust. It is also not available to justify force used against an innocent person, such as V in Illustration 11.1 (a) or the sacrificed twin in *Re A (conjoined twins)* [2001] Fam 147, as neither is posing an unjust threat to the other. The correct defence in the first case is duress. The correct defence in *Re A* is one of necessity.

The Criminal Justice and Immigration Act 2008 has put some of the key common law principles on a statutory footing to ensure clarity and consistency of approach. They include a restatement of the rule that whether or not the use of force is lawful depends not on whether it was **in fact** necessary, but whether the defendant honestly believed it to be necessary. They include, also, guidelines on matters to be taken into account in deciding whether the degree of force used was reasonable. These consolidate the principles enunciated in *Beckford* [1988] AC 130. Section 76 of the Criminal Justice and Immigration Act 2008 (CJIA 2008) as amended by the Crime and Courts Act 2013 (s.43), which applies to all cases involving the use of force in public or private defence, provides as follows:

> (3) The question whether the degree of force used by D was reasonable in the circumstances is to be decided by reference to the circumstances as D believed them to be.
>
> Further:
>
> (4) If D claims to have held a particular belief as regards the existence of any circumstances –
>
> (a) the reasonableness or otherwise of that belief is relevant to the question whether D genuinely held it; but
>
> (b) if it is determined that D did genuinely hold it, D is entitled to rely on it for the purposes of subsection (3), whether or not –
>
> (i) it was mistaken, or
>
> (ii) (if it was mistaken) the mistake was a reasonable one to have made.
>
> (5) But subsection (4)(b) does not enable D to rely on any mistaken belief attributable to intoxication that was voluntarily induced.

Therefore, in a case such as *Beckford*, in which the defendant claimed that he used a gun because he believed he was being shot at, the jury must be asked: first, whether D might have honestly believed that he was being shot at; and, secondly, whether, on this assumption, D's use of the gun was proportionate to the perceived threat. The jury should also be directed that, if D's belief that he was under attack was unreasonable, this would be irrelevant as a matter of law but very relevant as a matter of evidence. The more preposterous D's supposed belief, the less likely it is that he actually held it. There are two qualifications to the 'circumstances as D believed them to be' principle. If, as in *Oye*, he is suffering from an insane delusion that he is being attacked and uses force to resist that attack, D's defence is one of insanity, not self-defence. See Section 10.3.1.

The second qualification is provided by s.76(5). Ths disentitles the defendant from relying on the defence if the mistake is attributable to self-induced intoxication. So a person who, through drink, mistakenly believes they are about to be attacked and uses force to repel the supposed attack is acting unlawfully, for which see discussion of *O'Connor* at Section 10.5.1. It has been held recently that it is not necessary for the defendant to

actually be intoxicated to be disentitled from relying on his mistaken belief. It is enough that the mistaken belief, as in *R* v *Taj,* was attributable to voluntary intoxication, as where recent alcohol abuse has resulted in a temporary, short-term psychotic episode. This case sits uneasily with *Oye*. For a discussion of *Taj*, see Section 10.5.1.

11.3 Meaning of 'reasonable force'

Subsection 76(6) of the CJIA 2008 affirmed the common law position that the degree of force used by D is not to be regarded as having been reasonable in the circumstances as D believed them to be if it was disproportionate in those circumstances. Subsection 76(6) has now been amended to provide some extra protection to householders who overreact in the terror of discovering a burglar. For householders encountering an intruder, the question is not whether the degree of force is disproportionate but whether it is reasonable, which it may be so long as it is not 'grossly' disproportionate.

The common law provides that what is disproportionate is a question of degree. This means that the degree of force deemed reasonable varies according to the nature and degree of the threat. In *A-G's Reference (No 2 of 1983)* [1984] 2 WLR 465, it was held that a shopkeeper who armed himself with petrol bombs to protect his property from rioters was not acting disproportionately. However, a person protecting his property from burglars (*Martin* (*Anthony*) [2001] EWCA Crim 2245) or performing an arrest (*Clegg* [1995] 1 AC 482, see below) will no doubt be acting disproportionately if he shoots to kill, but proportionately if he shoots to pre-empt a murderous attack on himself or another (*Beckford*). The case law contains the following guidance as to how to assess the reasonableness of the defender's response.

11.3.1 Use of force must be necessary

The use of force will not be reasonable if it is not immediately necessary (on the facts as D believed them to be). If, therefore, there are other defence options available, for example locking a door to prevent the intrusion of a burglar, the use of force may not be reasonable.

11.3.2 No duty of retreat

In *Field* [1972] Crim LR 435, D was told that V was coming round to attack him. D remained where he was and, in repelling V's attack, killed him. The prosecution case was that D's use of force was unreasonable since he had the opportunity to retreat and seek police protection. The Court of Appeal rejected this argument and allowed the defence.

11.3.3 Provoking an attack

A person is not disqualified from using reasonable force to defend themselves although they were originally at fault in provoking the attack. In *Rashford* [2005] EWCA Crim 3377, D mounted a revenge attack on V. V himself went on the attack, along with some friends. D then sought to defend himself and killed V. The Court of Appeal stated that the fact that D provoked the attack did not exclude his use of the defence. The defence was available so long as V's retaliation was of a nature to justify the use of force in self-defence and if the violence used was not disproportionate to the perceived threat.

11.3.4 Pre-emptive strike

A person can make a pre-emptive strike so long as they honestly believe an attack to be imminent. This was made clear in the case of *A-G's Reference (No 2 of 1983),* considered above. It was said that the manufacture and storage of firebombs as a protective measure could negate liability for an offence amounting, in effect, to the possession of an explosive substance for an unlawful purpose. In *Beckford* (1988) Lord Griffith made the following statement of principle.

> A man about to be attacked does not have to wait for his assailant to strike the first blow or fire the first shot; circumstances may justify a pre-emptive strike.

11.3.5 Reasonable force decided objectively

Whether the degree of force used is reasonable is decided objectively rather than from the defender's point of view. In deciding whether reasonable force was used, what matters is not whether D believed the amount of force used was reasonable, but whether it **was** reasonable. In deciding whether it was reasonable, the court must take into account the fact that D was acting under conditions of extreme stress, and so the jury must accept that under such conditions reasonable people may make errors of judgement (*Owino* (1996)). As Lord Morris said in *Palmer* v *R* [1971] AC 814: 'Detached reflection cannot be expected in the face of an uplifted knife'.

Section 76 of the Criminal Justice and Immigration Act 2008 enshrines this approach. Section 76(6) provides that:

> (6) The degree of force used by D is not to be regarded as having been reasonable in the circumstances as D believed them to be if it was disproportionate in those circumstances.

In deciding whether it was disproportionate, s.76(7) says:

> the following considerations are to be taken into account (so far as relevant in the circumstances of the case) –
>
> that a person acting for a legitimate purpose may not be able to weigh to a nicety the exact measure of any necessary action; and
>
> that evidence of a person's having only done what the person honestly and instinctively thought was necessary for a legitimate purpose constitutes strong evidence that only reasonable action was taken by that person for that purpose.

Notice, however, that the defender's honest and instinctive belief is only evidential. It cannot override the requirement that the degree of force used must be proportionate to the threat. In *R* v *Clegg*, a private soldier serving with the Parachute Regiment in West Belfast fired four shots into an oncoming car at a road block. The final shot killed a passenger in the back seat. D's defence was that he had fired because he had thought that a colleague's life was in danger. In relation to the first three shots the judge had accepted that D may have fired in self-defence or in defence of his colleague. However, the fourth shot had been fired at the car after it had passed. It could no longer, therefore, ground the defence of self-defence since the danger had passed. Any use of force thus became automatically unreasonable, whatever D's degree of stress and whatever he honestly and instinctively believed.

Again, in *R* v *Martin*, D shot dead a burglar because he overestimated the danger to which he was subject. He may have done so due to a psychiatric disorder. The Court of Appeal, upholding D's conviction, restated the rule that the question as to how much force is lawful is a question of law and is an objective question. D's honest assessment of the degree of force necessary was not decisive. It could not be objectively reasonable to shoot a burglar in the absence of any evidence of physical threat, however scared he was.

A similar result occurred in *Yaman* [2012] EWCA Crim 1075. The Court held that, even if it was assumed that in attacking a court-appointed locksmith with a hammer, D had mistakenly 'done what he honestly and instinctively thought was necessary' to resist a supposed burglary on the family shop, the jury must still inevitably have concluded that the force he used was excessive.

Both *Yaman* and *Martin* illustrate the kind of problems likely to arise when householders are unexpectedly confronted with an intruder. In 2013, the Government made another attempt to ensure that public perceptions of the scope of the defence corresponded with the legal underpinnings. This time, however, the change is one of substance rather than language. Section 43 of the Crime and Courts Act 2013 adds a new subs.(5A) to s.76 of the CJIA 2008. The effect of subs.(5A) is to apply a more flexible standard of reasonableness of reaction to the householder (e.g. Tony Martin), than for the defence generally (e.g. Private Clegg), to give **householders** 'greater latitude in terrifying or extreme situations where they may not be thinking clearly about the precise level of force that is necessary to deal with the threat faced.' (Ministry of Justice circular). Subsection 5A provides:

> In a householder case, the degree of force used by D is not to be regarded as having been reasonable in the circumstances as D believed them to be if it was grossly disproportionate in those circumstances.

The effect of subs.(5A) is that, if householders act honestly and instinctively to protect themselves or their family from intruders using force that was reasonable in the circumstances as they saw them, they will not necessarily be guilty of an offence even if the level of force turns out to have been disproportionate in those circumstances. In *R (Collins)* v *The Secretary of State for Justice* [2016] EWHC 33 (Admin) Collins was tackled by a householder while intruding in his house. The householder put him in a headlock which caused serious injury from which Collins was not expected to recover. The question for the court was whether subs.(5A) had the effect of rendering any use of force other than grossly disproportionate force, reasonable force. The Queen's Bench Divisional Court ruled that, while grossly disproportionate force cannot be reasonable and so is unlawful, if the force used is disproportionate without being grossly disproportionate, it may or may not be reasonable. The decision is for the jury, taking into account all the householder's circumstances. In *R* v *Ray* [2017] EWCA Crim 1391 the Court of Appeal approved this approach. Whether, despite being disproportionate, it is reasonable or not is a matter for the jury, taking into account the context and all the circumstances.

By subs.(8B) the definition of a householder covers people who live in dwellings and also buildings which serve a dual purpose as a place of residence and a place of work (for example, a shopkeeper and their family who live above the shop). In these circumstances, the 'householders' can rely on the more generous defence regardless of which part of the building they were in when they were confronted by an intruder.

Activity 11.1

Read Wilson, Section 13.5.A.2(a)(ii) 'The qualifying triggers' and answer the following questions.

a. How might Clegg now expect to be able to avoid a conviction for murder?

b. Does the new test put too much power in the hands of the householder?

11.4 Scope of private defence

As we have seen, self-defence is available to all crimes involving the use of force, including physical force and pre-emptive force. It is even a defence to murder. Some concern has been voiced in this regard in relation to the actions of law enforcement agencies, such as the police. The 'honest belief' requirement in the need to use force has on occasions led to dubious acquittals of police officers who shoot to kill, without taking sufficient steps to determine whether the circumstances truly demand defensive action. This seems to be contrary to Article 2 of the European Convention on Human Rights which guarantees the right to life and permits fatal violence for defensive purposes only if it is 'absolutely necessary'. If D shoots V, believing V to be taking out a gun from his pocket when in fact it is his identification papers, the killing is hardly 'absolutely necessary', but the 'honest belief' requirement nevertheless acquits D.

Public and private defence is only available to crimes involving the use of force. This means it is not available where the crime committed to escape an unlawful threat of harm does not involve the use of force, for example, simple driving offences and most cases of criminal damage, theft or fraud. D must therefore bring his case within another defence to avoid liability. So public defence would not be available for a person, who, as a means of bringing a fugitive to justice (public defence), paints the latter's name and address on a police station wall, since graffiti does not constitute force. It would be different if A broke a window so as to be able to defend V, who was being attacked on the other side by D, or locked D in a room to prevent D attacking V.

Here, force – breaking a window or imprisoning someone involves force – is being used for defensive purposes. Likewise a person who, in order to escape a threatened attack, drives the wrong way down a one-way street or otherwise drives dangerously cannot

rely on self-defence but would need to bring her defence within the more restricted scope of duress of circumstances. It should be remembered that even driving offences may be brought within the scope of private defence if they involve the use of force. So in *R* v *Riddell* [2017] EWCA Crim 413 the defendant, having been pursued in her car by another driver and brought to a stop, sought to escape a threatened attack by nudging the pursuer aside with her car. On a charge of dangerous driving, the trial judge did not put the defence of self-defence to the jury. Instead, he directed them in relation to the defence of duress of circumstances whose elements were less favourable to the defence. The jury convicted. The defendant's appeal was successful. What she had done in response to the perceived threat – using her car to nudge the pursuer out of the way – involved the use of force and so the defence was applicable.

ACTIVITY 11.2

a. Read *R* v *Riddell* (above) as well as the module guide, Chapter 11 and Wilson, Sections 10.4 'Compulsion (I): duress by threats – the legal position', 10.5 'Compulsion (II): duress of circumstances' and 10.8 'Purposes for which reasonable force may be used'. Identify how duress of circumstances is a more challenging defence to raise successfully than self-defence.

b. Read the module guide, Chapter 11 and Wilson, Section 10.8.A.4 'What counts as force?'. Discover or invent an example of how a person might raise the defence of self-defence to a charge of criminal damage.

No feedback provided.

11.5 Duress

11.5.1 General matters

Duress is a rather unusual defence in that it involves the claim that it may be excusable to follow the commands of a wrongdoer rather than the state, and that it may be excusable to victimise an innocent person to save one's own skin. Therefore the defence is hedged around with restrictions. Reasonableness of reaction is of the essence for this defence since it is one of the criminal law's few concessions to human frailty. An account of the defence was expressed by Murnaghan J in *A-G* v *Whelan* [1934] IR 518 (Irish CCA) as:

> ...threats of immediate death or serious personal violence so great as to overbear the ordinary powers of human resistance should be accepted as a justification for acts which would otherwise be criminal.

There are two forms of duress: **duress by threats** and **duress of circumstances**. In duress by threats, D is coerced into committing an unlawful act by the threats of a wrongdoer. In duress of circumstances, D is compelled to commit an unlawful act to avoid a threat of harm posed by external circumstances.

ILLUSTRATION 11.2

a. X puts a gun to the head of D, a taxi driver, and says 'Get me to the airport in five minutes or I kill you'. D exceeds the speed limit in acceding to this demand.

b. D notices that the driver in the car behind him has lost consciousness. At any moment, the out-of-control car will crash into D's car at high speed. D goes through a red traffic light in order to avoid the crash.

In the first case, D may rely on the defence of duress by threats. In the second case, D's defence is one of duress of circumstances.

The basic principles governing duress were expounded in *Graham* [1982] 1 WLR 294. These have been subsequently approved by the House of Lords in *Howe* [1987] AC 417 and held applicable also to duress of circumstances in *Martin* [1989] 1 All ER 652. In *Graham* the defendant lived in a *ménage à trois* with W, his wife, and K, his homosexual lover. One night, after D and K had been drinking heavily, K put a lighting flex round

W's neck and then commanded D to pull at the other end. D did so and his wife was strangled. Both D and K were charged with murder. D pleaded not guilty, claiming that his action was coerced by his fear of K. Although the judge allowed the defence to go to the jury, it convicted D of murder. The Court of Appeal upheld the conviction. Lord Lane CJ proposed the following model direction as guidance to the jury.

> Was the accused, or may he have been, impelled to act as he did because as a result of what he reasonably believed to be the situation he feared that otherwise death or serious injury would result; second, if so, would a sober person of reasonable firmness, sharing the characteristics of the accused, have responded to the situation by acting as the accused did?

Activity 11.3

The above quotation encapsulates the basic principle governing both forms of duress. Commit it to memory.

Why is illustration 11.2(b) not a case of self-defence?

No feedback provided.

11.5.2 Duress by threats

These principles have suffered significant elaboration more recently by the House of Lords in the case of *Hasan* [2005] UKHL 22. In this case, in which the defendant pleaded duress by threats by X, a violent man with whom he had a criminal association, in answer to his trial for aggravated burglary, Lord Bingham placed the following restrictions upon its application as a defence. It seems likely that these principles, with the possible exception of 2, apply equally to duress of circumstances.

1. The threat or danger must be of death or serious injury.
2. The threat must be directed against the defendant, his or her immediate family or someone close to the defendant.
3. The relevant tests are in general objective, with reference to the reasonableness of the defendant's perceptions and conduct.
4. The defence is available only where the criminal conduct which it is sought to excuse has been directly caused by the threats relied upon.
5. There must have been no evasive action the defendant could reasonably have been expected to take.
6. The defendant must not voluntarily have laid themself open to the duress relied upon.
7. Duress may be a defence to any crime except some forms of treason, murder and attempted murder.

Activity 11.4

Commit the seven restrictions on the defence of duress outlined in *Hasan* to memory.

1. The threat or danger must be of death or serious injury

The essence of this defence is that the defendant's actions were morally involuntary, and only threats of death or serious injury remove the element of free choice. So in *Valderrama-Vega* [1985] Crim LR 220, the Court of Appeal ruled that the threat of exposing D's homosexuality was not enough to raise the defence. Again, the Court of Appeal in *Quayle* [2005] EWCA Crim 1415 ruled that duress of circumstances was not an answer to a charge under the Misuse of Drugs Act 1971 for a defendant who claimed he had consumed cannabis to combat severe neurological pain following a leg amputation. Severe pain does not amount to serious injury.

One extremely significant qualification to this restriction was made in *A (RJ)* [2012] EWCA Crim 434 where it was stated *obiter* that a credible threat of rape could ground the defence of duress or duress of circumstances.

Activity 11.5

Read *Dao* [2012] EWCA Crim 1717. Can false imprisonment or the threat of false imprisonment ground the defence of duress?

2. The threat must be directed against the defendant, his or her immediate family or someone for whom the defendant reasonably regards himself as being responsible

Duress is not limited to cases where the defendant is the subject of the threats. It also applies where his or her partner (*Hurley* v *Murray* [1967] VR 526), spouse or family is the subject (*Ortiz* (1986) 83 Cr App R 173). Until *Hasan* there was no strong authority for the proposition that the availability was limited to those with a close personal connection to the defendant. In *Shayler* [2001] EWCA Crim 1977, the defendant, a member of the security services, in passing documents to journalists breached the Official Secrets Act which, it was alleged, he had done in order to safeguard members of the public. At a preliminary hearing the judge ruled that the defence of duress of circumstances was not available to Shayler. His appeal was dismissed on the ground that he was unable to pinpoint with any degree of precision what the threats to security might involve or who was at risk. Lord Woolf limited the application of the defence to cases where:

> a defendant commits an otherwise criminal act to avoid an imminent peril of danger to life or serious injury to himself or towards somebody for whom he reasonably regards himself as being responsible.

Lord Woolf included among that class not merely members of the defendant's close circle but also cases where:

> he is placed in a position where he is required to make a choice whether to take or not to take the action which it is said will avoid them being injured. Thus if the threat is to explode a bomb in a building if the defendant does not accede to what is demanded the defendant owes responsibility to those who would be in the building if the bomb exploded.

It is clear that this class of subjects is far wider than that proposed by Lord Bingham in *Hasan*, and – for the reasons given by Lord Woolf – rightly so. An emergency is no less an emergency for the fact that the individuals threatened are not known personally to the defendant.

Activity 11.6

A tells B on the day of the trial that if he does not perjure himself C, A's gang member, has been given instruction to select and kill an unidentified child. Assuming B commits perjury, what problem will the defence have in raising the defence of duress? What argument would you make to advance the defence's case?

3. The relevant tests are in general objective, with reference to the reasonableness of the defendant's perception and conduct

Hasan confirms Lord Lane CJ's statement in *Graham* that if D acts under a mistaken belief that he, or someone for whom he is responsible, has been threatened with death or serious injury, the mistake will not avail him unless it is reasonable. Compare self-defence on this point. The decision in *Shayler*, for example, could equally have been decided on the ground that there was no plausible case appearing in the leaked documents that members of the public were at imminent risk of death or serious injury. D may have believed they were but the belief was not held on reasonable grounds.

In *A (RJ)* [2012] EWCA Crim 434, the defendant was convicted of the offence of perverting the course of justice when she falsely retracted allegations of rape against her husband. She did so, apparently, in the belief that she would suffer serious injury by her husband if she did not. This fear was real but not based on reasonable grounds since no threat of violence had been made to her when she made the false retractions on which her prosecution was founded.

The criminal law does not give *carte blanche* to a person threatened with death or serious injury to commit any crime demanded of them. Indeed, as we shall see, duress

is never a defence to murder or attempted murder, however powerful the threats. But, more generally, a reasonable balance must be struck between the threat posed to the defendant and the crime they must commit to avoid the threat. Although D is faced with a threat of death or grievous bodily harm, it may still be necessary for them to do their legal duty. Although there is authority for the proposition that duress of circumstances may be an answer to a charge of hijacking an aircraft (*Abdul Hussain* [1999] Crim LR 570), it might be that the jury concludes that participating in this crime is not objectively reasonable, however serious the threats.

As *Graham* provides, moreover, reasonable standards of courage are required. In deciding whether the defendant did display the standards of fortitude of reasonable people, it will not avail D to claim that they were a congenital coward. So in *Hegarty* [1994] Crim LR 353, the defendant pleaded duress to a charge of robbery and possession of a firearm. He claimed that he had been threatened with violence against his family if he refused. The court refused to allow medical evidence that D was 'emotionally unstable' and in a 'grossly elevated neurotic state' to vary the standards of fortitude to be expected of him. And in *Bowen* [1997] 1 WLR 372, the defendant's very low level of intelligence was similarly ignored on the basis that reasonable courage can be expected of everyone, including those with severe learning difficulties.

However, some characteristics of the defendant which may affect the levels of fortitude to be expected of reasonable people may be taken into account, so long as they are consistent with a coherent notion of a reasonable person. The legal position is summed up in the following statement of principle of Stuart Smith LJ in *Bowen*.

> The mere fact that the defendant is more pliable, vulnerable, timid or susceptible to threats than a normal person is not a characteristic with which it is legitimate to invest the reasonable/ordinary person for the purpose of considering the objective test… The defendant may be in a category of persons whom the jury may think less able to resist pressure than people not within that category. Obvious examples are age, where a young person may well not be so robust as a mature one; possibly sex, though many women would doubtless consider they had as much moral courage to resist pressure as men; pregnancy, where there is added fear for the unborn child; serious physical disability, which may inhibit self protection…

One further qualification needs to be made with respect to this rather rigorous restriction; namely that where a reasonable person has been reduced, through trauma such as cumulative domestic violence or rape (*Sewell* [2004] EWCA Crim 2322), to a condition of 'learned helplessness' and so unable to resist the threats of their abuser, this should be taken into account. Society cannot expect reasonable people to be steadfast in the face of unremitting physical and mental abuse.

Activity 11.7

a. Is *Hegarty* (1994) reconcilable with the case of *Emery* (1993), discussed in Wilson, Section 10.4.C 'A part subjective and part objective test'?

b. Can you think of any offences for which it might reasonably be concluded that taking part in the offence, even under threat of death, would not be reasonable?

4. The defence is available only where the criminal conduct which it is sought to excuse has been directly caused by the threats relied upon

It is not enough that the defendant was threatened with death or serious injury for non-compliance with the threat; they must execute or participate in the crime because of the threat. If D would have committed the crime anyway, the defence is unavailable. In *Valderrama* [1985] Crim LR 220, for example, the defendant was threatened both with exposure as a homosexual and threats to himself and his family if he did not smuggle cocaine. The Court of Appeal said that if D had committed the offence solely because of the threat to expose him as a homosexual, then he would not be able to rely on duress, even though he had also been threatened with death. However, if he had committed the offence at least in part due to the latter threat the defence would be available.

5. There must have been no evasive action the defendant could reasonably have been expected to take

Consistent with the requirement that D's participation in the offence must be an objectively reasonable means of allaying a threat of death or serious injury, the defence is not available if it could have been avoided, whether by escaping the coercer or seeking police protection. So in *Gill* [1963] 1 WLR 841, D was convicted of the theft of his employer's lorry. The Court of Appeal held that duress was not available where the defendant had been left alone outside his employer's yard, which he was due to rob, and therefore was well able to raise the alarm and escape the threat.

In *Hudson and Taylor* [1971] 2 QB 202, the Court of Appeal was not so exacting. The defendants were teenage girls who were prosecution witnesses in the trial of certain gang members. The gang threatened to 'cut them up' if they did not perjure themselves in court. They pleaded duress. The trial judge refused to allow the defence since the threat could hardly have been carried out immediately in open court. Nevertheless, the Court of Appeal allowed the appeal, agreeing that seeking police protection was not always reasonably to be expected.

In *Hasan* the House of Lords has now abandoned this relaxed approach to the requirement of urgency in duress. Lord Bingham, disapproving *Hudson and Taylor*, insisted that the defence was not available unless D reasonably apprehended immediate or almost immediate death or serious injury for failure to comply. If this were not the case, D would be expected to take evasive action.

ACTIVITY 11.8

Read Wilson, Section 10.4.D 'Immediacy of the threat' and answer the following question.

How is the abandonment of the approach in *Hudson and Taylor* reconcilable with the principle in (3) above that the court should bear in mind matters such as age, sex and physical health in deciding whether D could reasonably have been expected to resist the threat?

6. The defendant must not voluntarily have laid themself open to the duress relied upon

Intoxication

Once again, this requirement is a qualification of the general requirement of reasonableness which hedges round the defence. There are two aspects to this qualification. First, as *Graham* provides, loss of moral fortitude due to the effects of voluntary intoxication cannot be relied upon. The jury should be told to disregard any evidence of the defendant's intoxicated state when assessing whether they acted under duress. The reasonable person is sober and steadfast, not drunk and out of control. This does not prevent the defendant from raising evidence of intoxication to negate *mens rea*. Defence counsel did not present such an argument in *Graham*.

ACTIVITY 11.9

Read Wilson, Section 9.11.D 'Intoxicated mistakes' and answer the following question.

Would the position be any different if the intoxication was involuntary?

Voluntary subjection to the risk of coercion

The defence is also denied to those who voluntarily place themselves at risk of coercion. This is another example of the doctrine of prior fault. In *Sharpe* [1987] QB 853, the defendant joined a criminal gang. He later participated in a robbery on a Post Office, in which a sub-postmaster was killed. D's defence to manslaughter was duress: he claimed that he had undertaken the robbery only because he had a gun to his head. The defence was rejected upon the basis that D voluntarily joined the gang, knowing that coercion might later be brought to bear to commit an offence. In *Hasan* [2005] UKHL 22, the House of Lords stated that the defendant is disqualified from relying on the defence not only where they actually foresee that violence may be used to exact compliance, but also where they should reasonably know that it may be.

The rule applies equally where the defendant voluntarily runs the risk of coercion outside the scope of a criminal organisation. In *Heath* [2000] Crim LR 109, a drug user who was coerced into supplying a class B drug by his own supplier who he had not paid was denied the defence on the basis that he should have known the risks of mixing with drug dealers. A similar decision was reached in *Mullally* [2012] EWCA Crim 687.

7. Duress may be a defence to any crime except some forms of treason, murder and attempted murder

Until fairly recently, duress could be raised in answer to a charge of murder but only where the defendant was an accessory to, rather than perpetrator of, the murder. This was the outcome of *DPP for Northern Ireland* v *Lynch* [1975] AC 653 in which the defendant, as driver, had participated in the murder of a police officer by the IRA. D's defence was duress, claiming the coercer would have shot him if he did not comply. The trial judge disallowed the defence and the Court of Appeal dismissed D's appeal. The House of Lords, underlining the rationale of the defence as a concession to human frailty, allowed the appeal. Lord Morris, explaining the decision, said:

> any rational system of law should take fully into account the standards of honest and reasonable men. By those standards it is fair that actions and reactions may be tested. If then someone is really threatened with death or serious injury unless he does what he is told to do is the law to pay no heed to the miserable, agonising plight of such a person? For the law to understand not only how the timid but also the stalwart may in a moment of crisis behave is not to make the law weak but to make it just. In the calm of the court-room measures of fortitude or of heroic behaviour are surely not to be demanded when they could not in moments for decision reasonably have been expected even of the resolute and the well disposed.
>
> In posing the case where someone is 'really' threatened I use the word 'really' in order to emphasise that duress must never be allowed to be the easy answer of those who can devise no other explanation of their conduct nor of those who readily could have avoided the dominance of threats nor of those who allow themselves to be at the disposal and under the sway of some gangster-tyrant…The law would be censorious and inhumane which did not recognise the appalling plight of a person who perhaps suddenly finds his life in jeopardy unless he submits and obeys.

In *Howe* [1987] AC 417, two appellants, H and B, were coerced by X into torturing and murdering a young man. The House of Lords dismissed their appeals against conviction and, overruling *Lynch*, said that it could be used neither by the principal nor the accessory. Lord Hailsham LC, ignoring the 'human frailty' basis of the defence, made it an issue rather of moral reasonableness. A reasonable person does not kill another to save their own skin, a principle which had earlier been used in the necessity case of *Dudley and Stephens* (1884) 14 QBD 273.

> [In the case] where the choice is between the threat of death or… serious injury and deliberately taking an innocent life… a reasonable man might reflect that one innocent human life is at least as valuable as his own or that of his loved one. In such a case a man cannot claim that he is choosing the lesser of two evils. Instead he is embracing the cognate but morally disreputable principle that the end justifies the means.

In *Gotts* [1992] 2 AC 412, the restriction was extended to attempted murder. In this case, D was coerced by his father into helping him to kill his mother. The Court of Appeal ruled that the defence of duress was not available. It has been decided, however, that duress is an answer to conspiracy to murder (*Ness* [2011] EWCA Crim 3105).

Activity 11.10

Read Wilson, Section 10.4.F 'Scope of the defence' and answer the following questions.

a. Which approach do you prefer, *Howe* or *Lynch*?

b. The House of Lords refused to allow the defence to either principal or accessory. Is this fair?

c. **Is it cogent to distinguish between the relative contributions of principal and accessory? If so, you might be interested in knowing that in *Howe* the coercer did not execute the killing and so he was the accessory.**

d. **Can you think of a situation where it would definitely be unfair to disallow the defence to an accessory?**

e. **If D intentionally commits grievous bodily harm to V under coercion D is entitled to raise the defence. If V happens to die due to poor medical treatment, D will be charged with murder and so will not be able to raise the defence. Is this coherent?**

f. **If not, should duress be withdrawn from s.18 of the Offences Against the Person Act 1861?**

No feedback provided.

11.6 Duress of circumstances

In 1986 the defence of duress was allowed in a number of cases involving dangerous driving and other driving offences, although the crime to be committed was not nominated by the wrongdoer; it was nominated by the driver himself as a means of escaping the wrongdoer's threat of death or serious injury. In *Willer* (1986) 83 Cr App R 225, duress was allowed as an answer to a charge of reckless driving when D drove through a pedestrian precinct to escape from a gang threatening violence to him and his passengers. This was not, in itself, a substantial departure from precedent. After all, there is little difference between A saying to V 'drive through this pedestrian precinct or else I shoot you' and A threatening to shoot V, in response to which A drives off through a pedestrian precinct. If the one excuse is available, the other should be too.

A similar decision was reached in *Conway* [1989] QB 290, except that here D mistakenly believed he was being attacked by a gang when in fact they were plain clothes police officers trying to make an arrest on his passenger. You will remember that the defence remains available even if D is mistaken as to the facts, so long as the mistake is reasonable.

Martin [1989] 1 All ER 652 was the first case in which it was explicitly recognised that duress of circumstances was a separate form of the defence in which it was not necessary to show that the defendant acted so as to escape the threats of a person bent on killing or causing serious injury to them or a companion. Here, D drove his stepson, who had overslept, to work although he was a disqualified driver. D had been told by his wife that if he did not do so the stepson would lose his job and she would commit suicide. The Court of Appeal ruled that the trial judge was wrong in not allowing the defence of duress of circumstances to be put to the jury.

In *Pommell* [1995] 2 Cr App R 607, the defence was made available for the first time to a case not involving a driving offence. D was charged and convicted of being in possession of a loaded machine gun. D claimed that he had taken possession of it to prevent the owner shooting to kill and was intending to take it to the police the next day. In *S and L* [2009] EWCA Crim 85, duress of circumstances was ruled available to a charge of employing unlicensed security guards as a means of addressing the risk of terrorist attack on their premises which abutted a public highway.

Note 1: The cases dealt with above all involved 'crimes without victims', i.e. no one was victimised by the defendant's decision to escape danger by breaking the law. Does it operate where an innocent person is victimised? In *R* v *Petgrave* [2018] EWCA Crim 1397, the Court of Appeal affirmed that it would in a case where the defendant was charged with causing serious injury by dangerous driving, contrary to s.1A of the Road Traffic Act 1988, when he had mounted the pavement and injured the victim in trying to escape from a dangerous gang.

Note 2: *Pommel, Martin* and *S and L*, to a greater extent than *Conway* and *Willer*, involved subtle changes to the conceptual DNA of the defence of duress. The defendant is not merely saying 'I broke the law to escape D causing me or someone

else serious injury' but rather 'I did it because it was the lesser of two evils. If I had not broken the law a worse evil would have occurred'. In other words, it transcends the usual rationale for duress which is that it acts as a concession to human frailty. It takes on the trappings of a partial justification rather than a mere excuse and begins to transmute into a defence of necessity.

11.7 Necessity

The potential scope of necessity was described in the Canadian case of *Perka* v *Queen* (1984) 13 DLR (4th) as:

> Necessity covers all cases where non-compliance with the law is excused by an emergency or justified by the pursuit of some greater good.

11.7.1 Necessity as an excuse

The recognition of the defence of duress of circumstances was in effect a recognition of a general defence of necessity, a defence which had long been resisted by the criminal courts. In fact, *Petgrave* notwithstanding, there is little in present case law to suggest that duress of circumstances will develop to embrace the same coverage as duress by threats. As we know, duress by threats is an answer even to crimes of violence where an innocent is victimised. Duress of circumstances, by contrast, has usually been applied in so-called victimless crimes. Indeed, the leading case on necessity (*Dudley and Stephens* (1884)) explicitly rejected any defence of necessity which would permit 'the killing of an innocent to save one's own skin'. As a result, two shipwrecked sailors, who killed and ate the cabin boy after days adrift in an open boat, had no answer to a charge of murder.

It was this case and this principle which led Lord Hailsham in *Howe* to disallow the defence of duress by threats in cases of murder. Until *Willer* and *Conway* the courts, using *Dudley and Stephens* as authority, consistently refused to allow this 'lesser of two evils' defence. There were two reasons given for this. The first, as illustrated by *Dudley and Stephens* itself, was that it would introduce the potential for individual rights to be overridden by collective interests. If those defendants had a defence, would it not also afford a defence to doctors and others who effected forced blood transfusions or organ transplants if this accorded with the balance of evils?

The second reason is that such a defence would subvert the rule of law since it could, in effect, allow individuals to ignore their legal duty in the pursuit of some supposedly greater good. On balance it might be considered better to allow the State to sort out problems needing solution rather than leaving it to individual choice. So in *Buckoke* v *GLC* [1971] Ch 655, the Court of Appeal held that it was no answer to a charge of jumping a red traffic light that the driver was in a fire engine answering an emergency. And in *Southwark LBC* v *Williams* [1971] Ch 734, it was no answer to trespass that the trespassers were homeless and the building unoccupied. In this case, Lord Denning gave a classic illustration of a 'floodgates' argument in the context of the threat to the rule of law posed by a potential defence of necessity.

> …if hunger were once allowed to be an excuse for stealing, it would open a way through which all kinds of disorder and lawlessness would pass…If homelessness were once admitted as a defence to trespass, no one's house could be safe. Necessity would open a door which no man could shut. It would not only be those in extreme need who would enter. There would be others who would imagine that they were in need, or would invent a need, so as to gain entry.

The real significance of the acceptance of the defence of duress of circumstances must be considered in the light of this statement, since it provides an answer to Lord Denning's concerns. The defence is limited to cases of emergency when something has to be done immediately to prevent harm and there is no opportunity to seek guidance or state protection. And it is limited to cases where the harm threatened is of death or serious injury. The defendant, in other words, is not simply choosing a breach of the law as the lesser of two evils: rather, the nature of the emergency gives him no choice.

The scoping statement provided in *Perka* is only partly covered by duress of circumstances, since the latter does not legitimate action taken in defiance of a criminal prohibition simply because it would be the lesser of two evils. Applied to a case such as *Buckoke* v *GLC*, a defence is now available if the fire engine jumped the red traffic lights in the reasonable belief that it was necessary to prevent loss of life, but it would remain unlawful to do so simply to facilitate the putting out of the fire and thus reduce the extent of fire damage and the resources necessary to effect this.

11.7.2 Necessity as a justification

The justificatory form of necessity outlined in *Perka* has now been accepted by the courts in one restricted context, namely medical intervention. There is a good reason for this – that if the case is not an emergency, doctors generally have the ability to secure legal authority for their action by an application to the High Court.

The first case of this nature was *Re F* [1990] 2 AC 1. Doctors in a mental hospital sought a declaration that it would be lawful for them to perform a sterilisation operation on a mentally incompetent (female) patient who had formed a sexual relationship with a fellow patient. The House of Lords concluded that it was in her overall 'best interests' for the operation to proceed on a balance of all her interests, including her interest in remaining free from the physical and psychological effects of pregnancy, abortion or childbirth on the one hand, and her interest in having procreative capacity and remaining free from surgical interference on the other. Lord Goff, for the House of Lords, underlined its justificatory nature by stating that it was not of the essence that there be some emergency requiring immediate action, although in many cases this would be present. Operations and other interventions may be justified even if performed for other than clinical reasons. He said:

> these might include such humdrum matters as routine medical or dental treatment, even simple care such as dressing and undressing and putting to bed.

The availability of the defence does not, however, depend upon authority being sought. In *Bournewood* [1999] 1 AC 458, the defence was allowed *ex post facto* to justify the detention of a patient suffering a mental disorder and whose condition posed a potential threat to himself and others.

These cases were not exceptional on the facts, since they involved mentally incompetent patients whose wellbeing depended upon the availability of such a defence. In other words, their human rights were supposedly being advanced, rather than trampled on, by the defence. The defence does not, however, justify doctors acting contrary to a competent patient's express wishes, for example performing a life-saving caesarean section (*St George's Healthcare NHS Trust* v *S* [1998] 3 All ER 673) or leg amputation (*Re C* [1994] 1 All ER 819) on a patient who refuses consent.

In *Re A (Conjoined Twins)* [2001] Fam 147, the defence of necessity was used to justify an operation to separate conjoined twins who shared a heart. The necessity for the operation was that without it, both twins would quickly die. The problem, however, was that the inevitable consequence of the operation would be the immediate death of the twin lacking a heart and that was hardly in her best interests! Would the proposed operation be lawful in the light of this? Doctrine holds that intentional acts calculated to produce certain death is murder, and duress of circumstances is no defence to murder. If necessity was to operate as a defence here, therefore, it would have to be, like self-defence, in its justificatory form. Brooke LJ (at 1052) explicitly adopted the justificatory lesser of two evils basis for the defence in the following statement of principle. The defence would be limited to cases where:

- the act is needed to avoid inevitable and irreparable evil
- no more should be done than is reasonably necessary for the purpose to be achieved, and
- the evil inflicted must not be disproportionate to the evil avoided.

Activity 11.11

See Wilson, Section 10.6.D 'Necessity/duress of circumstances and murder' for a full discussion of the scope of justificatory necessity in cases of intentional killing. Looking more closely at *Re A (Conjoined Twins)*. It could be suggested that central to the decision was the fact that the killing was a side effect of an otherwise entirely proper action rather than a means to an end. It would not justify, for example, killing a terminally ill patient to provide organs for others who would die without them. Looked at in this way, it is possible that the defence of necessity may well be applicable outside the medical arena to cases where the only way to prevent loss of life is to take action which, incidentally, causes others to die.

What defence, if any, can be relied upon in the following examples?

a. **D is crossing a road. He sees in front of him that the central reservation is full of people waiting to cross to the other side. A lorry is bearing down on him. If he does not push into the people on the reservation he will be hit and possibly killed. He notices that there are also lorries on the other carriageway, equally dangerous to anyone who steps out from the central reservation. He knows that if he pushes his way on to the central reservation someone will be pushed off to their certain death or serious injury. He does so and V is killed as a result.**

b. **D is caught on the staircase of a sinking ship, and the woman in front of him is frozen with fear and cannot move. D knows that if he does not move her he will be drowned and that he can only do so by throwing her down the staircase to her certain death by drowning. He does so and she drowns.**

c. **A jet fighter from the Royal Air Force shoots down a passenger plane, which has been hijacked by terrorists, just as it is about to be flown into a 30-storey office block. All of the passengers and crew are killed.**

Am I ready to move on?

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

1. State the rules governing self-defence.
2. State the rules governing duress and duress of circumstances.
3. State the rule governing necessity.
4. Give three similarities and three differences between duress and necessity.
5. Give three similarities and three differences between duress and self-defence.
6. Give three similarities and three differences between self-defence and necessity.

NOTES

12 Property offences

Contents

NOTES

12.1 Theft

The law relating to property offences was codified in 1968 in the form of the Theft Act, which aimed to simplify, consolidate and reform the previous ragbag of property offences. It was only partially successful. While the law of theft, burglary, robbery and handling remains largely as enacted, the law relating to fraud was found not fit for purpose and was replaced first in the Theft Act 1978, and then again in the Fraud Act 2006.

Theft, and the elements thereof, are defined in ss.1–6 of the Theft Act 1968 although, as will be seen, the Act does not purport to give a comprehensive definition of the various conduct and mental elements. Theft is defined in s.1 as:

> A person is guilty of theft if he dishonestly appropriates property belonging to another with the intention of permanently depriving the other of it.

Following the usual criminal template, therefore, the *actus reus* of theft is the appropriation of property belonging to another; and the *mens rea* is dishonesty as to the appropriation together with an intention permanently to deprive the owner of the property. Each of these elements will be examined in turn, beginning with the *actus reus* which comprises three elements – all of which the prosecution must prove beyond reasonable doubt.

- There must be property.
- The property must be appropriated by the defendant.
- The property appropriated must belong to another at the time of the appropriation of it.

12.1.1 *Actus reus*: theft

Property

There is a comprehensive definition of property in s.4 of the Theft Act 1968. Subsection 4(1) gives us a general statement to the effect that property:

> includes money and all other property, real or personal, including things in action and other intangible property.

Subsection 4(2) then qualifies subsection (1) by severely restricting the scope of stealable land (real property). The reason for this is simple. It is not generally possible to appropriate a parcel of land since land cannot disappear as watches and handbags can. If your neighbour appropriates one metre of your garden for their garden, your remedy is in civil trespass, not criminal theft.

Real property means land and interests in land, such as a tenancy. Personal property means material objects which can (as a rule) be bought and sold; for example furniture, clocks, pictures, food, books, clothes and so on. Things in action are not material objects but are things of value which can be liquidated into money and enforced in the courts. A debt is a good example.

Activity 12.1

Read Wilson, Section 14.2.A.2 'Property: general definition', Section (b) 'Things in action and other intangible property' and answer the following question.

A takes B's cheque for £100 given to B by C as payment for a bicycle. A pays the cheque into her bank account, causing a transfer of funds from C's account to A's account. What has A stolen?

Subsection 4(2)(a) states the general rule that land and interests in land cannot be stolen and its exceptions.

> (2) A person cannot steal land, or things forming part of land and severed from it by him or by his directions, except in the following cases, that it to say –

> (a) when he is a trustee or personal representative, or is authorised by power of attorney, or as liquidator of a company, or otherwise, to sell or dispose of land belonging to another, and he appropriates the land or anything forming part of it by dealing with it in breach of the confidence reposed in him…

This exception is intended to cover cases such as that of an executor of a will who, instead of transferring the land to the intended beneficiary, sells it for their own purposes.

Subsections 4(2)(b)and (c) make a further qualification to deal with the case of people who steal things from off the land which formed part of the land at the time of the appropriation. So, a person can steal land if:

> (b) when he is not in possession of the land [he] appropriates anything forming part of the land by severing it or causing it to be severed, or after it has been severed; or
>
> (c) when, being in possession of the land under a tenancy, he appropriates the whole or part of any fixture or structure let to be used with the land.

Subsection 4(2)(b) deals with the case of **trespassers** who, for example, steal turf or topsoil, garden trees or shrubs, garden fixtures such as fountains or stone terraces, or parts of the house such as lead from the roof or a fireplace or staircase.

Subsection 4(2)(c) deals with the case of **tenants**, who cannot steal turf or topsoil, garden trees or shrubs, but can steal fixtures such as fountains and stone terraces.

Subsections 4(3) and (4) deal with another exception. Again, the property concerned is not land itself but is a thing forming part of the land.

> (3) A person who picks mushrooms growing wild on any land, or who picks flowers, fruit or foliage from a plant [including shrubs or trees] growing wild on any land, does not (although not in possession of the land) steal what he picks, unless he does it for reward or for sale or other commercial purpose.
>
> (4) Wild creatures, tamed or untamed, shall be regarded as property; but a person cannot steal a wild creature not tamed nor ordinarily kept in captivity, or the carcase of any such creature, unless either it has been reduced into possession by or on behalf of another person and possession of it has not since been lost or abandoned…

A person who picks flowers from a flowerbed or greenhouse, or apples from a garden tree commits the *actus reus* of theft, since apples and flowers are property. Subsection 4(3) applies to their 'wild' counterparts. It affirms that wild flowers, or fruit or foliage from wild trees or plants on other people's land, do not count as property capable of being stolen unless it is done for some kind of commercial purpose. A person who picks wild blackberries or apples, plants or mushrooms and sells them to a restaurant or shop, or processes them for onward trade, is covered by s.4 and commits theft, assuming all the other elements (e.g. dishonesty) of theft are present.

12.1.2 Identifying the property

A key task in deciding whether theft of property has occurred is to identify the property. Misidentifying the property means the charge will fail, even though a theft has been committed.

ACTIVITY 12.2

Read Wilson, Section 14.2.A.2(b) 'Things in action and other intangible property' and state what, if anything, has been stolen in the following questions.

a. **A draws forged cheques owned by B for the sum of £1,000 on B's bank account and pays them into his account, causing a transfer of funds (a variation of what happened in *Chan Man-Sin* v *A-G for Hong Kong* [1988] 1 WLR 196).**

b. **A eats a meal in a restaurant, although he has no money, and leaves without paying the bill, which is £20.**

Bodies and body parts

One cannot steal bodies or body parts because bodies are not personal property. In *Sharpe* (1857) 169 ER 959, D dug up a corpse and sold it to a surgeon for dissection. D was charged with and convicted of theft, but his conviction was quashed. As it was said in this case, 'a body wants no owner'. The same rule applies to body parts.

Illustration 12.1

A cuts a lock of B's hair because B is a pop star and she wants a keepsake.

A has not committed theft of the hair. This is an offence against the person (battery), not against property. A similar conclusion follows if the hair is on the floor of the hairdressers, except here there is no criminal offence at all. There are some qualifications to this to cover cases such as mummies and corpses for dissection which take on the properties of property rather than being simply a corpse. Authority for this is *Kelly* [1999] QB 621, in which a Royal College of Surgeons' technician gave body parts to D, who was an artist. These included human heads, arms, legs and torsos. D made casts of the body parts which were exhibited in an art gallery. Both D and the technician were convicted of theft, but in their appeal they contended the body parts did not constitute property. The appeal was dismissed. A corpse, or part of a corpse, is capable of being property within s.4 of the Theft Act 1968 if it has acquired different attributes by virtue of the application of skill, such as dissection or preservation techniques, for exhibition or teaching purposes.

Using the same reasoning, in *Welsh* [1974] RTR 478, a driver was guilty of theft for removing his own urine specimen from a police station. He did this to avoid a conviction for driving with excess alcohol.

Activity 12.3

Read Wilson, Section 14.2.A.2 'Property: general definition', Section (a) 'Human body parts' and answer the following question.

A, a hairdresser, collects his client's hair with which to make cushions. He keeps the hair in a refuse bag pending stuffing the cushions. B, a rival cushion stuffer, takes the hair, having put it in her own bag. What, if anything, has B stolen?

No feedback provided.

12.1.3 Appropriation

Prior to the Theft Act 1968 the essence of theft, or larceny as it was known, was the taking and carrying away of personal property. (One of the key differences between larceny and theft introduced by the Theft Act is that there is no longer any need for a taking and carrying away of the property. It is not needed but is sufficient.) Appropriation is defined by s.3(1) of the Theft Act 1968 as:

> Any assumption by a person of the rights of an owner amounts to an appropriation, and this includes, where he has come by the property (innocently or not) without stealing it, any later assumption of a right to it by keeping or dealing with it as owner.

This statement emphasises that it is not necessary to physically take property to appropriate it. Indeed, as the provision makes clear, one can even appropriate property which is lawfully in one's possession. A person who finds property, or borrows it, is not committing theft. However, if they subsequently assume rights of ownership over the property – for example by selling it, lending it to someone else, or deciding to keep it – this amounts to an appropriation of the property. In deciding whether the defendant has appropriated the relevant property, the first question to be asked therefore is what the rights of an owner comprise. The second question is whether the defendant has assumed one of those rights and, if so, which one. If the defendant exercises any of these rights over property belonging to someone else, he appropriates that property.

In *Pitham and Hehl* (1977) 65 Cr App R 45, the defendant invited two people into his friend's house while his friend was in prison and offered to sell them his friend's furniture. The Court of Appeal held that this offer constituted an appropriation as it was

an assumption of one of the rights of ownership, namely the right to sell. Compare the recent case of *R* v *Darroux* [2018] EWCA Crim 1009. The defendant filled out claim forms for overtime and expenses, which she gave to her employers. The claims were grossly inflated. She was charged with theft of the moneys transferred to her account via bank transfer. In order to gain a conviction, the prosecution had to show that the money coming into her account came there as a result of her assuming a right of ownership over it. Had she? What had she done? What she had done was to fill out some claim forms, which was a long way from doing anything in regard to the money. Yes, she had caused the transfer but, no, she did not cause it by way of appropriation. She did it by way of writing a false claim form. The Court of Appeal quashed her conviction.

Activity 12.4

Read Wilson, Section 14.2.A '*Actus reus*'. List as many rights of ownership as you can think of and consider how each of these rights could be appropriated. Then consider the following questions.

a. **What rights of ownership did the defendant in *Morris* (1983) appropriate? How did he do so?**

b. **If A takes the key of a car so that he can steal the car later, has he appropriated only the key or also the car?**

c. **Would Mrs Darroux have appropriated the money transferred into her account if she had drawn a cheque on it?**

Consent and appropriation

Is it a necessary ingredient in an appropriation that the act be unauthorised? In *Lawrence* [1972] AC 626 the House of Lords said no. An Italian student took a lift in a taxi. At the end of the trip, as he did not speak good English, he held out his wallet for the taxi driver to take the right fare. The taxi driver took far more than the correct fare and was charged and convicted of theft of the money. He appealed on the basis that the trial judge should have told the jury that there could be no appropriation if the owner consented. The House of Lords upheld the conviction, stating that the statutory definition of appropriation did not include the words 'without the owner's consent'. So even if the student had truly consented to the taking of the money it had still been appropriated by the taxi driver.

The House of Lords came to a different conclusion in *Morris* [1984] AC 320. The defendant had swapped price tags on a tin of beans in a supermarket in order to purchase the beans at a lower price. He was arrested by a store detective before reaching the checkout and charged with theft of the can. Upholding the conviction, the House of Lords concluded that it was of the essence of an appropriation that the act be by way of 'adverse interference or usurpation of the owner's rights'. Contrary to *Lawrence* (where taking the money from the wallet was an appropriation despite the owner's authority), their Lordships concluded that taking the goods off the shelf was not an appropriation because self-service shops authorise this act. It was only when the price labels were swapped that an appropriation occurred, because this was not authorised and was adverse to the owner's right. Similar decisions were reached in *Meech* [1974] QB 549 and a number of other cases including *Fritschy* [1985] Crim LR 745.

Fritschy (F) was a dealer in gold coins (krugerrands) for a Dutch company. F was asked by V to collect a consignment of such coins from England for onward delivery to H's bank in Switzerland. F took them to Switzerland but did not deliver them to H's bank, instead keeping them for his own purposes. The question for the court (which does not concern us) was where the appropriation had taken place. On the authority of *Lawrence* it had taken place in England. The Court of Appeal, preferring the House of Lords decision in *Morris* to that in *Lawrence*, decided that it had taken place in Switzerland. There had been no appropriation in England because D had taken possession of the krugerrands with H's consent and, until he had deviated from V's instructions and authority (in Switzerland), had not appropriated V's property.

The conflict of approach between *Lawrence* and *Morris* was finally resolved in *Gomez* [1993] AC 442. D, the assistant manager of a shop, agreed with his accomplice, R (a customer), to help him acquire goods in exchange for two stolen cheques. Knowing that the cheques were stolen, D deceived the shop manager into authorising the sale of the goods to the customer in exchange for the cheques. D was charged with theft contrary to s.1(1) of the Theft Act 1968 and was convicted at first instance. He appealed, submitting that the goods had been sold under a contract between the customer and the shop, and that there could be no appropriation of property belonging to another where the act relied upon was a contract of sale passing ownership to the customer. The Court of Appeal (Criminal Division) agreed and allowed D's appeal against conviction. On appeal by the Crown, the House of Lords held that the fact that the act was authorised in no way prevented it from being an appropriation. It was not of the essence of an appropriation that it constituted some form of **challenge to, or interference with, the owner's rights.**

Activity 12.5

Note that in *Gomez* it was D, not R, who was charged with theft. What had D done to appropriate the property?

In *Gomez*, the transfer was defective because the shop manager's consent was obtained by fraud and so the transfer of ownership could be undone. Does the person who induces the transfer also appropriate property where there has been no fraud and where the transferee receives an absolute title to the property?

This was the question the House of Lords had to answer in *Hinks* [2001] 2 AC 241. In this case D had befriended V, a naive and gullible man, and encouraged him to make her gifts of money from his bank account. She was convicted of theft, although there was no evidence of duress or deception, or that V had parted with the money otherwise than by gift. The defence case was that the recipient of a valid gift could not be guilty of theft. Either there is a valid transfer of title or there is an appropriation. There cannot be both. Lord Steyn said that whether or not V had gifted the money, D, by acquiring title, had appropriated it. The acquisition of title, on this view, is simply the clearest possible case of 'assuming rights of ownership'. This was a surprising decision because the transfer was treated as valid by the civil law – V could not claim the money back in the civil courts as it was a perfect gift – but it was an invalid transfer by the criminal law. D was guilty of stealing the money, assuming her obtaining of the money was thought to be dishonest. The same principle applies to other transactions involving the transfer of ownership such as contracts for sale (*Gomez*).

Activity 12.6

The House of Lords made it clear that most people who received property by way of gift would not be guilty of theft. Liability in such a case will depend upon whether D was dishonest in receiving the gift. Most receivers of gifts are not – thank goodness! Now read Wilson, Section 14.2.B.2 'Dishonesty' and decide whether Mrs Hinks was dishonest in receiving her gift and how the court approached the question of dishonesty. Once you have done that you might wish to read the dissenting opinion of Lord Hobhouse who, however immoral you think Mrs Hinks was, is surely right in concluding that she was not. You will find *Hinks* in the Online Library.

Belonging to another

A person cannot be guilty of theft if the property they appropriate does not belong to another person. But a person can be guilty of theft if they appropriate property that belongs to them! How can this be? The answer to this question is to be found in s.5 of the Theft Act 1968 which defines the term 'belonging to another'. Section 5(1) states that property belongs to 'any person having possession or control of it, or having in it any proprietary right or interest'.

The consequence of this rather puzzling subsection is that a person can commit theft of their own property so long as it also belongs to someone else for the purpose of s.5. To understand this section properly let us assume that the property is a racehorse,

which is owned by a Mr Southwell. For the purpose of the Theft Act 1968 the racehorse belongs to:

- Mr Southwell
- Mrs Goodwood, part owner
- Ms Lingfield, the owner of the stables where the racehorse is stabled
- Mr Aintree, the jockey, when he takes the horse for a gallop (during the gallop)
- Mr Doncaster, the blacksmith, to whom the horse is delivered for a few hours to be shod (during those hours)
- Mrs Wincanton, the owner's friend, to whom he lends the horse to compete in a race (during the loan period)
- The Happy Valley Finance Company, who lends Mr Southwell £50,000, using the horse as security.

If any of these people appropriate the racehorse from any one of the others, they have appropriated 'property belonging to another'. The racehorse belongs to Mr Southwell, Mrs Goodwood and the Happy Valley Finance Company since each has 'proprietary rights or interests in the horse'. It belongs to the other parties by virtue of their possession or control during the time they are in possession or have control. This does not of course mean that they are necessarily guilty of theft because of the need to establish all the elements of the offence, in particular, of course, dishonesty. If Mr Southwell took back the horse from Mrs Wincanton without formally terminating the bailment he would have appropriated property belonging to another, but he would not usually be guilty of theft since his taking would not be dishonest and, moreover, Mrs Wincanton would have no right as against him to retain the horse and so he could terminate the bailment perfectly legitimately simply by taking the horse. In *Meredith* [1973] Crim LR 253, the defendant took his own car from a police car park where it had been impounded. He was indicted for theft. The trial judge directed the jury to acquit on the ground that the police, although having the possession and control of the car for the purpose of s.5(1), had no right to retain the car as against him.

Activity 12.7

Read Wilson, Section 14.2.A.3 '"Belonging to another": who does property belong to?' and compare *Meredith* with *Turner* [1971] 1 WLR 901 CA, which is a good illustration of how a true owner can steal from a mere possessor. Why was Meredith acquitted and Turner convicted? Are they both right? Make sure you make notes of both cases and your conclusions.

Abandoned property

If property is abandoned it may belong to no one, in which case it cannot be stolen. However, even abandoned property may belong to someone else, for example the owner of the land or vessel in which the property is found.

In *Hibbert* v *McKiernan* [1948] 2 KB 142, D was a trespasser on land owned by a golf club who collected golf balls lost and abandoned by their owners. He was charged with theft. D argued that, having been abandoned, the balls belonged to no one: the King's Bench Divisional Court disagreed. Although the balls no longer belonged to their previous owners they did belong to the club. Since D was a trespasser, the golf club had the right to exclude him from the course and, therefore, from the balls. To that extent the club had control of the balls and so they belonged to the club for the purpose of s.5. Note that this means that other golfers would not be committing theft of balls which **they** found on the course. These balls, having been abandoned, would belong to no one **as against them**. It is for this reason also that I am not guilty of theft when, every Saturday, I collect a dozen or so golf balls from my garden which some unfortunate golfer has hit there from the golf course abutting my property. The golf balls belong to me. I do not own them but, for the purposes of s.5, I am the only person who cannot steal them.

Williams v *Phillips* (1957) 41 Cr App R 5 is a comparable case. A householder put refuse out for collection by the local authority refuse workers. It was held by the Divisional Court that such refuse remained property belonging to the householder until collected, whereupon property passed to the local authority. So refuse workers helping themselves to such property could be convicted of theft, on the basis that the property had always belonged to someone (see also *Woodman* [1974] QB 754 and *Hancock* [1990] Crim LR 125).

Activity 12.8

See Wilson, Section 14.2.A.3(b) 'Theft by owners'. If A, a householder, hires a building skip into which to throw her doors and windows, which she is replacing, does B appropriate 'property belonging to another' if he takes them? In order to answer this question you must consider whether there is any difference between this case and that of *Williams* v *Phillips*.

The property must belong to another at the time of appropriation

In *Chodorek* v *Poland* [2017] ACD 244 (82) QBD the Administrative Court confirmed that a person who uses a debit card at an ATM to withdraw cash commits theft if he has no overdraft facility and knows he does not have the funds to cover the amount withdrawn. All the elements of the offence are present, namely a dishonest appropriation of property belonging to another with the intention of permanently depriving the other of it. The property appropriated in this case is money (i.e. personal property), not a thing in action. And, at the time of the appropriation, the money belonged to the issuing bank and not to him as he was not in credit.

Corcoran v *Whent* [1977] Crim LR 52 is a perfect, if rare, example of how a theft conviction was not possible because the property appropriated no longer belonged to another person at the time of appropriation. D ate food in a restaurant with a friend. When he left the restaurant, his friend told him that the meal had not been paid for. D did not go back to pay for the meal although his intentions on entering the restaurant were perfectly honest. He was later arrested, charged and convicted of theft. D's conviction was quashed on the ground that although all the elements of theft were present, they did not coincide. At the time the appropriation (eating) of the property (food) belonging to another (restaurant) occurred he had no *mens rea* for theft. At the time the *mens rea* was formed he did not appropriate property belonging to another for three simple reasons: (i) one cannot assume rights of ownership over the contents of one's stomach, (ii) the food was no longer food (property) it was mush in his stomach and (iii) it belonged to no one, not even him!

Subsection 5(3) of the Theft Act 1968

This is a deceptively difficult subsection designed to cover the case of someone who has passed ownership and possession in property to someone else for a particular purpose and that purpose is disregarded. Is the transferee guilty of theft? The subsection reads:

> Where a person receives property from or on account of another, and is under an obligation to the other to retain and deal with that property or its proceeds in a particular way, the property or proceeds shall be regarded (as against him) as belonging to the other.

This subsection has the effect that if A gives property (e.g. money) to B to do something specific with it (e.g. pay a bill, deliver to charity), B commits theft if they do something else with it **even if B has become the sole legal owner** of the property.

The major problem arises in deciding whether an obligation has arisen to deal with the transferred property in a particular way. By 'obligation' is meant legal obligation. Easy cases involve money which is explicitly earmarked by the transferor for a particular purpose.

Illustration 12.2

Chen is collecting for the charity, Prisoner's Aid, outside a train station. Nico puts £5 into Chen's collection box. Chen later takes out the £5 and buys a spicy chicken burger with it.

As far as the civil law and s.5(1) are concerned, the £5 belongs only to Chen. It no longer belongs to Nico, nor does it yet belong to the charity. Section 5(3), however, deems the money still to belong to the donor, although technically they have transferred possession and all rights and ownership over the money to the donee. This is because charity collectors owe an obligation to the donors to hand over their donations to the relevant charity. So Chen is guilty of theft. This is exactly what happened and was decided in *Wain* [1995] 2 Cr App R 660.

In *Davidge* v *Bunnett* [1984] Crim LR 297, the defendant shared a flat with others who gave her cheques to pay their joint gas bill. It was understood that D would have to pay the cheques into her own bank account before doing so. In fact, D spent the proceeds on Christmas presents. The Divisional Court held that s.5(3) applied, that D was under a legal obligation to use the proceeds to pay the bill and therefore they were property belonging to another by virtue of s.5(3).

Compare this case with *DPP* v *Huskinson* (1988) 152 JP 582, where it was held not to be theft to use housing benefit for purposes other than paying the recipient's rent. The point of the relevant legislation was to impose a duty upon the social services to pay benefit to the recipient. It was not the point of the legislation to impose an obligation on the recipient to apply it directly for that purpose. In short, the housing benefit was his own to deal with as he saw fit.

Activity 12.9

Read Wilson, Section 14.2.A.3 '"Belonging to another": who does property belong to?', Section (c) 'Special cases of belonging' and answer the following questions, making sure you take notes.

a. **Why was the travel agent in *Hall* (1972) not guilty of theft? Did he not have an obligation to secure flights for the depositors?**

b. **Who decides whether D has an obligation to deal with the property in a particular way and what is taken into account in deciding this?**

Subsection 5(4) of the Theft Act 1968

Subsection 5(4) was designed to address problems such as occurred in *Moynes* v *Cooper* [1956] 1 QB 439, in which an employer paid an employee's salary twice into the employee's bank account by mistake and the employee spent it. Under the civil law, the funds in the account (thing in action) belong to the account holder. Subsection 5(4) confirms that the property mistakenly transferred or otherwise received belongs also to the transferor for the purpose of the law of theft, so that if the transferee treats the property as their own they will be guilty of theft. It reads as:

> Where a person gets property by another's mistake, and is under an obligation to make restoration (in whole or in part) of the property or its proceeds or of the value thereof, then to the extent of that obligation the property or proceeds shall be regarded (as against him) as belonging to the person entitled to restoration, and an intention not to make restoration shall be regarded accordingly as an intention to deprive that person of the property or proceeds.

It has been made clear in a number of cases that reliance on s.5(4) is not strictly necessary to denote the relevant property as belonging to another. In *Shadrokh-Cigari* [1988] Crim LR 465, a bank account was wrongly credited with approximately £286,000 rather than the £286 owing. D took and spent the money. He was convicted of theft of the money on the basis that it remained property belonging to another, namely the issuing bank.

Activity 12.10

Read Wilson, Section 14.2.A.3(c) 'Special cases of belonging' and explain the basis upon which the Court of Appeal upheld the appeal in *Shadrokh-Cigari*. Is s.5(4) completely redundant following this case?

12.1.4 *Mens rea*: theft

Dishonesty

The dishonesty requirement reflects the general principle that criminalisation is inappropriate if the defendant has not acted in a socially unacceptable or immoral fashion (see Section 1.2 of this module guide). Whether or not an appropriation of a person's property is socially acceptable or not depends to a certain extent on why it was done. If the property was a gun, for example, and it was done to prevent the owner killing with it, it might be considered morally incoherent to convict the appropriator of theft. This would mean that the defendant would be expected to prioritise a property interest above a personal interest. Why would they? Why should they?

Dishonesty is not defined in the Theft Act 1968. However, s.2 of the Act tells us what dishonesty is **not**. Section 2(1) states that certain beliefs of the defendant are inconsistent with having a dishonest state of mind. These are:

a. a belief that he has in law the right to deprive the other of it, on behalf of himself or of a third person; or

b. a belief that he would have the other's consent if the other knew of the appropriation and the circumstances of it; or

c. a belief that the person to whom the property belongs cannot be discovered by taking reasonable steps.

The gun example above is a possible illustration of where s.2(1)(a) might apply. So also is the case where D takes a sum of money from V believing they have the right to it because V owes them that same sum (compare *Robinson* (1977) Crim LR 173). So also is *Hinks*, although the court at first instance obviously thought otherwise. An example of s.2(1)(b) is where D takes V's milk from the refrigerator of their jointly occupied flat for a cup of tea, having used all their own milk. An example of s.2(1)(c) is where D finds a sum of money in a public area which, because of its relatively small size, they conclude will never be reported to the police. The key point here is not that D does have this right (s.2(1)(a)), or does have V's consent (s.2(1)(b)), or that the property cannot be returned to the owner by taking reasonable steps (s.2(1)(c)), **but that D has this belief**. The jury will decide this by reference to all the evidence.

It was once thought that if D did not have one of the beliefs in s.2 then they were automatically dishonest as a matter of law. This view was rejected in a number of cases in the early years following the passing of the Act. The reason for this was explained by Lawton LJ in *Feely* [1973] 1 QB 530. He said that immorality was of the essence of stealing and the mere fact that a person takes property when he knows he has no right or the owner would not consent does not render the taking immoral.

The facts of the case help us understand this point. D was a cashier in a betting office who, contrary to his firm's instructions, took some money out of the till on a Friday, intending to repay it on the Monday. He left a note to this effect in the till. D was charged with theft. The trial judge held that D's actions were clearly dishonest. Section 2 did not apply and his intention to replace the money was irrelevant. The Court of Appeal allowed the appeal. Lawton LJ said that whether or not a person is dishonest was not a matter for the judge but was a question of fact which should have been left to the jury. He said:

> Jurors, when deciding whether an appropriation was dishonest can be reasonably expected to, and should, apply the current standards of ordinary decent people. In their own lives they have to decide what is and what is not dishonest. We can see no reason why, when in a jury box, they should require the help of a judge to tell them what amounts to dishonesty.

A different direction for dishonesty – which is slightly more beneficial to the defence – was laid down in *Ghosh* [1982] QB 1053, a case on fraud, which carries the same dishonesty requirement. The defendant was a consultant at a hospital. He falsely claimed fees in respect of an operation that he had not carried out. D claimed that he thought he was not dishonest since he was owed the same amount of money for consultation fees. The judge directed the jury members, in accordance with *Feely*, that they must simply apply their own standards as ordinary decent people. D was convicted and his appeal was dismissed by the Court of Appeal. Lord Lane CJ stated that the jury must consider if the conduct of the accused was dishonest according to the 'ordinary standards of reasonable and honest people' (if not, then the prosecution fails). If it is dishonest according to those standards then the jury must consider whether the accused 'must have realised that what he was doing was by those standards dishonest'.

The significant aspect of this direction is that it permits an acquittal in cases where the defendant is dishonest according to prevailing social standards but does not realise this. Critics describe the test as a Robin Hood defence.

ACTIVITY 12.11

Read Wilson, Section 14.2.B.2 'Dishonesty' and answer the following question.

Why is the *Ghosh* test described as a Robin Hood defence?

Ivey v *Genting Casinos* [2017] UKSC 67

The *Ghosh* test was abandoned by the Supreme Court in a case decided under the Gambling Act 2005. The question for the Court was whether Mr Ivey, a professional gambler, was acting dishonestly, that he was cheating, in gambling with cards, which although provided by the casino, he was able to identify by virtue of a defective pattern on the cards' reverse side. He argued that he was not dishonest because, whatever the general public might feel about the honesty of his actions, as a professional gambler he considered what he did to be simply good gambling and assumed the public would think likewise. The Supreme Court rejected this argument. In so doing, it found that the second limb was defective in that it introduced an unnecessary and problematic subjective element into the assessment of dishonesty. Whether someone is dishonest or not does not vary with the defendant's own assessment of what counts as dishonesty but is decided according to objective standards of ordinary, reasonable people. In future, only the first question is to be considered, that is whether, according to the standards of reasonable and honest people, what was done was dishonest. This returns the law to the position in *Feely* [1973] 1 All ER 341 and will become the standard test for dishonesty in theft, fraud and other offences in which dishonesty is an element.

The procedure in relation to directing the jury on dishonesty is first of all to ask it to consider whether s.2 is applicable. If it is, that is an end to the matter and D is acquitted. If it is not, the jury must then consider whether the defendant is dishonest according to the *Ivey*/*Feely* test, that is according to the standards of ordinary people as represented by the jury.

A five-strong Court of Appeal in *R* v *Barton and Booth* [2020] EWCA Crim 575 has confirmed that the *obiter* comments as to the test for dishonesty – set out in the judgment of Lord Hughes in *Ivey* v *Genting Casinos* [2017] UKSC 67 – constitute the law to be applied when an issue arises as to alleged dishonesty. First, what was the defendant's actual state of knowledge or belief as to the facts and, secondly, was his conduct dishonest by the standards of ordinary decent people? The subjective question of whether a defendant appreciated that his behaviour was dishonest by those standards no longer applies.

ACTIVITY 12.12

Read Wilson, Section 14.2.B.2 'Dishonesty'.

Do you think the current mechanism for deciding whether a person is dishonest is sufficiently clear and certain to pass muster?

No feedback provided.

Activity 12.13

Read Wilson, Chapter 14.2.B.2 'Dishonesty', Section (b) 'What dishonesty is' and answer the following question.

A takes a bruised apple from a market stall and gives it to a homeless person sitting on the floor nearby. What direction should the judge give the jury on dishonesty?

No feedback provided.

Activity 12.14

Read Wilson, Section 14.2.B.2 'Dishonesty', Section (c) 'Reforming dishonesty' and outline the proposals for reforming theft and dishonesty tabled by Professors Smith, Glazebrook, Tur and Elliot.

No feedback provided.

Intention permanently to deprive

A defendant commits theft only if it is their intention for the victim never to recover the property. If D intends only to borrow property this cannot be theft, however dishonest the taking is. The key point here is that this is a *mens rea* rather than an *actus reus* element. Theft does not require the victim **to be** permanently deprived of their property. It simply requires D to have this **intention** at the precise moment they appropriate the property. Intention includes conditional intention; that is, the intention of someone who appropriates property – say a holdall – conditionally on the contents proving sufficiently valuable to take permanently. To gain a conviction, however, it is necessary for the prosecution to draft the charge so as not to refer to any specific property (compare *Easom* [1971] 2 QB 315), for example by charging D with theft of 'articles unknown, the contents of a holdall belonging to X' (see also *A-G's Reference (Nos 1 and 2 of 1979)* [1979] 3 All ER 143).

In the case of fungibles such as money, food, drink and so on, this intention exists even if D intends to return an identical sum, amount of food, drink and so on. This was made clear in *Velumyl* [1989] Crim LR 299, in which D had taken money from his employer's safe and claimed that he intended to pay it back after the weekend. The Court of Appeal held that D had not intended to return the exact coins and notes, and that therefore he was properly convicted of theft on proof of dishonesty. (**Note**: in such cases it would be far better for D to contend that he was not dishonest, given his intention to replace the money with an equivalent fund.)

Subsections 6(1) and 6(2) of the Theft Act 1968 provide two special circumstances beyond its normal meaning where the intention to take something temporarily counts as an intention permanently to deprive the owner of the property.

Subsection 6(1) of the Theft Act 1968

A person is to be treated as having an intention to permanently deprive the owner of his property if his intention is to:

> treat the thing as his own to dispose of regardless of the other's rights; and a borrowing or lending of it may amount to so treating it if, but only if, the borrowing or lending is for a period and in circumstances making it equivalent to an outright taking or disposal.

This provision refers to cases where the appropriation **amounts to an outright disposal** but the defendant nevertheless shows no particular commitment to depriving V of the property permanently (*Coffey* [1987] Crim LR 498). An obvious example is where D appropriates V's property, for example his dog or his painting, intending to ransom the property back to V upon payment of a sum of money. Another example is where D intends to exhaust the value of the property before returning it. So if D 'borrows' V's ticket for the Manchester United game against Manchester City intending to return it after the game, D has – by virtue of s.6(1) – the intention to permanently deprive V of her property because D is treating the ticket as his own to dispose of regardless of the other's rights.

In *Marshall, Coombes & Eren* [1998] 2 Cr App R 282, the Court of Appeal ruled that selling on a used but unexpired tube ticket counts, by virtue of s.6(1), as involving an intention permanently to deprive London Underground of the ticket – even though the ticket will eventually find its way back to London Underground – since the seller is treating the thing as their own to dispose of (through sale) regardless of the other's rights. In *DPP* v *Lavender* [1994] Crim LR 297, the defendant removed some doors from a council property that was due for demolition and then installed the doors in his girlfriend's flat which was also owned by the council. D was charged with theft of the doors. It was held that he did have the intention to permanently deprive under s.6(1) as, by installing the doors at another's house, D was treating the doors as if they were his own to dispose of regardless of the owner's rights.

This provision has generally been interpreted rather restrictively. It does not cover, for example, the case of a person who 'borrows', without the owner's consent, a very valuable piece of jewellery, intending to return it at the end of their year-long holiday. The courts have insisted that the defendant's intention must be to exhaust the property's usefulness, or sell or otherwise get rid of it – for example by leaving it in a remote or private location (*Lavender*). In *Lloyd* [1985] QB 829, D worked as a projectionist at a cinema who allowed B to take the films to make pirate copies and then return them. The Court of Appeal quashed D and B's convictions on the ground that they lacked the intention permanently to deprive the owner of the films, not having sought to dispose of the films, and that s.6(1) did not cover the case of borrowing for a dishonest purpose, however damaging to the owner's rights this may be.

ACTIVITY 12.15

Read Wilson, Section 14.2.B.1 'Intention to deprive the owner permanently of his property' and answer the following question.

Jack Bilko, a golf professional, discovers that he has forgotten his golf balls when he arrives at the first tee of the Masters Tournament at Augusta. While his playing partner, Duke Lonard, is not looking, Jack takes a box of balls from Duke's golf bag which he uses throughout the course of the round. At the end of the match he replaces all the balls in Duke's bag. At the beginning of the next round Duke discovers the box of balls and, concluding their condition is not good enough to play with, opens another box of balls. If Jack were prosecuted for theft, would the prosecution be able to rely on s.6(1)?

Subsection 6(2) of the Theft Act 1968

By subs.6(2), A is deemed to have the intention to permanently deprive B of B's property if A parts with property in A's possession or control under a condition, which A may not be able to perform. This is intended to cover the kind of case where someone who has property belonging to someone else in their possession or control pawns that property to another.

Am I ready to move on?

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

1. Explain the circumstances when body parts amount to property capable of being stolen.
2. Explain what a thing in action is and how it can be stolen.
3. Explain when land or things forming part of land can be stolen.
4. Explain what an appropriation means.
5. Explain the legal position regarding consented-to appropriations.
6. Give your own example of how someone could be guilty of theft by receiving an outright gift or making a purchase.
7. Explain what 'belonging to another' means.

8. Explain why s.5(3) of the Theft Act 1968 is necessary to the law of theft.
9. Explain the circumstances in which a person can be guilty of theft although it cannot be proved that they intended permanently to deprive the owner of the property.
10. Explain the procedure for proving dishonesty in the light of both s.2 of the Theft Act 1968 and *Ivey*.
11. What are the main objections to the current tests for dishonesty?

12.2 Burglary

Section 9 of the Theft Act 1968 creates two separate offences of burglary: an inchoate crime of ulterior intent where there is no need to prove the commission of the substantive offence (s.9(1)(a)); and a complete crime where proof of the commission of an offence is of the essence (s.9(1)(b)). Section 9(1) provides:

> A person is guilty of burglary if –
>
> (a) he enters any building or part of a building as a trespasser and with intent to commit any such offence as is mentioned in subsection (2) below; or
>
> (b) having entered any building or part of it as a trespasser he steals or attempts to steal anything in the building or that part of it or inflicts or attempts to inflict on any person therein any grievous bodily harm.

Since both s.9(1)(a) and s.9(1)(b) have 'entry of a building as a trespasser' as common features for burglary these will be dealt with first before we cover the specifics of the two offences.

12.2.1 Common features

In order to be guilty of burglary, D must enter a building or part of a building as a trespasser. The following questions must be asked, therefore, in connection with both forms of the offence.

- Was there an entry? If yes,
- did the person entering enter as a trespasser? If yes,
- was the entry to a building or part of a building?

What counts as entry?

To enter premises, entry of the whole person is not necessary; however, the entry must be 'effective'. This does not necessarily mean that the entry has to be capable of enabling the commission of an offence, but this helps. It is a question of fact for the jury. In *Brown* [1985] Crim LR 212, it was confirmed that, contrary to the earlier authority of *Collins* [1973] QB 100, the entry need not be substantial. So D's conviction for burglary was upheld on the basis of him having smashed the window of a shop and having leant in, feet still on the pavement, to take goods from inside the window. In *Ryan* [1996] Crim LR 320, on comparable facts the conviction was upheld although D, who had become stuck in the window, had not managed to penetrate sufficiently far into the premises to steal anything.

Did the person entering enter as a trespasser?

Entry will be as a trespasser if the entry is made without the consent, express or implied, of the occupier, and without statutory authority. The question of whether the defendant had entered as a trespasser was of key concern in *Collins*. The defendant, intending to rape V, climbed naked up a ladder and perched on her windowsill. V mistook him in the dark for her boyfriend and welcomed him in. It was not clear how far into the room D was when he received his invitation, but the jury found that his entry was sufficient for a conviction. However, the court made clear that if he was still on the windowsill when invited in, he would not have entered as a trespasser and so could not be guilty of burglary.

Since *Collins* it has also been decided that those who enter premises in excess of authority are trespassers on those premises. This covers those who may have permission to be in the property but exceed the permission by doing something which they were not invited to do. So in *Jones and Smith* [1976] 1 WLR 672 it was burglary for a son to enter his parent's house intending to steal a TV. Although he had general authority to enter the premises, that authority was vitiated by entering in excess of the presumed terms of his parent's consent.

ACTIVITY 12.16

Read Wilson, Section 16.4.B 'Entry as a trespasser' and answer the following questions.

a. **Raffles enters Wizzo supermarket intending to buy a razor. As he has little money he decides, before entering, that if the razor costs more than the £3 in his pocket, he will steal the razor. Has Raffles committed burglary?**

b. **In the light of *Jones and Smith* would Collins now be deemed to have entered as a trespasser, assuming the invitation to enter was issued prior to his having entered the bedroom?**

Was the entry to a building or part of a building?

A building is not defined in the Theft Act 1968, although s.9(4) states that it includes 'a vehicle or vessel constructed or adapted for human habitation' – for example houseboats, canal barges and caravans. A consensus holds that a building must be some form of structure with a degree of permanence capable of being entered. This would cover barns, churches, shops, warehouses and even portable cabins such as freezer containers, and outbuildings – but probably not tents (*B and S* v *Leathley* [1979] Crim LR 314).

A person who enters a building lawfully may become a trespasser in relation to a part of that building where they have no licence to go. Parts of buildings include living rooms, service rooms, bathrooms and roofs. In the case of *Walkington* [1979] 1 WLR 1169, it was held that a person lawfully visiting a department store was guilty of burglary when she went behind a shop counter to steal from the till. This area, being clearly defined, was 'part of a building' and she, having no authority to be there, entered as a trespasser.

12.2.2 *Mens rea*: burglary

For both offences of burglary, the defendant must know they are a trespasser or be reckless as to whether they are trespassing at the time of entry. They must also have the relevant *mens rea* for the crime they commit or intend to commit, for example, dishonesty and the intention to permanently deprive in the case of theft.

ACTIVITY 12.17

Did Collins have the *mens rea* for burglary upon entering the room?

No feedback provided.

Specific offences

(i) Section 9(1)(a) burglary

The **s.9(1)(a) offence** requires intention to commit one of the ulterior offences. It will be charged when there is evidence that D had entered with the relevant intent, but had not yet consummated the proposed crime. In everyday language, a person can be a burglar without actually stealing anything or causing any harm. The most common ulterior intent is the intent to steal. Following *Jones and Smith*, this has the surprising consequence that a person who enters a shop intending to steal from it commits burglary immediately upon entering the shop, because by having this intent they enter in excess of authority and therefore enter as a trespasser.

It is important to remember that it is not necessary for the prosecution to prove entry **with intent to steal**, although of course this will usually be the case. A person who enters with intent to commit any of the offences specified commits burglary. By s.9(2) these are offences of:

- stealing anything in the building or part of the building in question, or
- inflicting on any person therein any grievous bodily harm, or
- doing unlawful damage to the building or anything therein.

It is not burglary, therefore, to enter premises as a trespasser with intent to commit fraud, rape or cause actual bodily harm.

(ii) Section 9(1)(b) burglary

The **s.9(1)(b) offence** does not require proof of an ulterior intent at the time of entering as a trespasser. It is charged only where there is evidence that the substantive offence has been committed. Since the offence has been committed, proof of the ulterior intent upon entering as a trespasser is unnecessary. This form of burglary is more restricted in its coverage than s.9(1)(a). It is committed where, having entered as a trespasser, the entrant:

- steals or attempts to steal, or
- inflicts or attempts to inflict grievous bodily harm.

It does not cover, therefore, the case of a person who enters premises as a trespasser and then causes criminal damage to the premises or inflicts bodily harm less than grievous bodily harm. In such a case the prosecution must charge the substantive offence. For the s.9(1)(b) offence the prosecution must prove not only the entry as trespasser but also all of the elements of the ulterior offence.

Activity 12.18

Read Wilson, Section 16.5 'Modes of committing burglary' and then answer the following questions.

a. **A enters a private office at her local bank, without authority, to recover the handbag she had mistakenly left there earlier in the day. Are either forms of burglary committed?**

b. **A enters her flatmate's room to borrow, without permission, her evening dress. Are either forms of burglary committed?**

c. **Do you think s.9(1)(b) burglary should include cases where D commits criminal damage or a non-serious offence against the person? Why do you think these crimes are not included?**

(iii) Aggravated burglary under s.10 of the Theft Act 1968

Under s.10(1):

> (1) A person is guilty of aggravated burglary if he commits any burglary and at the time has with him any firearm or imitation firearm, any weapon of offence, or any explosive; and for this purpose –
>
> (a) 'firearm' includes an airgun or air pistol, and 'imitation firearm' means anything which has the appearance of being a firearm, whether capable of being discharged or not; and
>
> (b) 'weapon of offence' means any article made or adapted for use for causing injury to or incapacitating a person, or intended by the person having it with him for such use; and
>
> (c) 'explosive' means any article manufactured for the purpose of producing a practical effect by explosion, or intended by the person having it with him for that purpose.

The mere fact that the defendant has with them at the time of the burglary an object that could be used as a weapon of offence such as a crowbar or knife does not mean the offence is committed. The prosecution must either show that the article's primary purpose is for causing injury such as a gun or hunting knife or has been adapted for such use or, in the case of articles such as crowbars, knives, etc. that it was **intended for such use by the defendant**. See *R* v *Eletu and White* [2018] EWCA Crim 599.

The relevant time for possessing the weapon depends on whether it is a s.9(1)(a) offence or a s.9(1)(b) offence. If (a) then possession must be at time of entry; if (b) possession must be at the time the ulterior offence is committed. In *O'Leary* (1986) 82 Cr App R 341, D entered a house without a weapon. Once inside he took a knife from the kitchen and took it upstairs to effect the burglary. D's conviction was upheld on appeal. It was held that since the offence was charged under s.9(1)(b), there was no requirement that he had the knife at the time of entry.

Am I ready to move on?

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

1. Explain the difference between s.9(1)(a) and s.9(1)(b) burglary.
2. Explain the considerations the prosecution must take into account in deciding which to charge.
3. List the substantive offences around which **both** forms of burglary are constituted.
4. Explain what 'entry as a trespasser' involves.
5. Explain when, if ever, a person can be guilty of burglary although they have the occupier's consent to entering the building.
6. Explain what 'building' and 'part of a building' mean for the purpose of burglary.
7. For the purpose of aggravated burglary how does the form of the burglary impact on the question of when the burglar is in possession of a weapon?

12.3 Fraud

The Fraud Act 2006 abolishes all the deception offences in the Theft Acts 1968 and 1978. These included obtaining property by deception, obtaining services by deception and evading a debt by deception. The main reason for the change was that the previous offences had a high degree of overlap, were unduly technical, and did not cover some important forms of fraudulent wrongdoing. For example, communicating false information by computer as a 'phishing' ploy designed to defraud the recipient could not ground a deception offence, because all deception offences required D to have made a false representation which was believed and acted on by a specific person.

This causal effect had to be proved by the prosecution. So, also, a car seller who made false representations to a purchaser who subsequently bought the car would not be guilty of fraud unless the prosecution could prove **beyond reasonable doubt** that, but for these representations, the purchase would not have been made. This clearly makes the prosecution's job difficult, and probably too difficult.

The Fraud Act 2006 replaces the deception offence with one basic fraud offence which can be committed in three ways. These are by:

- false representation
- failure to disclose information
- abuse of position.

The main change renders the wrongdoing the intentions of the wrongdoer rather than the reactions of the victim. David Ormerod (*Smith and Hogan's criminal law* (Oxford: Oxford University Press, 2015) [ISBN 9780198702313]) complains that, in effect, the new offence criminalises 'lying'. It is intended to capture wrongdoing such as that of computer 'phishers', who make their money out of duping the one in a million people who happen to believe them, which was not possible under the old law. The problem is that it also in theory captures many less heinous forms of behaviour which are part and parcel of everyday commercial life. Sellers are expected to tempt us with 'white lies', are they not? The maximum sentence for fraud is 10 years' imprisonment.

12.3.1 Section 2: fraud by false representation

The essence of this form of fraud is some form of deception. Section 2 of the Fraud Act 2006 reads as follows:

(1) A person is in breach of this section if he –

(a) dishonestly makes a false representation, and

(b) intends, by making the representation –

(i) to make a gain for himself or another, or

(ii) to cause loss to another or to expose another to a risk of loss.

(2) A representation is false if –

(a) it is untrue or misleading, and

(b) the person making it knows that it is, or might be, untrue or misleading.

(3) 'Representation' means any representation as to fact or law, including a representation as to the state of mind of –

(a) the person making the representation, or

(b) any other person.

(4) A representation may be express or implied.

(5) For the purposes of this section a representation may be regarded as made if it (or anything implying it) is submitted in any form to any system or device designed to receive, convey or respond to communications (with or without human intervention).

Elements of the offence

The *actus reus* requires proof that D made a false representation. The *mens rea* requires proof that D:

- knew the representation was or might be false, and
- acted intending to make a gain or cause a loss, and
- acted dishonestly.

Actus reus: fraud

The conduct element in fraud by false representation is simple. It requires proof that D made a representation and that representation was false. There is no need to prove that V acted to their detriment in reliance on the representation. Indeed, there is no need for it to be communicated to V so long as it is made. So the phisher commits the offence as soon as they type out their false statement: the prosecution does not have to wait until the email is transmitted.

Meaning of representation

Representation is not defined in the Fraud Act 2006 except to say:

(3) 'Representation' means any representation as to fact or law, including a representation as to the state of mind of –

(a) the person making the representation, or

(b) any other person.

(4) A representation may be express or implied.

The simplest meaning of representation is 'stating something', 'pretending something', 'professing something' or 'creating an impression'. So a seller who tells a buyer that the car he is selling is in good condition makes a 'representation' that it is in good condition. Similarly, a buyer who tells the seller that her credit is good makes a 'representation' that her credit is good. A representation can be made without words. It can be made by conduct; for example, painting over rust damage on a car, thus giving the impression it is in better condition than it is. It can also be implied.

Illustration 12.3

Assume A wishes to buy a car on credit and wishes to influence the decision to advance her credit. The following words or actions will be express representations.

a. **My credit is good (representation of fact).**

b. **I bank with Coutts and Co. (a bank used largely by the rich and powerful) (one express and one implied representation of fact – the implied representation is creating an impression that she is rich and powerful).**

c. **I have just won £1 million on the lottery (representation of fact – she is creating an impression that she is rich).**

d. **I will pay you back next week (representation as to state of mind – she is creating an impression that she intends to pay the money back).**

Activity 12.19

Read Wilson, Section 15.1.C.1. 'Fraud by false representation', Section (a) '*Actus reus*'. Look at the following scenarios and state what representations are being made and identify which, if any, are false.

a. **A, a poor man, hires a Rolls Royce for the day.**

b. **A, a car dealer, turns back the odometer reading on a car prior to selling it.**

c. **A pays for chips in a casino with a cheque, having lost the bank's authority to use it.**

Note, for exam purposes the **most important abilities** you should be able to display in the context of fraud are:

a. being able to identify the representation that you think is the basis of the fraud charge, and

b. being able to explain why **in relation to that representation** it is false.

It will usually help to ask yourself 'What false impression or statement is D making for the purpose of defrauding V?'

Can one make a representation by saying or doing nothing?

As a general rule, the answer is no since making a representation means to state something or do something.

Illustration 12.4

A sells B a car, the odometer of which he knows carries a false reading.

A cannot be guilty of fraud as he has made no false representation as to the mileage. It would be different if, upon being asked, A confirmed the reading or said that it was genuine (express representation of fact) or that he believed it to be genuine (express representation as to his state of mind).

Activity 12.20

Read Wilson, Section 15.1.C.1.(a) '*Actus reus*' and answer the following questions.

a. **A is selling her car. It is in bad condition. To ensure that B, a potential buyer, does not realise this, she tells B she will only show him the car at 9pm. B inspects the car and does not spot the defects. Is A guilty of fraud?**

b. **Would it make any difference to the answer to the above question if A had said, untruthfully, 'You will have to come at 9pm as I do not get back from work until then'?**

In two situations silence may constitute a false representation. In both cases the silence creates a false impression.

Where there exists a duty of disclosure (also covered by s.3)

Illustration 12.5

Adam performs a surgical operation on Eve at Green Wing Hospital. He does not tell the hospital that Eve is a private patient and, as a result, the hospital, assuming Eve is a national health service (free) patient, does not invoice him for the cost of the operation (*Firth* (1990) 91 Cr App R 217).

By not telling the hospital, when he is under a duty of disclosure, Adam is creating a false impression that Eve is a national health service (NHS) patient rather than the private patient she actually is. Because of his duty of disclosure, the hospital is entitled to assume that all patients operated on are NHS patients unless Adam tells them otherwise.

Where the circumstances giving rise to a representation change so that the original representation no longer accurately describes the true state of affairs.

Illustration 12.6

a. **Adam tells Eve truthfully that the odometer reading on the car he is selling is accurate. Prior to concluding the sale he discovers that the odometer has, in fact, been tampered with. He does not communicate this to Eve.**

b. **Adam truthfully tells his local authority that Eve, his mother, is bedridden and so in need of a downstairs bathroom. On the strength of this representation the local authority agrees to install a new bathroom. Before starting the work Eve dies. Adam fails to tell the local authority of her death (the facts of *Rai* [2000] 1 Cr App R 242).**

In both cases, Adam's silence is impliedly telling the other party that nothing relevant to their agreement has changed since the first representation was made. Put another way, in both cases the statement that Adam has made which was once true is now false. The change in circumstances has made it so.

Representations and machines

Under the old law of the Theft Acts, it was also not possible to make representation to a machine: the essence of the deception offences was the tricking of a human mind. The Fraud Act 2006 s.2(5) now makes it possible to commit fraud via a machine, since a representation is regarded as having been made:

> if it (or anything implying it) is submitted in any form to any system or device designed to receive, convey or respond to communications (with or without human intervention).

This would include putting false information on an online tax or insurance form, or computer 'phishing' as in the case of those who place viral sob stories on the internet which are intended to cause naive recipients to transfer money to the phisher. In this latter case the representation is made as soon as the representation is typed on to the phisher's machine, thus relieving the prosecution from having to prove that anyone read it.

A person who puts a foreign coin in a slot machine, such as a car park ticket machine or chocolate machine, also commits fraud, whether or not the ruse is successful, not because of subs.2(5) but because by putting the coin in they are making a representation in the usual way. 'This is a £1 coin', 'this is a $2 coin', as the case may be. Under the old law this was not a fraud because it required a human mind to be deceived. As has been explained the fraud is now complete upon the making of a false representation. It does not have to be effective or even communicated.

Activity 12.21

Read Wilson, Section 15.1.C.1.(a) '*Actus reus*' and answer the following question.

Adam, intending to sell his car, puts an advertisement on the windscreen while it is in his garage. It says that the car has been driven by one careful female owner. In fact it has been driven by him. Has Adam committed the *actus reus* of fraud at this stage?

The representation must be false

By subs.2(2) of the Fraud Act 2006, a representation is false if (a) it is untrue or misleading, and (b) the person making it knows that it is, or might be, untrue or misleading. This is a very inclusive definition. It includes the situation of someone who believes what they say to be true but knows it might not be true or knows it might be misleading. The coverage of the act is so wide it covers the kind of cases of (sharp) practice in which most tradespersons have traditionally engaged to make a living. It criminalises 'mere puffs'. If Heineken describes its lager as 'probably the best lager in the world', is it acting fraudulently when all purchasers understand that the claim is not to be taken too seriously and do not buy their lager on the strength of it?

ACTIVITY 12.22

Read Wilson, Section 15.1.C.1 (a) '*Actus reus*' and answer the following questions.

a. **Adam owns a BMW in which he has driven 111,000 miles since he bought it a year ago. The odometer, having 'gone round the clock', shows 11,000 miles. It is worth £15,000 as it stands, but £30,000 if the mileage truly was 11,000. He puts a notice on his car windscreen in the following terms: 'BMW for sale. One year old. One careful owner. £30,000'. Has Adam made a false representation? If so, what is it?**

b. **Claire is an art dealer. She describes a painting in the sales particulars as an 'early Constable'. The painting, as she knows, is painted not by John Constable, but by his son, John Charles Constable, a lesser artist. Has Claire made a false representation? If so, what is it?**

c. **Jane is an art dealer. She describes a painting in the sales particulars as an 'early Rembrandt'. She believes it to be a Rembrandt, and indeed bought it as such, but knows that in the case of this particular painter precise attribution is difficult due to the number of workshop versions of Rembrandt's work on the market. In fact it is not a Rembrandt. Has Jane made a false representation? If so, what is it?**

Note: Remember what was said earlier about the importance of being able to identify the representation and what is false about it. If you are having difficulty with any of these three cases you need to revisit the textbook.

***Mens rea*: fraud**

The core *mens rea* element for fraud contrary to ss.2, 3 and 4 of the Fraud Act 2006 is the defendant's intention by making the representation, to make a gain for themself or another, or to cause loss to another or to expose another to a risk of loss. Intention in this context, in line with its meaning in theft and unlike its meaning elsewhere, means purpose or knowledge of virtual certainty. In theft, such knowledge is intention **as a matter of law**, rather than as a matter of evidence (see Section 5.3.2 'Murder and manslaughter: what does "intention" mean?'). If D knows that their representation will cause loss to V or expose V to the risk of loss, D intends that consequence. Gain and loss are defined by s.5(2) and (3) of the act:

> (2) 'Gain' and 'loss' –
>
> (a) extend only to gain or loss in money or other property;
>
> (b) include any such gain or loss whether temporary or permanent;
>
> and 'property' means any property whether real or personal (including things in action and other intangible property).
>
> (3) Gain' includes a gain by keeping what one has, as well as a gain by getting what one does not have.

ACTIVITY 12.23

Read Wilson, Section 15.1.C.1 'Fraud by false representation', Section (b) '*Mens rea*' and decide, giving reasons, whether the following representations are capable of resulting in a conviction of fraud.

a. Adam promises to marry Eve in order to encourage her to agree to sexual intercourse.

b. Adam tells people in a queue for a concert that he has a bad back in order to gain a better place in the queue.

c. Eve misrepresents her golf handicap in order to be permitted to join a top club.

Note: The gain or loss can be temporary or permanent, so making a misrepresentation to induce a loan of a car or money, or to gain time to pay a debt would be covered. In this latter example, fraud is constituted since 'gain' includes a gain by keeping what one has, as well as a gain by getting what one does not have. 'Loss' includes a loss by not getting what one might get, as well as a loss by parting with what one has.

There are four possible cases of this *mens rea* requirement.

1. The intention to make a gain for oneself by false representation (this will be the most usual case).
2. The intention to make a gain for someone else, for example giving a false reference to secure someone a job or a loan.
3. The intention to cause a loss to another. Usually this will go hand-in-hand with an intention to make a gain, either for oneself or for another, but it will include cases where the representor's purpose is purely destructive. Here is an example.

Illustration 12.7

Janice, a committed vegetarian, places an advertisement in the *Daily Globe* newspaper, implying that the hotdogs of HotdiggetyDog hotdog manufacturers actually contain dog meat. The representation, which is false, is made in an attempt to damage sales of HotdiggetyDog meat products.

This is fraud, because of Janice's intention to cause financial damage to HotdiggetyDog.

4. The intention not to cause a loss to the representee but to expose them to the risk of loss (this is more unusual).

Illustration 12.8

a. A, a mortgage broker, puts false earnings particulars on clients' mortgage forms to induce the lender to lend to her clients.

b. B, a financial adviser, advises his client, C, to invest a large amount of money in X company, telling him it is a good investment. He knows that the investment is risky but hopes that the investment pays off and will advance his reputation as an adviser.

A is guilty of fraud. Her liability turns on the fact that although she does not intend to cause the lender any loss, she does intend to expose the lender to the **risk** of loss, namely the risk that the borrowers may default (*Allsop* (1977) 64 Cr App R 29). B is also guilty of fraud for the same reason.

Dishonesty

The final *mens rea* element is dishonesty. Dishonesty, in this context, is *Ivey* dishonesty. There is no equivalent to s.2 of the Theft Act 1968 in the Fraud Act 2006. This means that a person who makes a false representation in order to gain what they believe they are in law entitled to is not automatically to be acquitted: it will be a matter for the jury. This was made clear in the pre-2006 Act case of *Woolven* (1983) 77 Cr App R 231 and one must assume the position is unaltered.

12.3.2 Fraud by failing to disclose information

This provision is probably unnecessary since a failure to disclose information which one has a duty to disclose counts as a representation for the purpose of s.2 of the Fraud Act 2006. Section 3 was included in order to simplify the proof of guilt. Section 3 allows a conviction simply upon proof of the duty to disclose and the failure to do so with the

relevant intent. The important aspect of s.3 is the requirement that the defendant be under a legal duty of disclosure: a moral duty is not enough. The concept of 'legal duty' is explained in the Law Commission's Report on Fraud, which said:

> Such a duty may derive from statute (such as the provisions governing company prospectuses), from the fact that the transaction in question is one of the utmost good faith (such as a contract of insurance), from the express or implied terms of a contract, from the custom of a particular trade or market, or from the existence of a fiduciary relationship between the parties (such as that of agent and principal).

So an art dealer would not commit the offence if they bought a painting at a car boot sale knowing that the painting was worth a thousand times the asking price, as they have only a moral duty of disclosure.

Mens rea: failing to disclose information

The *mens rea* for s.3 of the Fraud Act is as for s.2. There is no requirement that the defendant be aware that they are under a legal duty of disclosure, although evidence of lack of awareness will, no doubt, influence the jury's assessment of dishonesty. Section 3 states:

(1) A person is in breach of this section if he –

(a) dishonestly fails to disclose to another person information which he is under a legal duty to disclose, and

(b) intends, by failing to disclose the information—

(i) to make a gain for himself or another, or

(ii) to cause loss to another or to expose another to a risk of loss.

The *mens rea* for s.4 is as for s.2. There is no requirement that the defendant be aware that they are under a duty to safeguard the other's financial interests, although evidence of lack of awareness will, no doubt, influence the jury's assessment of dishonesty.

Fraud by abuse of position

(1) A person is in breach of this section if he –

(a) occupies a position in which he is expected to safeguard, or not to act against, the financial interests of another person,

(b) dishonestly abuses that position, and

(c) intends, by means of the abuse of that position –

(i) to make a gain for himself or another, or

(ii) to cause loss to another or to expose another to a risk of loss.

(2) A person may be regarded as having abused his position even though his conduct consisted of an omission rather than an act.

The Law Commission described the type of relationships intended to be covered by fraud by abuse of position as follows:

> The necessary relationship will be present between trustee and beneficiary, director and company, professional person and client, agent and principal, employee and employer, or between partners. It may arise otherwise, for example within a family, or in the context of voluntary work, or in any context where the parties are not at arm's length. In nearly all cases where it arises, it will be recognised by the civil law as importing fiduciary duties, and any relationship that is so recognised will suffice. We see no reason, however, why the existence of such duties should be essential. (para.7.3)

Whether a person occupies a position in which they are expected to safeguard the interests of another is a question of law for the judge. Usually this will be because the relationship, as in the case of trustee/beneficiary, contains, or is constituted by, explicit duties of acting in the other's interests or not acting against those interests. It may, however, simply be understood as where A permits B to use her apartment while she

is on holiday. It goes without saying that B would abuse his licence if he were to use A's apartment to deal in drugs or sell weapons from.

Note: Students, when answering problem questions, often ignore s.2 and go straight to s.3. This is bad practice and illustrates the importance of identifying the (false) representation. You should generally only use s.3 as a default option, that is, where, having concluded that s.2 is or is not available and why, you go on to consider the alternative possibility of liability under s.3. All of the examples given in the illustrations and activities in this section are, first and foremost, cases of fraud by false representation (s.2). Consider, for example, Activities 12.12–12.20. A student who fails to analyse each of these activities by reference to s.2, and who simply talks about whether Adam, Clare and Jane are under a duty of disclosure and so liable under s.3 for not making disclosure, misses the whole point of these questions and would not do very well! So, what answer did you give to in relation to Adam and his BMW?

12.3.3 Obtaining services dishonestly

Section 11 of the Fraud Act 2006 replaces s.2 of the Theft Act 1978. It covers any case where services, for which payment would be expected, are obtained as a result of dishonest conduct. By s.11:

> (1) A person is guilty of an offence under this section if he obtains services for himself or another –
>
> (a) by a dishonest act, and
>
> (b) in breach of subsection (2).

The new offence differs from the old one by constituting the conduct element as any form of dishonest conduct rather than the deception required by s.2.

Actus reus: obtaining services dishonestly

Under the previous law it was an offence only where there was a deception. Now any dishonest act will be covered. The difference in coverage can be seen in the following example.

Illustration 12.9

D parks her car in a pay-and-display car park. She does not pay for a ticket, hoping that she will return before a ticket inspector arrives.

Under the Theft Act 1978 this would not be an offence under s.2 as no false representation has been made. It is, however, an offence under s.11 because D has obtained a service and her conduct is dishonest.

Illustration 12.10

Other cases of obtaining services dishonestly include the following.

a. **Entering a cinema without paying.**
b. **Having a haircut without paying.**
c. **Obtaining chargeable data or software (e.g. music downloads) over the internet without paying.**
d. **Ordering a meal in a restaurant knowing you have no means to pay (also fraud by false representation).**
e. **Attaching a decoder to a TV to access chargeable satellite services without paying.**
f. **Using the services of a members' club without paying and/or without being a member.**

Section 11 also differs from ss.2, 3 and 4 of the Fraud Act 2006 in the *actus reus* requirement that the service be actually obtained. In this respect it is similar to the offence it replaced. However, where the relevant services are obtained as a result of a false representation, rather than by some other form of dishonest act, it will be possible to proceed under either section.

ILLUSTRATION 12.11

a. Adam parks his car in a pay and display car park. Eve, who is about to leave the car park, gives Adam her unexpired ticket. Adam places the ticket on his windscreen.

Adam is guilty under s.11. He is also guilty of fraud by false representation. By putting the ticket on his windscreen he is impliedly representing that he has paid for it. The gain he makes is keeping the fee due.

b. Mary untruthfully tells the sales assistant in a cinema that she is underage so as to be allowed in at a lower price.

Since Mary is not a minor, she is guilty of fraud by false representation. The gain she intends to make is the money she is enabled to keep in her pocket by her false representation as to her age. She is also guilty of obtaining services dishonestly.

What conduct does 'obtaining services' cover?

Subsection 11(2) clarifies what is mean by 'obtaining services'. As with the previous offence, it refers to a narrower range of conduct than you might think.

> (2) A person obtains services in breach of this subsection if –
>
> (a) they are made available on the basis that payment has been, is being or will be made for or in respect of them,
>
> (b) he obtains them without any payment having been made for or in respect of them or without payment having been made in full, and
>
> (c) when he obtains them, he knows –
>
> (i) that they are being made available on the basis described in paragraph (a), or
>
> (ii) that they might be,
>
> but intends that payment will not be made, or will not be made in full.

Subsection 11(2) makes it clear that only services made available on the basis that payment has been, is being or will be made for or in respect of them are covered.

ACTIVITY 12.24

How good are your statutory interpretation skills? Read s.11(2) and consider whether the following situations are examples of obtaining services dishonestly.

a. D, in order to avoid paying a charge at his local swimming pool, sneaks into a school's pool, use of which is restricted to school pupils on a non fee-paying basis. Is this an offence under the Fraud Act 2006?

b. Adam and Eve pretend to be Muslims in order to get their child into a fee-paying school, restricted to pupils of that religion. They are, in fact, Christians.

c. D, in order to avoid paying a full charge at her local swimming pool, pretends to be a pensioner.

d. D, in order to see an adult film, tells the assistant that he is 18 when he is only 16.

Are you happy with your answers? Now look at Wilson, Section 15.2 'Obtaining services dishonestly' to see if you were right.

Mens rea: obtaining services dishonestly

The offence requires *Ivey* dishonesty, knowledge that payment is required or might be, and an intention not to pay for the service or not to pay in full. Section 2 of the Theft Act 1968 does not apply.

12.3.4 Making off without payment

Section 3 of the Theft Act 1978, which is still in force, provides:

(1) Subject to subsection (3) below, a person who, knowing that payment on the spot for any goods supplied or service done is required or expected from him, dishonestly makes off without having paid as required or expected and with intent to avoid payment of the amount due shall be guilty of an offence.

(2) For purposes of this section 'payment on the spot' includes payment at the time of collecting goods on which work has been done or in respect of which service has been provided.

(3) Subsection (1) above shall not apply where the supply of the goods or the doing of the service is contrary to law, or where the service done is such that payment is not legally enforceable.

This offence is designed to enable a prosecution where, although the defendant has acted dishonestly, it may be difficult to prove or prevent fraud or theft. It is easier to prove that a driver has dishonestly made off without paying for their petrol than to prove that they had an intention not to pay when first filling up the car – which would ground a charge of theft or fraud.

Activity 12.25

At examination time you should be wary of putting undue emphasis on this offence in cases where theft, fraud or obtaining services dishonestly are also present. This offence is best thought of as an offence of last resort, for use where proving another offence may be difficult. For example, read Wilson, Section 15.2.A '*Actus reus*' and answer the following question.

While out shopping, Yuri sees a shirt priced £50. He swaps the price tag for one marked £30 and pays the lower price. Yuri buys a DVD and pays for it with a £10 note. The shop assistant mistakenly gives him change for a £20 note. Yuri realises this once he is outside the shop but keeps the money. What offences, if any, have been committed?

In this question most of the marks would be awarded for discussion of theft and fraud in relation to the swapping of the price tags. Can you see why it is a case of both fraud and theft? Read Wilson, Sections 15.2.A '*Actus reus*' and 15.1.C 'Fraud'. In relation to the mistake question your discussion should again concentrate on theft. Only then consider whether there is a making off (see Wilson, Sections 15.3.A.1 'Making off' and 15.3.A.3 'Without having paid as required or expected'). Has Yuri made off without paying as required or expected in the light of the mistake made?

No feedback provided.

Actus reus: making off without payment

A person can be liable only if they have **made off from the spot** where payment was due. Liability turns therefore on whether payment is due and, if so, where that spot is and whether D has departed from it. In *McDavitt* [1981] Crim LR 843, D, following an argument about his bill, made for the restaurant door having refused to pay for his meal. He was stopped and the police were called. D admitted having intended to leave without paying. A submission of no case to answer was accepted on a charge of making off without payment. The Court of Appeal ruled that 'making off' means making off from the spot where payment is required or expected. In this case the spot was the restaurant. The jury should have been directed that it could not convict of this offence but it was open to them to convict of an attempt.

Compare *Moberly* v *Alsop* [1992] COD 190, in which D travelled on a train without paying for a ticket. She was apprehended, having gone through the ticket barrier, and charged with making off without paying. She argued that she had not made off without paying because the spot for paying was the ticket office and she had not made off from there. Indeed, she had never been there! This argument was rejected.

Activity 12.26

Why was the argument in *Moberly* v *Alsop* rejected? When you have thought about the answer, read Wilson, Section 15.3.A.1 'Making off', Section (a) 'From the spot where payment is due or expected' to see if your reasoning was correct.

A person commits the offence only if, when making off, payment on the spot is required or expected. If, therefore, the expectation is that D will be 'billed' for the goods or services they are not guilty, even if it was their intention when making off that they would not pay. So also D will not commit the offence if there has been a breach of contract or if the contract was otherwise unenforceable. It was stated in *R* v *Wilkinson* [2018] EWCA Crim 2154 that a taxi fare cannot be lawfully due unless and until the driver has taken the passenger to the requested destination, or to the point where the passenger asks to be let out of the taxi, thereby varying the destination. As a result, the offence was not committed where, following a dispute between a passenger and driver, the driver told the passenger that, if she was going to complain, she could get out of the taxi immediately at a point short of her destination, which offer she refused.

Making off takes no particular form. A person can make off by stealth, or brazenly without any form of dissimulation. A question does, however, surround the status of permitted departures, as when a customer dupes a creditor into allowing them to depart by pretending to have left their wallet at home. Is this a making off? In *Vincent* [2001] EWCA Crim 295, the Court of Appeal concluded that it was not, since the effect of the deception is to pre-empt any expectation that payment would be made on the spot. Fraud could have been charged, but only if it could be proved that D had at some stage decided not to pay before receiving any goods or services. Under these circumstances D would in this case, by staying on in the hotel, have been impliedly representing that he intended to pay for the goods or services when he did not (*DPP* v *Ray* [1974] AC 370).

Activity 12.27

Read Wilson, Section 15.2.A '*Actus reus*' for a discussion of this problem.

Mens rea: making off without payment

The *mens rea* for s.3 of the Fraud Act 2006 is dishonesty and an intention to avoid payment of the amount due. Significantly, s.3 does not state that the intention must be to make permanent default. The commonsense view is this should not be the case because having to prove D intended to make **permanent** default will make the prosecution's burden of proof rather difficult. It is easy to claim that one intended to pay later and difficult to disprove this beyond reasonable doubt. Nevertheless in *Allen* [1985] AC 1029, the House of Lords held that the offence was constituted only upon proof of an intention permanently to avoid paying the amount due. So a hotel customer who checked out without paying did not commit the offence if he was temporarily financially embarrassed and intended to pay later.

Activity 12.28

In *Lawrence* [1972] AC 626, the House of Lords refused to read the words 'without the transferor's consent' into the definition of appropriation for the purpose of theft, saying if Parliament had wanted this it would have said so. In the case of *Allen*, the House of Lords did read into the words of the provision the word 'permanently' after 'intention'. In so doing it has rendered the offence 'toothless'. Is this a case of double standards and do you agree with the decision in *Allen*?

No feedback provided.

Am I ready to move on?

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

1. State the essential elements of fraud by false representation.
2. Explain what a representation is.
3. Give examples of an express representation of fact, of law and of a state of mind.
4. Give three examples of an implied representation.
5. State, illustrate and explain the circumstances in which a person can be making a representation by staying silent.
6. State, illustrate and explain what 'false' means for the purpose of the Fraud Act 2006.
7. State, illustrate and explain the circumstances in which a representation can be false although the representor believes it to be true.
8. State and explain the *mens rea* for fraud by representation.
9. Explain when it is proper to charge fraud by abuse of position rather than by false representation.
10. State the essential elements of obtaining services dishonestly.
11. State, explain and illustrate what is meant by 'services' for the purpose of this offence.
12. Explain and illustrate the situations in which a person can be liable for both fraud and obtaining services dishonestly.
13. Explain and illustrate the situations in which a person can be liable for obtaining services dishonestly, but not fraud.
14. Explain and illustrate the situations in which making off without payment – but no other property offences – can be charged.
15. Explain what 'making off' comprises for the purpose of s.3 of the Theft Act 1978.
16. State, explain and illustrate the requirement that the defendant makes off from the 'spot where payment is due'.
17. Explain the relevance of a person purchasing goods on credit for their potential liability under s.3 of the Theft Act 1978.
18. Explain the *mens rea* for making off without payment.

NOTES

13 Criminal damage

Contents

Introduction

The Criminal Damage Act 1971 was designed to simplify the law and to ensure consistency with other property offences (principally theft). It contains a basic offence of damaging property and an aggravated offence where the damage to property is foreseen or intended to endanger life.

13.1 Simple criminal damage

Section 1(1) of the Criminal Damage Act 1971 states:

> A person who without lawful excuse destroys or damages any property belonging to another intending to destroy or damage any such property or being reckless as to whether any such property would be destroyed or damaged shall be guilty of an offence.

The maximum punishment for a violation of s.1(1) following a trial on indictment is 10 years' imprisonment (s.4(2)). Where the offence is committed by fire it will be charged as arson with a potential maximum sentence of life imprisonment.

13.1.1 *Actus reus*: simple criminal damage

As with theft there are three elements of the *actus reus*.

- There must be property.
- That property must belong to another.
- D must damage that property.

13.1.2 Property

Property is defined in a similar way to property for the purpose of theft. However, it does not include things in action or intangible property as these are immaterial and so cannot suffer damage. Another significant difference is that there are no restrictions regarding land or buildings. Indeed the most common subject of criminal damage, as in arson, will be land and buildings.

Section 10 states:

> (1) in this Act 'property' means property of a tangible nature, whether real or personal, including money and:
>
> (a) including wild creatures which have been tamed or are ordinarily kept in captivity, and any other wild creatures or their carcasses if, but only if, they have been reduced into possession which has not been lost or abandoned or are in the course of being reduced into possession; but
>
> (b) not including mushrooms growing wild on any land or flowers, fruit or foliage of a plant growing wild on any land.
>
> For the purposes of this subsection 'mushroom' includes any fungus and 'plant' includes any shrub or tree.

Criminal damage therefore includes damage to land, including cultivated plants and domesticated animals. It includes damage to things on the land, whether or not they form part of the land. It also includes damage to personal property such as cars, vases, carpets, food, drink, paper, clothes and so on.

13.1.3 Destroys or damages property

'Destroys' adds nothing to 'damages' and so here we will consider what counts as damage. Any alteration to the physical nature of the property may amount to damage, depending on the circumstances, the nature of the property and the nature of the alteration. Whether property has been damaged is a question of fact for the magistrates or jury. The case of *Morphitis* v *Salmon* [1990] Crim LR 48 involved dismantling a scaffold barrier across the road. D was acquitted of criminal damage to the bar component of the barrier. The court made the point that a scratch on the bar of the barrier would not be damage as it could not have impaired its value or usefulness, as scaffolding components get scratched in the normal course of events. This case shows that whether or not damage has occurred can be determined only by considering the object and the nature of the change wrought to it. If D had scratched a piece of furniture instead of a scaffold bar, the jury would no doubt have considered the damage element satisfied. Again, if he had been charged with damage to the barrier as a whole, by dismantling it, he might have been convicted.

ACTIVITY 13.1

a. Read Wilson, Chapter 17 'Criminal damage'. Note down as many different examples of criminal damage as you can find for future reference.

b. Why, in *Henderson and Battley* (1984), was depositing 30 lorry loads of rubble on a building site criminal damage?

c. Do you agree with the view in *Smith and Hogan* (2015) that wheel clamping should count as criminal damage, contrary to the decision in *Drake* v *DPP* (1994)?

No feedback provided.

13.1.4 Property belonging to another

By s.10(2) property for the purposes of the act belongs to any person:

> (a) having the custody or control of it;
>
> (b) having in it any proprietary right or interest (not being an equitable interest arising only from an agreement to transfer or grant an interest); or
>
> (c) having a charge on it.

Section 10 goes on to state that

> (3) Where property is subject to a trust, the persons to whom it belongs shall be so treated as including any person having a right to enforce the trust.
>
> (4) Property of a corporation sole shall be treated as belonging to the corporation notwithstanding a vacancy in the corporation.

This provision bears comparison with the position with theft. The offence is committed only if the property damaged belongs to someone else. So the owner of property can commit criminal damage of that property if it also belongs to someone else in the sense provided by s.10. This would cover part owners of real or personal property, tenants or occupiers of land, and those in possession or control of real or personal property. So if, on the facts of *Turner* [1971] 1 WLR 901, D had damaged his car rather than taken it, he would have committed the *actus reus* of criminal damage. Likewise if a landlord damages the house let to their tenant, or vice versa, the *actus reus* is satisfied.

The key thing to notice here is that it is not (simple) criminal damage to damage **one's own** property, so long as it does not also belong to another in one of these senses. In *Denton* [1982] 1 All ER 65, D set fire to T's property at T's request, to perpetrate an insurance fraud. He was convicted at first instance but his conviction was later quashed. The insurance company had no proprietary interest in the property damaged and T was the sole owner, so could not be liable. As Lord Lane CJ said in this case: 'It is not an offence for a man to set light to his own property'. And if T was not liable, D could not be either because of the presence of T's consent (see s.5(2)).

13.1.5 *Mens rea*: simple criminal damage

The defendant must intend to damage property belonging to another or be reckless in respect of causing such damage. Intention carries its general meaning. The meaning of recklessness for the purposes of the Criminal Damage Act was for many years a matter of controversy until the House of Lords' decision in *G* [2003] UKHL 50 which returned recklessness to its previous (subjective) meaning. These states of mind were explained and discussed in Chapter 5 of this module guide, and reference should be made to them.

Note: Remember that intention includes having damage as one's objective or foreseeing it as virtually certain. D is reckless if they recognised the risk of damage to property and nevertheless went on to take that risk **unreasonably**. Recklessness does not always require conscious awareness of the risk at the time of acting. It includes the case of someone who closes their mind to the risk (*Parker* [1977] 1 WLR 600, *Booth* v *CPS* [2006] EWHC 192 (Admin)).

It should be understood that legal principle requires *mens rea* to extend to every single aspect of the *actus reus*. This means that the prosecution must prove not merely that D intended damage to property (or recklessness) but more specifically that they also intended (or were reckless) to damage property belonging to another. It is an answer to the charge, therefore, that D believed they were damaging their own property. In *Smith* [1974] QB 354, a tenant was found not guilty of damaging wiring in the apartment he was renting. He had installed it himself and this had led him to believe it belonged to him not the lessor.

13.1.6 Lawful excuse

Section 1 of the Criminal Damage Act 1971 refers to damaging property without lawful excuse. Apart from the general defences, which will always be available, s.5 provides for two offence-specific defences. These are belief in the owner's consent and belief that it is necessary to protect one's own property.

Section 5 states:

> (2) A person charged with an offence to which this section applies shall, whether or not he would be treated for the purposes of this Act as having a lawful excuse apart from this subsection, be treated for those purposes as having a lawful excuse–
>
> (a) if at the time of the act or acts alleged to constitute the offence he believed that the person or persons whom he believed to be entitled to consent to the destruction of or damage to the property in question had so consented, or would have so consented to it if he or they had known of the destruction of or damage and its circumstances; or
>
> (b) if he destroyed or damaged...the property in question...in order to protect property belonging to himself or another or a right or interest in property which was or which he believed to be vested in himself or another, and at the time of the act or acts alleged to constitute the offence he believed –
>
> (i) that the property, right or interest was in immediate need of protection; and
>
> (ii) that the means of protection adopted or proposed to be adopted were or would be reasonable having regard to all the circumstances.

Section 5 is the Criminal Damage Act 1971 equivalent of s.2 of the Theft Act 1968.

With respect to both of these lawful excuses it is enough that the belief was honestly held. There is no requirement that the belief be reasonable.

13.1.7 Belief in the consent of the person or persons believed to be entitled to consent

Normally speaking, the person believed to be entitled to consent will be the owner, but not necessarily. It may include the owner's agent or manager or any other person D thinks has the power of consent.

Note: The person believed to be entitled to consent does not include God: an ingenious argument put forward by the defendant clergyman in *Blake* v *DPP* [1993] Crim LR 586 as a defence to a charge of damaging property by graffiti!

Section 5(2)(a) provided the defendant with his excuse in *Denton* (see above). It also provided the defendant with her excuse in *Jaggard* v *Dickinson* [1981] QB 527. D, after an evening's drinking, found that she had been locked out of her home. She broke into a house which, in her drunken state, she thought belonged to a friend who would consent. In fact she was mistaken; it was the house next door. The magistrates held that she could not rely upon s.5(2)(a) since her belief in consent was brought about by self-induced intoxication (see Chapter 10). The Divisional Court quashed the conviction relying on s.5(3) which states: 'For the purposes of this section it is immaterial whether a belief is justified or not if it is honestly held'.

Mustill J said that:

> the court is required by s.5(3) to focus on the existence of the belief, not its intellectual soundness; and a belief can be just as much honestly held if it is induced by intoxication, as if it stems from stupidity, forgetfulness or inattention.

13.1.8 Damaging property in order to protect a person's own property or an interest therein

The simplest case of s.5(2)(b) is where D damages property in order to protect their own property (e.g. shoots a dog worrying their sheep or sets fire to a haystack to prevent a fire on neighbouring land spreading to their house). The defence extends beyond property to property interests. So knocking down a wall blocking a right of way was held to be a lawful excuse in *Chamberlain* v *Lindon* [1998] 1 WLR 1252.

Section 5(2)(b) has been held to apply only where the damage done is for the direct and immediate purpose of protecting property. So in *Hunt* (1978) 66 Cr App R 105, D argued that he set fire to a bed in an old people's home to draw attention to the non-working fire alarm. The Court of Appeal ruled that this was not a lawful excuse. D's action was taken not to protect the old people's home from damage but to act as a warning. In short, the act must be for the direct purpose of protecting property from harm.

13.2 Aggravated criminal damage

Section 1(2) of the Criminal Damage Act 1971 states:

> A person who without lawful excuse destroys or damages any property, whether belonging to himself or another –
>
> (a) intending to destroy or damage any property or being reckless as to whether any property would be destroyed or damaged ; and
>
> (b) intending by the destruction or damage to endanger the life of another or being reckless as to whether the life of another would be thereby endangered;
>
> shall be guilty of an offence.

Simple criminal damage is a property crime. Aggravated criminal damage, however, is a hybrid offence against property and against the person. Its core application is cases of dangerous arson. The kind of case covered by the aggravated offence is *A-G's Reference (No 50 of 2005)* [2005] EWCA Crim 2041, in which the defendant used petrol to set fire to his room in hostel, in the hope that he would be rehoused. The hostel was destroyed. The aggravated offence was committed – D had committed arson and he was reckless as to whether life would be endangered **by** that arson.

Although dangerous arson is the usual fact scenario, the offence extends to all cases where, by damaging property, other people's lives are put at risk. Because it is designed to protect people from harm, this offence can be committed irrespective of whether the property damaged belongs to another.

13.2.1 Elements of the offence

- There must be intentional or reckless damage to property.
- The property does not have to belong to another person.
- The person must intend to endanger life by that damage, or be reckless as to whether life would be endangered by that damage.

The requirement that the risk to life must derive from the damage done to the property needs to be understood, so it is particularly important to do Activity 13.2.

Activity 13.2

Read Wilson, Section 17.3 'Criminal damage endangering life'. Which of the following are not forms of aggravated criminal damage and why? Make sure you take notes recording your answer. It is an important point.

a. **Cutting the brake cable in a car.**

b. **Exploding dynamite during office hours in a bank vault in order to gain access to a safe.**

c. **Demolishing a high wall on a public street, or felling a tree, without taking precautions to safeguard passers by.**

d. **Ripping out copper electrified cables on a railway line, leaving live wires exposed.**

e. **Throwing a stone through a car windscreen intending to hit V, the driver.**

f. **Shooting a hole in the tyre of a car while it is being driven by V.**

Am I ready to move on?

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

Simple criminal damage

1. State the differences and similarities between the meaning of property in the context of criminal damage and theft.
2. State and explain when a person can be guilty of damaging their own property.
3. Explain and illustrate what 'damage' means for the purpose of the Criminal Damage Act 1971.
4. State and explain the *mens rea* for criminal damage.
5. State, explain and illustrate the 'lawful excuses' under s.5 of the Criminal Damage Act 1971.
6. Explain why a person who cuts through a neighbour's fence in order to rescue the neighbour's dog from drowning in their pond has a lawful excuse to criminal damage on the fence.
7. Explain why a similar person who throws his neighbour's dog into the pond in order to demonstrate to the neighbour how dangerous the pond is to the dog does not have a lawful excuse for committing criminal damage on the dog.

Aggravated criminal damage

1. State and explain the elements of aggravated criminal damage.
2. Give three examples of how the offence can be committed other than by arson.
3. State the doctrinal distinctions between simple and aggravated criminal damage.
4. Explain why it is not necessary in relation to aggravated criminal damage for the property damaged to belong to another.
5. Explain why, in *Steer* (1987) (Wilson, Section 17.3.B '*Mens rea*'), a person who shot a gun through a closed window of a room hoping to endanger the life of the people in the room was not guilty of aggravated criminal damage.

NOTES

14 Criminal attempts

Contents

NOTES

14.1 Retribution or prevention?

The difference between the person who tries to commit a crime and fails and their counterpart who is successful may be nothing more than a gun which misfires, poor aim or a victim who ducks. From a penological perspective, both offenders may be equally dangerous and equally in need of rehabilitation and restraint.

Therein lies one rationale for the law of criminal attempts. However, there is a problem with this rationale in that criminal law generally is premised on the defendant having done something manifestly wrong which demands retributive punishment. If the rationale behind the law of criminal attempts is to prevent people who intend to commit an offence from committing it, then it may justify a law of criminal attempts which allows the intervention of law enforcement agencies **well before** the defendant has done anything manifestly wrong. What is the law of attempts for – retribution or prevention? (See Chapter 2 of this module guide and Wilson, Chapter 3 'Punishment'.)

This confusion at the heart of criminal attempts has created some destabilising doctrine. Consider, for example, the case of *Geddes* (1996) 160 JP 697. D was found in a boy's lavatory in a school, armed with knife, rope and masking tape. He did this in furtherance of an intention to falsely imprison a boy with a view to committing a sexual assault. The question was whether this could amount to an attempt to falsely imprison the boy. The judge ruled that it could and it was for the jury to decide whether it did. The jury was in no doubt – D was convicted. The Court of Appeal, however, quashed the conviction. To count as an attempt at false imprisonment, D had to do more than prepare for it. He had to have done things which formed **part of the execution** of the offence.

The difference between the approaches of the trial judge and the Court of Appeal is simple. The trial judge was treating the law of criminal attempts as a way of preventing dangerous and blameworthy people from committing offences. The Court of Appeal was treating the law of criminal attempts as a means of **punishing** people who got so near to the commission of a substantive crime as to be worthy of punishment for its inherent wrongfulness, rather than for what it heralded. The former approach is forward-looking and preventive; the latter is backward-looking and retributive (see Chapter 2 of this module guide). Some jurisdictions, for example the United States, follow the former approach. Some, such as England and Wales and most other common law jurisdictions, follow the latter approach, albeit with some degree of equivocation.

Prior to the Criminal Attempts Act 1861, the law was that there should be proximity between the offence intended and the acts done by the accused in furtherance of the commission of that offence. The need for proximity was first advanced in the case of *Eagleton* (1855) 169 ER 826, in which the defendant was given the job of delivering bread to the poor for which he was paid by the guardians of a parish. D claimed the money but delivered loaves which were underweight and was charged with attempting to obtain money by false pretences. Parke B gave the following statement of principle which became the standard test for attempts.

> Acts remotely leading towards the commission of the offence are not to be considered as attempts to commit it; but acts immediately connected with it are...

Since the defendant in *Eagleton* had committed the last act needed on his part to commit the offence, his act was clearly proximate (immediately connected) to it and so he was guilty. Unfortunately, this led on occasions to judges insisting that an attempt always required defendants to have performed the last act needed on their part for the crime to be committed; in other words for them to have **completed** their attempt.

Activity 14.1

Read and takes notes on the discussion of the cases of *Robinson* and *Comer* v *Bloomfield* in Wilson, Section 18.4.D 'When does the attempt begin? The common law tests'. Do you agree with the court's decision in these two cases that the defendants had not committed an attempt? What was their reason for reaching this decision?

Generally, however, the courts did not require defendants to have performed the last act necessary on their part to complete the attempt. So in *White* [1910] 2 KB 124 it was said that a defendant could be guilty of attempting to kill his mother by poison although the *modus operandi* was to poison by cumulative effect and the defendant had administered only small amounts at the time he was convicted. A number of different tests were essayed: for example, in *Stonehouse* [1978] AC 55 Lord Diplock referred to the fact that the defendant had 'crossed the Rubicon'; that is, he had gone so far towards achieving his criminal objective that there was no turning back, although there were still acts needed to be done.

Attempting to commit a crime was made a statutory offence by the Criminal Attempts Act 1981. A major objective of the Act was to pinpoint with greater precision than hitherto the quality of conduct which amounts to an attempt. The basic definition is contained in s.1:

> (1) If, with intent to commit an offence to which this section applies, a person does an act which is more than merely preparatory to the commission of the offence, he is guilty of attempting to commit the offence.

14.2 *Actus reus*

In England and Wales, the Criminal Attempts Act 1981 is representative of the general common law approach, which is to seek a midway point between acts of preparation and acts of perpetration to constitute the attempt. Proximity to the completed offence is still required but, in order to ensure a practical marriage of prevention and retribution, the test for proximity is couched in terms which avoid specifying **the degree of proximity** required. This is done by requiring an act which is 'more than merely preparatory to the commission of the offence'. Ireland, Canada, Victoria, Singapore and Australian Capital Territory all use a similar formula. The emphasis in each case is upon what remains to be done. Is the person in the process of executing the offence or simply preparing for it?

ACTIVITY 14.2

Read Wilson, Section 18.5.A.1 'The act interpreted' and answer the following questions.

a. **Did D in *Geddes* go beyond mere preparation? The Court of Appeal said not but many critics of the case thought he had. What do you think?**

b. **Adam wants to kill his wife. Knowing that she has a potentially fatal heart condition that is susceptible to fat and salt, he makes sure that every meal he cooks for her is heavily laden with both fat and salt. Is Adam guilty of attempted murder?**

c. **Did the defendant in *Dagnall* attempt to rape his victim? Why do you think he was convicted when the defendant in *Geddes* was not? Are they both right?**

14.2.1 When is an act 'more than merely preparatory'?

The 'more than merely preparatory' test is still a proximity based test. The judge decides whether the defendant's acts are capable of being more than preparatory. If they are so capable the jury then decides whether they are in fact. Judges have been instructed to ignore pre-Criminal Attempts Act 1981 tests – such as the Rubicon test – in favour of a test which distinguishes between when the defendant is 'on the job', that is in the process of executing the offence, and when they are merely preparing for this. In *Gullefer* [1990] 1 WLR 1063, D, in the course of a greyhound race, realised the dog that he had put money on was not going to win, so he climbed on to the track in an attempt to stop the race, hoping that this would enable him to recover his stake. The stewards decided not to stop the race. It was held that D's acts were too remote from the offence he was charged with attempting (theft of the stake money). The Court of Appeal held that at the time D was arrested he could not be in the process of committing theft as the race had not been called off, so there would be no evidence of

him doing acts of execution fit to put to the jury. Lord Lane CJ said that the *actus reus* of attempt is satisfied:

> when the merely preparatory acts come to an end and the defendant embarks upon the crime proper. When that is will depend of course upon the facts in any particular case.

It would have been different if the race had been called off, since then D was in a position to execute the offence.

This test was also adopted in *Campbell* (1991) 93 Cr App R 350, where D was charged with attempted robbery of a Post Office. He had reconnoitred the place, bought a disguise and imitation firearm and had armed himself with a threatening note he was intending to give to a cashier. D was arrested before he entered the Post Office. The Court of Appeal, quashing his conviction, held that these were acts of preparation. He had not embarked upon the crime proper.

Activity 14.3

This accounts also for the decision in *Geddes*. The Court of Appeal concluded that what D had done was to make preparation for what he had in mind to carry out later. As you will probably agree, these decisions may be logical but they are hardly practical. Just how far does the would-be child molester or robber have to go before they commit the attempt?

No feedback provided.

A case falling on the other side of the line is *Jones* (1990) 91 Cr App R 351. In this case, D, who was jealous of V, got into V's car while it was stationary and handed over a letter. While V read it, D took a loaded sawn-off shotgun from his bag, pointed it at V at a range of some 10 to 12 inches and said, 'You are not going to like this' or similar words. V grabbed the end of the gun and pushed it sideways and upwards. There was a struggle, during which V managed to throw the gun out of the window. D's conviction for attempted murder was upheld. The Court of Appeal rejected the contention that he had not performed the last act necessary to commit the offence – he still had to take off the safety catch, aim the gun and pull the trigger – and so had not gone beyond the preparatory stage. In the Court's view:

> once he had got into [the] car, taken out the loaded gun and pointed it at the victim with the intention of killing him, there was sufficient evidence for the consideration of the jury on a charge of attempted murder.

Clearly the legal position continues to be uncertain and, because of the outcry arising on the basis of cases such as *Geddes*, the Law Commission was charged with making proposals for reform. Initially it considered the idea that a back-up inchoate offence of preparing for crime might be used to mop up cases like *Geddes*, *Campbell* and *Gullefer*. Disappointingly, in response to criticism of these proposals, it ended up making no major recommendations for reform.

Activity 14.4

Do you think the Criminal Attempts Act 1981 succeeded in bringing greater precision to the definition of a criminal attempt? Could you think of a better definition than that appearing in s.1?

The following definition of a criminal attempt might be appropriate and would at least discourage judges from reaching decisions such as that in *Geddes*. To constitute an attempt:

> A must have done an act which was directly connected with its commission and which was the last act the actor contemplated as necessary to commit the intended offence, or was a more remote act which, without being an act of mere preparation, formed part of a sequence of connected acts designed for the execution of the offence.

This could be supplemented by a list of statutory illustrations covering the most problematic cases.

Try applying this to the cases covered in Wilson, Section 18.5.A '*Actus reus*'. Does it help?

No feedback provided.

14.3 *Mens rea*

Section 1 of the Criminal Attempts Act 1981 specifies that attempt is a crime of specific intent. A must intend to commit the substantive criminal offence. This means that the *mens rea* of attempted murder is not the intention to kill or cause grievous bodily harm but the intention (specifically) to kill. This was made clear in *Whybrow* (1951) 35 Cr App R 141, in which D built an electric device to give an electric shock to his wife when she took a bath. Parker J directed the jury that if it was satisfied that in doing so D intended to kill his wife or do her grievous bodily harm, then he would be guilty of attempted murder. The Court of Appeal ruled that this was a misdirection but upheld the conviction as there had been no miscarriage of justice.

ACTIVITY 14.5

Why do you think the Court of Appeal considered that there had been no miscarriage of justice in *Whybrow*?

As it is a crime of specific intent, this also means that recklessness is not enough. This is so even if the substantive offence can be committed by recklessness. So in *Mohan* [1976] QB 1, D was driving his car and responded to a police officer's signal to stop. D slowed down but then accelerated towards the police officer, who moved out of the way, and D drove off. D was charged with attempting to cause bodily harm by wanton driving at a police constable. The jury was directed that the prosecution had to prove that D realised that such wanton driving would be likely to cause bodily harm. The Court of Appeal quashed D's conviction, ruling that a conviction for an attempt to cause bodily harm by dangerous driving requires proof that D intended to cause harm by dangerous driving. It was not sufficient to prove that D did not care whether he hit the police officer when attempting to escape, nor that he knew it was likely.

Similarly, in *O'Toole* [1987] Crim LR 759 it was held that to be guilty of attempted arson requires proof that D intended to cause damage by fire. A reckless use of combustibles is not enough, even though this would be enough to convict of the substantive offence of arson.

14.3.1 Circumstances

One qualification is in order. Consider crimes which require proof not only that a particular result has occurred but also that certain circumstances exist. An example is rape. The result which must be proved is sexual intercourse: the circumstance which must be proved is absence of victim's consent. The corresponding *mens rea* for rape is an intention to have intercourse and knowledge that V is not consenting or absence of reasonable grounds for believing that V is consenting. What is the corresponding *mens rea* for attempted rape?

There are two possibilities. The first is that, in addition to an intention to have intercourse, D also has to intend (i.e. know for a fact) that V is not consenting. In other words, it would have to be D's intention to have intercourse with a non-consenting person (a very small minority of cases, one would hazard). This would acquit of attempted rape any person who tried to have intercourse with a person and simply did not care whether the person was consenting or not (the vast majority). In *Khan* [1990] 1 WLR 813 it was held, at a time when recklessness as to consent was the minimum *mens rea* requirement, that recklessness as to the circumstances was also enough for attempted rape; that is, it was sufficient that D tried to have intercourse with V, not caring one way or the other whether she was consenting or not.

The *Khan* approach to attempts has been expanded to other crimes. For example, in *A-G's Reference (No 3 of 1992)* [1994] 2 All ER 121, on a charge of attempted aggravated arson contrary to s.1(2) of the Criminal Damage Act 1971, it was held that it was sufficient for the prosecution to establish a specific intent to cause damage by fire and that D was reckless as to whether life would thereby be endangered. It was not necessary to prove that D intended that the lives of others would be endangered by the damage.

In 2014 the Court of Appeal adopted a rather different approach. In *R* v *Pace* it was held that a scrap metal dealer who bought metal suspecting it to be stolen could not be liable for attempting to commit the offence of concealing, disguising or converting criminal property (lead) contrary to s.327(1) of the Proceeds of Crime Act 2002 (POCA). The lead in their possession was not stolen and the fact that they suspected it was, which was sufficient for the substantive offence, was insufficient for the attempt. This is an astonishing decision which is clearly at odds with the decision in *Khan* and the reason for it.

Activity 14.6

Read Wilson, Section 18.5.B.2 'Attempts and recklessness as to circumstances' and answer the following questions.

a. **Since *Khan* was decided, the *mens rea* for rape has changed. It is not necessary to show that D knew V was not consenting or did not care one way or the other. D can be guilty of rape even if he honestly believes V to be consenting if that belief is not reasonable. What is the corresponding *mens rea* for attempted rape? Is it still recklessness (D does not care one way or the other), or is it enough that D has no reasonable grounds for believing V to consent?**

b. **Do you approve of the way that *Khan* was adopted in the *A-G's Reference (No 3 of 1992)* case?**

14.4 Impossible attempts

At common law, the courts got themselves into a mess with respect to what was termed 'impossible attempts'. A person **could be** guilty of an attempt if what they did was factually incapable of producing the substantive offence (e.g. a pickpocket dipped their hand into an empty pocket intending to steal from it) or if the means adopted for the task were inadequate (e.g. someone tries to blow up a safe with a firework). However, a person **could not be** guilty of an attempt if what they were doing was **legally incapable** of producing a criminal offence.

Illustration 14.1

a. **D shoots V, an already dead man, believing him to be alive.**

b. **D takes talcum powder through customs believing it to be heroin.**

c. **D buys a gold ring believing it to be stolen. It is not.**

In each case, D intends to commit an offence and takes more than merely preparatory steps towards achieving it; yet until 1981, D was guilty of nothing. Lord Hailsham in *Haughton and Smith* [1975] AC 476 put it as follows.

> Steps on the way to the commission of what would be a crime, if the acts were completed, may amount to attempts to commit that crime, to which, unless interrupted, they would have led; but steps on the way to the doing of something, which is thereafter done and which is no crime, cannot be regarded as attempts to commit a crime. Equally, steps on the way to do something which is thereafter *not* completed, but which if done would not constitute a crime, cannot be indicted as attempts to commit that crime.

Section 1(2) of the Criminal Attempts Act 1981 reverses that rule. It provides that:

> A person may be guilty of attempting to commit an offence to which this section applies even though the facts are such that the commission of the offence is impossible.

Section 1(3) states further that in any case where:

> (a) apart from this subsection a person's intention would not be regarded as having amounted to an intent to commit an offence; but
>
> (b) if the facts of the case had been as he believed them to be, his intention would be so regarded,
>
> then, for the purposes of subsection (1) above, he shall be regarded as having had an intent to commit that offence.

This convoluted provision means simply that, in deciding whether what the person was doing was attempting to commit a crime, we should ignore whether the crime would have resulted if the facts were as they actually were and consider rather whether it would have resulted if the facts had been as they supposed.

In *Anderton* v *Ry*an [1985] AC 560, four years after the passing of the 1981 Act, the House of Lords, incredibly, refused to accept that s.1(3) was intended to abolish the rule that a person could not be guilty of an attempt to commit a crime if (as in (b) and (c) of Illustration 14.1), the steps he was taking could not have resulted in the commission of an offence. As a result, D's conviction for attempted handling was quashed when the goods which D handled, and which he thought were stolen, were not in fact stolen.

Eventually the House of Lords saw reason in *Shivpuri* [1987] AC 1. The defendant was paid to act as a drugs courier. He was required to collect a package containing drugs and to distribute its contents according to instructions which would be given to him. On collecting the package D was arrested by police officers, and he confessed to them that he believed its contents to be either heroin or cannabis. An analysis revealed the contents of the package not to be drugs, but a harmless vegetable substance. D was convicted for attempting to be knowingly concerned in dealing with and harbouring a controlled drug, namely heroin. His appeal to the House of Lords was dismissed. Lord Bridge, who was in the Court which decided *Anderton* v *Ryan*, was handed the short straw of confessing the Court's error in the earlier case. He said, with admirable clarity, making it even more astonishing that the mistake was made first time round:

> the first question to be asked is whether the appellant intended to commit the offences… The answer was plainly yes, he did. Next, did he… do an act which was more than merely preparatory to the commission of the offence? [The acts were] clearly more than preparatory to the commission of the *intended* offence… This… analysis leads me to the provisional conclusion that the appellant was rightly convicted…

ACTIVITY 14.7

Read Wilson, Section 18.5.D 'Impossibility' and answer the following question.

Adam is a believer in voodoo. He believes that he can kill people by making a wax model of them and sticking a pin in the model where the heart should be. He makes such an image of Eve and sticks a pin in, intending to kill her. Is Adam guilty of attempted murder? Should he be?

Am I ready to move on?

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

1. State the two rationales for criminal attempts.
2. State and explain the proximity approach to criminal attempts.
3. Explain why it has proved difficult to settle on a clear and effective rule governing criminal attempts.
4. State the current test for deciding whether a person has performed an act which is 'more than merely preparatory to the commission of the offence'.
5. State and explain the *mens rea* for criminal attempts.
6. State and explain the *mens rea* for attempted murder.
7. Explain the legal position surrounding the *mens rea* for crimes, such as rape or criminal damage, where proof of a circumstance is necessary in addition to a consequence.
8. State and explain the rules governing 'impossible attempts'.

15 Participation in crime

Contents

NOTES

15.1 Complicity

Often more than one person is involved in the commission of a criminal offence. The person who is the most immediate cause of the *actus reus* is known as the **principal**. If two persons are involved, for example in stabbing a victim, they both may be principals. If a person procures an innocent third party, say a child below the age of criminal responsibility, to commit the *actus reus* of an offence, the principal is the procurer. The principal is said to have committed the crime by using 'an innocent agent'. Everyone else who is involved in the commission of the offence and is criminally liable is referred to as an **accessory**, also known as an accomplice, or **secondary party**. Complicity itself is also known as secondary party liability, accomplice liability or, simply, accessoryship. These words can be used interchangebly.

The legal position regarding complicity is set out in the Accessories and Abettors Act 1861. Section 8 states:

> Whosoever shall aid, abet, counsel or procure the commission of any indictable offence… shall be liable to be tried, indicted, and punished as a principal offender.

The effect of this is that an accessory to an offence is guilty of the substantive offence, rather than – in the case of conspiracy, for example – an inchoate offence.

Prosecutors will generally specify whether a person is being charged as principal or accessory, but this is not strictly necessary since the secondary party is being indicted for the substantive offence rather than their participation in it (*Swindall and Osborne* (1846) 2 Cox CC 141). This has the advantage for the prosecution of allowing a case to proceed even where it is not clear which of two or more parties was the principal and which was the accessory. For example, in *Giannetto* [1996] Crim LR 722, W had been murdered but there was insufficient evidence to show whether the killing was done by G, W's husband, or by a hitman who G had procured to do the killing. The Court of Appeal said that this lack of evidence was not fatal to the conviction since, one way or another, G had committed murder – either by killing W himself or by encouraging another to do so.

Activity 15.1

Read Wilson, Section 19.2.E 'Trial procedure'. Compare this with the position where the prosecution can prove that one of two has committed a murder. For example, in the case of *Lane and Lane* (1986) where it was clear that one of them had killed their child but not which one. Why were they both acquitted? Consider now *Smith* v *Mellors and Soar*. Do you agree with the decision? What principle of criminal justice does this case illustrate?

One last point needs to be made. Although the accessory is tried, indicted and punished in the same way as the principal offender, what the prosecution needs to establish to gain a conviction differs alarmingly. This is because the elements of liability of accessoryship are quite distinct from those of the substantive offence. For example, to be guilty of murder as principal, the prosecution must prove that the principal, in furtherance of an intention to kill or cause grievous bodily harm to V, performed an act which caused V's death. By contrast, to be guilty of murder as secondary party, the prosecution must prove only that A, in furtherance of an intention to assist or encourage P to kill or cause grievous bodily harm to V, provided such acts or encouragement. It does not have to prove that A intended the death of or grievous bodily harm to V. It does not even have to show that A's acts of assistance or encouragement caused P to kill V or even influenced P's actions.

Illustration 15.1

P wants to kill V. He orders A, under pain of death, to drive him to V's house and wait for him and then drive him away again. A does this, foreseeing that P might kill or cause grievous bodily harm to V but hoping that he will not (a variation on the facts of *DPP* v *Lynch* (1975)). P kills V.

A is guilty, along with P, of murder although he has no *mens rea* for murder and his acts do not cause V's death. He is guilty because he intends (indirectly) to help P (by driving the getaway car) commit what will be, if it takes place, the crime of murder (killing with intent).

15.2 Elements of accessoryship

15.2.1 *Actus reus*

P must have committed an offence

The theory underlying accessoryship is that A's liability does not derive from what A has done but what P has done. This is why a gunsmith is guilty of murder simply by supplying a gun to P which they know will be used to commit murder. A's liability derives from the fact that they have lent support to P in the commission of the offence of murder. In theory, then, if P does not commit an offence, A cannot be complicit in it. This does not require P to be convicted or even for his identity to be known – P may have fled the country – so long as there is evidence that P, or someone, committed the relevant crime and A aided and abetted that crime. There is one statutory exception to this rule that a person cannot be an accessory to something which is not a crime, namely complicity in suicide under s.2 of the Suicide Act 1961.

Proving that a crime has been committed will usually involve the prosecution proving all the elements of that crime. So in *Thornton* v *Mitchell* [1940] 1 All ER 339, a bus conductor was helping his driver to reverse. His instructions were hopelessly inadequate and the driver collided with a pedestrian, causing the pedestrian's death. The driver was convicted at first instance of driving without due care and attention and the conductor was convicted for aiding and abetting the offence. On appeal the driver's conviction was quashed because it was quite reasonable for him to rely on the conductor's guidance in reversing a bus. The conductor's conviction was also therefore quashed, since there was no crime for the conductor to aid. This principle applies even where A is charged with procuring, rather than simply aiding and abetting, the offence (*Loukes* [1996] 1 Cr App R 444).

A person can remain liable as an accessory, however, **where the *actus reus* of the offence is committed**, even though the principal is acquitted because they lack *mens rea*, or have a defence. To understand how, complete the activity below.

ACTIVITY 15.2

Read Wilson, Section 19.5.A 'Conviction of secondary party where perpetrator is not liable' and answer the following questions.

a. **If A's liability as an accessory derives from the fact that P has committed an offence, why then was the procurer in *Cogan and Leak* (1976) and *Bourne* (1952) guilty of the offence?**

b. **What was the particular theoretical problem attached to convicting the husband of rape in *Cogan and Leak*?**

c. **Do you think that the decisions in both cases were more driven by a desire to punish an appalling case of wrongdoing than respect for legal principle?**

Aiding, abetting, counselling or procuring the offence

The conduct elements for accessoryship are aiding, abetting, counselling or procuring an offence. In theory each of these terms describes distinct behaviours: 'aid' means to help or assist, 'abet' involves instigation or encouragement, 'counsel' implies advising or urging. However, these words have no particular magic and can usually be reduced to two: encouraging or assisting (the commission of an offence).

Procedural matters

In practice the indictment will read, whatever the nature of A's participation, 'A aided, abetted, counselled or procured the commission of' murder, theft, criminal damage, burglary and so on. Only in the case of 'procure' may it sometimes be necessary to specify the precise nature of the participation. This is because one can procure someone to commit an offence although there was no common enterprise, as where A, without P's knowledge, adulterates P's drink which causes P to be over the prescribed alcohol limit when driving a car. This will not be 'aiding and abetting or

counselling' the offence but it will be 'procuring it' (*A-G's Reference (No 1 of 1975)* [1975] QB 773). To procure means 'to produce by endeavour'.

As with all other conduct elements, aid, abet, counsel and procure usually require some form of act. It is not aiding or abetting rape for a soldier to watch silently while the principal, another soldier, is committing the offence (*Clarkson* [1971] 1 WLR 1402). This is because watching silently offers no encouragement or assistance. If P did in fact gain encouragement from the silent witness, say because it led P to think that A approved P's actions, the act requirement would be satisfied. In *Coney* (1882) 8 QBD 534, for example, the mere presence of spectators at an illegal prize fight was thought to be *prima facie* evidence upon which the jury might find encouragement and so convict as accessories. It was not necessary to show that any individual charged had joined in the applause. A spectator would be liable in that situation, however, only if they were aware that their attendance was acting as an encouragement to P. Without this awareness, they would lack *mens rea*.

Activity 15.3

Read Wilson, Section 19.3.A.1 'Level of participation', Section (c) 'Complicity by omission and inactivity' and answer the following questions.

a. **Under what circumstances does a duty to control another's conduct arise so that failure constitutes complicity in that other's wrongdoing?**

b. **On the basis of *Du Cros* v *Lambourne* (1907), is a householder, who knows that her guests intend to drive home, under a duty to ensure they do not drink alcohol in excess of permitted limits?**

Communication and causation

If the basis upon which A is charged is an act of encouragement, this has to be communicated to the principal. If, therefore, P does not hear or read the words of encouragement, A cannot be charged as an accessory on the basis of that act alone. However, there need be no direct **causal connection** between the words of encouragement and the commission of the offence. So in *Calhaem* [1985] QB 808, a woman who hired a hitman to kill another woman had her conviction upheld on appeal, although there was evidence that the hitman may have killed on his own account rather than because of the woman's encouragement.

In the case of assistance, however, there need be no communication. So a person who acts as a lookout while others commit an offence, or puts a gun in another's pocket 'just in case', is guilty of assisting although none of the principals knew of their action (*State* v *Tally* (1894) 102 Ala 25). Again, no direct causal connection with the commission of the substantive offence need be established. Nor, indeed, need the words of encouragement or the assistance be substantial. Saying 'Oh, goody' in response to a proposal to kill is sufficient encouragement (*Giannetto* (1996)). Supplying a pair of gloves to help prevent fingerprint identification is sufficient assistance.

Activity 15.4

Read Wilson, Section 19.3.A.1(b) 'Is a causal link between the accessory's contribution and the substantive crime necessary?' and answer the following question.

a. **A procures P, a hitman, to kill C. On the way to C's house, P is involved in a car accident which results in P's car being badly damaged. P gets out of the car to remonstrate with the driver and, after an argument with him, kills him. By a coincidence, the driver is C. Is A complicit in the murder?**

Read Wilson, Sections 8.1 'Introduction', 19.3.A.1(b) 'Is a causal link between the accessory's contribution and the substantive crime necessary?' and 19.5.A 'Conviction of secondary party where perpetrator is not liable' and answer the following question. This time it involves consideration of different parts of the course.

b. A procures P, a hitman, to kill C. On the way to C's house, P is involved in a car accident which kills the driver of the other car. By a coincidence, the driver is C.

i. Is P guilty of murder?

ii. If P is not guilty of murder, is A nevertheless liable as an accessory to murder?

15.2.2 *Mens rea*

The mental element of accessoryship was described by Devlin J in *NCB* v *Gamble* [1959] 1 QB 11 as follows:

> aiding and abetting is a crime that requires proof of *mens rea*, that is to say, of intention to aid [or encourage] as well as of knowledge of the circumstances.

This means that A's acts of assistance or encouragement should be given with a view to encouraging or assisting the commission of an offence, and the aider or encourager should know the nature of the offence to be committed. This basic explanation is deceptively simple (remember it!) and so we need to consider it more closely.

Intention to assist or encourage

You might have hoped that by this time in your studies we would not have to look again at the meaning of intention. Unfortunately, complicity is probably the most significant area where its meaning has been considered. This is because, in our everyday lives, we all do acts which we know will assist or encourage others to commit offences. Authors may write crime novels with plots or information which may help or encourage readers to commit copycat crimes, such as murder, as was alleged of Anthony Burgess's *A clockwork orange*. A magazine article may explain in meticulous detail how fraudsters can bypass the chip and pin system in using a stolen credit card. TV journalists may broadcast footage of prison or urban riots, which encourage others to do likewise. Shopkeepers or internet providers may sell weapons which may later be used to cause harm, or clothes or equipment otherwise useful in the commission of an offence. Others may offer alcoholic drinks to dinner guests whose only means of getting home is by driving a car, or give money to a beggar, thus encouraging them to persist in begging (not in itself an indictable offence but which is often associated with fraudulent practices), or to a prostitute thus encouraging her pimp to continue illegally exploiting her. Are these activities forms of criminal complicity?

This is a complex question. By intention, is it enough for the prosecution to show that A **knew** that their acts **would** (or even might) assist or encourage P to commit an offence? Or does it have to show that A acted **in order to** encourage or assist its commission? In *NCB* v *Gamble,* Devlin agreed with the first approach:

> If one man deliberately sells to another a gun to be used for murdering a third, he may be indifferent whether the third man lives or dies and interested only in the cash profit to be made out of the sale, but he can still be an aider and abetter.

This statement was approved and clarified in *JF Alford Transport Ltd* [1997] Crim LR 745. Lorry drivers pleaded guilty to misrepresenting their mileage on a tachograph record. The appellants, their employers, were convicted of aiding and abetting those offences. On appeal it was argued, *inter alia*, that the trial judge wrongly directed the jury that the passive acquiescence of the employers in the offence committed by their drivers was sufficient to amount to aiding and abetting the offence. This argument was rejected by the Court of Appeal. The trial judge was correct. What mattered was knowledge of the principal offence, coupled with the ability to control the action of the offender and the deliberate decision to refrain from doing so. The Court of Appeal said that proof of these things entitled the jury, in the absence of any alternative explanation, to infer that 'the company had been positively encouraging what was going on'. In other words on the issue of what could amount to positive encouragement the prosecution approach was correct. Thus if the management's reason for turning a blind eye was to keep the drivers happy rather than to encourage the production of false tachograph records that would afford no defence.

The appeal was allowed, however, on the basis that there was insufficient evidence that the employers knew what was going on.

The importance of this restatement of the *mens rea* requirement in complicity is twofold. First, it indicates the importance that A knows, rather than simply suspects, that their conduct will assist or encourage the commission of an offence. Second, the restatement is consistent with the principle laid down in *Moloney*, and upheld in *Woollin*, that acting in the knowledge that a particular consequence will follow from one's act **is evidence** that the consequence was intended but not intention **as a matter of law**. As the statement itself says, it entitles the jury, '**in the absence of any alternative explanation**, to infer…' This gives the jury some discretion not to infer an intention to assist or encourage from knowledge where there is 'an alternative explanation'.

A prime example of where an alternative explanation was available is *Gillick* [1986] AC 112 in which the House of Lords made clear that a doctor who gave contraceptive advice to an underage girl was not to be taken to have intended to assist or encourage the commission of unlawful sexual intercourse by virtue only of knowing that it would for certain have this effect. The alternative explanation here is that the doctor was simply performing his medical duty of preventing an unwanted pregnancy.

Activity 15.5

Revisit the examples given at the beginning of this section of people doing acts which they know will assist or encourage others to commit offences but without wanting to. What would prevent their liability as an accomplice if it could be proved that someone benefited from the acts when committing a crime?

Knowledge of the circumstances

Clearly a person cannot be held responsible for assisting or encouraging the commission of an offence unless they know that what they are doing will have this effect. In *Johnson* v *Youden* [1950] 1 KB 544, it was put as follows:

> Before a person can be convicted of aiding and abetting the commission of an offence, he must at least know the essential matters which constitute that offence.

There are three facets to this principle.

- A is not responsible unless they know that P's intentions are criminal and the circumstances which would make it so.
- A is not responsible if P commits a crime other than the crime to which support is lent.
- A is not responsible, although they know their acts will assist or encourage P to commit some kind of crime, unless they have a good idea of what crime P intends to commit.

Illustration 15.2

A, a garage mechanic, believing B to be the rightful owner of C's car, gives B the keys to the car. B takes the keys and steals the car.

A is not liable as an accessory to theft. Although he intends to assist B to **take** the car, he does not intend to assist B to **steal** the car. This requires A to know that B is not the owner and that he intends to dishonestly misappropriate the car.

Activity 15.6

Read Wilson, Section 19.4.B 'Knowledge of circumstances' and answer the following questions. Be sure to record your answers and the reasons for them for later use.

a. **P is committing a bank robbery. He points his gun at V, a bank teller. A, a bank customer, sees B, another customer, just about to tackle P. In his excitement A shouts, 'Go on, get him!' P thinks A is encouraging him to kill V, which he does. Is A liable as an accessory to murder?**

b. **A encourages B to have intercourse with V. Neither A nor B know that V is under age. What is the criminal liability of A and B?**

c. A, a gunsmith, sells a revolver type handgun to P, a suspicious-looking character. He suspects that, although P has a licence for the gun, the licence may be forged and that the gun may be used for a wrongful purpose, including murder. P does use the gun for this purpose. Is A liable as an accomplice to murder?

d. P asks A, a gunsmith, for a replica gun which looks 'as authentic as possible'. A believes the gun is to be used to hold up a bank but he sells it to P anyway. In fact, P modifies the gun so that it is capable of firing bullets. P kills V, a bank teller, with it. Is A liable as an accomplice to murder?

e. A, who does not like V, tells P, her friend, that V deserves a good beating and asks him to effect it. P goes round to V's house and shoots him dead. Is A complicit in the murder?

How much detail need the accessory know?

Johnson v *Youden* says that the accessory needs to know the 'essential elements of the offence': in other words, the essential things which will make the principal's conduct a criminal offence. In Illustration 15.2, this will require A to know:

- that the car belongs to someone other than B. He does not need to know precisely who it belongs to
- that B intends not to return it – A would not be an accomplice to theft if he believed that B was taking the car for a temporary period
- that B's taking is dishonest – A would not be an accomplice to theft if he believed that the car had been abandoned and the owner could not be found.

Activity 15.7

Sometimes the secondary party may not know the precise crime to be committed but knows that some crime is intended. Is this lack of precise knowledge always fatal to a criminal charge? Read Wilson, Section 19.4.B 'Knowledge of circumstances' for an answer to this important question. What principle derives from *Bainbridge* [1960] 1 QB 129? Learn this principle (by heart if possible). Using the same section of Wilson, now answer the following question.

P, a criminal, asks A, his sister, to drive him to a particular destination. A asks P what he is going to do. P says 'It's better you don't know.' A drives P there and then drives off. P kills V. Is A an accessory to murder?

In practice, however, few assisters or encouragers have 'no idea' what the intended offence is to be. As a result, doctrine has further developed to diminish the significance of the 'I had no idea' defence. After *Bainbridge* another development occurred in *DPP for Northern Ireland* v *Maxwell* [1978] 3 All ER 1140, in which A was told by a member of the Ulster Defence Army (an illegal terrorist organisation) to guide a car to a public house. Driving his own car, A led another car containing three or four men to the public house and then went home. One of the men threw a bomb into the public house, but the attack failed due to action taken by the son of the public house licensee. A was charged with doing an act with intent to cause an explosion by a bomb, contrary to s.3(a) of the Explosive Substances Act 1883, and with possession of a bomb, contrary to s.3(b) of that Act. A was convicted of both offences as an accomplice. He appealed, contending that since he did not know what form the attack would take, or of the presence of the bomb in the other car, he could not properly be convicted of aiding and abetting in the commission of crimes of which he was ignorant. The Court of Criminal Appeal in Northern Ireland dismissed his appeal. A then appealed to the House of Lords.

Activity 15.8

Read Wilson, Section 19.4.B 'Knowledge of circumstances'. What was the outcome of the appeal in *Maxwell*? Find the principle the House of Lords formulated in reaching its decision and learn it. Together with *Bainbridge*, it covers most of what you need to know and understand about the liability of accessories where they are unsure of the crime the principal intends to commit.

No feedback provided.

The effect of these two cases (*Maxwell* and *Bainbridge*) is to significantly reduce the power of the secondary party to claim that they should not be held accountable because they did not know the essential elements of the offence to be committed. What are we left with? Here is a summary.

Summary

- If A does not know P intends to commit a crime, A cannot be liable as an accessory although they give assistance and/or encouragement to P in the acts which constitute that crime.
- If A believes that P intends to commit crime X but in fact P commits crime Y, A is not complicit in crime Y (questions (d) and (e), Activity 15.6).
- If A does acts which lend assistance or encouragement to P who commits a crime, but without knowing or intending that their acts offer that support, A cannot be liable as an accessory to P's crime (question (b), Activity 15.6).
- If A gives advice or assistance to someone, suspecting that the advice or assistance may be used to commit a crime but not knowing for sure, they cannot be guilty as an accessory (question (c), Activity 15.6).
- If A gives advice or assistance knowing that P intends to commit a crime but has no idea what the crime is or what type of crime it is, A cannot be guilty as an accessory.
- If A gives advice or assistance, knowing a crime is to be committed, not knowing the precise details but knowing the type of crime it is, A is liable as an accessory (*Bainbridge*).
- If A gives advice or assistance, knowing a crime is to be committed, not knowing the precise details nor the type of crime it is, but contemplating its commission because it is on their mental 'list' of possible crimes to be committed, A is liable as an accessory (*Maxwell*).

Liability of accessories for unforeseen consequences

We have considered the case of a supplier, A, who supplies P with an article useful in the commission of an offence but P **deliberately** commits another offence. Here, A is not complicit in that offence (question (d), Activity 15.6). The principle is the same if A's participation was by way of encouragement. The question arises, however, as to A's liability if the deviation is **not deliberate**. The basic principle of derivative liability is that A is liable to the extent that P is liable. A, like P, bears the risk of the consequences turning out other than was expected, so long as P did not **deliberately deviate substantially** from the terms upon which help or encouragement was given.

Illustration 15.3

A procures P to kill C by poison. P mistakenly administers the poison to V, not C. V is poisoned and dies.

P is guilty of the murder of V. A is complicit since A encouraged the poisoning, knowing that it was P's intention to commit murder, and V's death arose from the execution of that intention. A's derivative liability means that both A and P take responsibility under the doctrine of transferred malice.

Illustration 15.4

A procures P to poison C. P gives a poisoned apple to C to eat. Later C, not knowing what it contains, gives the apple (in P's absence) to V, who eats it and dies.

P is guilty of the murder of V by virtue of the doctrine of transferred malice. A will be complicit since, again, A encouraged the poisoning, knowing that it was P's intention to commit murder, and V's death arose from the execution of that intention. A's derivative liability means that both A and P take responsibility under the doctrine of transferred malice.

ILLUSTRATION 15.5

A encourages P to 'give V a good beating'. P does give V a good beating and V dies.

P is guilty of either murder or manslaughter depending upon his *mens rea*. Accordingly, A is guilty as an accessory as her liability derives from that of P. A will be guilty of murder if she gave P encouragement knowing that P's intention was to commit grievous bodily harm (one of the essential elements of the offence of murder). Otherwise A will be guilty of manslaughter.

ILLUSTRATION 15.6

A procures P to kill C by poisoning. P, having no poison, kills C by shooting him with a gun.

This is a deliberate variation, **but not a substantial one**, since the 'essential elements of offence' – intentionally killing C – are known to A.

In the following section, we shall examine joint enterprise liability, an area of law which has seen some significant developments in recent years. The good news is that the basic principle is easy to understand: it is the application of that principle which has proved the challenge. In order to make things as simple to understand as possible, I shall give you a lot of illustrations.

15.3 Joint enterprise liability

As I hope you will now understand, there are two main ways of participating in crime. The first form involves the secondary party giving help or encouragement to a principal, but not being an active participant in the commission of the offence. The second form, as where a gang is formed to commit a particular crime, involves the secondary party having an active role to play in the commission of the offence and sharing a common purpose with the principal to commit that offence. This second form of participation in crime is known as joint enterprise. Most of the confusion as to the potential scope of the secondary party's liability has arisen in this form of participation.

15.3.1 Basic outline of joint enterprise liability

In the normal course of events, where a criminal gang share a common purpose to commit crime A and crime A is committed by one or more members of the gang, all members of the gang are liable, either as principals or as accessories. This has been explained above. An illustration follows.

ILLUSTRATION 15.7

A and P are engaged in a joint enterprise to burgle C's house. P breaks a window to gain entrance.

Both A and P, in addition to being joint principals to the crime of burglary, are guilty of criminal damage, P as principal, A as accessory, since the damage to the window arose out of the execution of the joint enterprise. A's liability does not require this to have been expressly agreed upon or even thought about.

Moreover, even the best-laid plans can go wrong. This might involve unexpected events occurring and, due to the extreme pressure such enterprises excite, the individuals involved will sometimes commit another offence in the heat of the moment.

ILLUSTRATION 15.8

A criminal gang, comprising A, B, C, D, E, F and G, decides to rob a bank. Each member of the gang is allocated a specific role. It is A's job to terrorise the bank tellers; B's and C's jobs to monitor the customers; D's job to act as a lookout; and E's job to drive the getaway car. Finally it is F's and G's jobs to take and load the money. All of these people are members of the joint enterprise.

Suppose E drives the getaway car so fast in escaping the scene of the crime that a pedestrian is killed. A, B, C, D, F, and G will be liable as accessories to the offence of

causing death by dangerous driving in addition to the robbery. Although this offence is not part of the common purpose, the other parties are complicit because this offence arose **from the execution of the common purpose**. They are liable because E is liable.

Suppose, however, A decides to shoot a bank teller, what is the liability of B, C, D, E, F and G? Are they complicit in the murder as well as the robbery or is their liability only limited to the robbery (the common purpose)? This is different from the previous case because the killing does not form the common purpose, does not arise from its execution and is deliberate and intentional. The basic principle, which is easy to understand and that you must remember, is that the other parties will not be a party to the murder unless it was agreed, expressly or impliedly, that this should happen or should happen if the necessity arose.

Liability under these circumstances is known as 'joint enterprise' liability, since liability for crime Y arises from a common purpose to commit crime X. D2's liability is justified on the ground that, by continuing with the common venture agreeing that D1 might commit crime B in the course of it, they are regarded as having also lent their support to this offence.

Elaboration

Joint enterprise doctrine has developed to address these kind of eventualities. The basic principle governing joint enterprise liability is now understood to be the same as in accessoryship generally; namely that, because the accessory's liability derives from that of the principal, any crime that P commits A also commits, so long as A intentionally assisted or encouraged its commission. This is particularly pertinent in cases of joint enterprise. One of the tasks of the jury, therefore, is to decide whether A did intentionally assist or encourage P to perform the criminal acts in question. This will require it to take inferences from the conduct of the parties and the other circumstances to determine whether A's participation implicitly or explicitly assisted or encouraged P to do what he did. This is why in Illustration 15.8 the other parties are complicit in E's offence of causing death by dangerous driving.

In *Baldessare* (1930) 144 LT 185, D1 took a car for a joyride without permission. He invited D2 to join him. The joyride ended in the death of a pedestrian, as a result of D1 driving without proper lights and at an excessive speed. D1 was held liable for manslaughter. Was D2 liable as well? The Court of Criminal Appeal said yes. It held, dismissing the appeal, that the jury was entitled to take the inference from all these facts that what D2 intentionally encouraged was not simply taking a ride in a stolen car but joyriding, that is, thrill-seeking through dangerous driving. This was what D2 had signed up to by entering and then staying in the car after D1 had started his dangerous driving. D2 was a willing rather than a reluctant participant.

Activity 15.9

Read Wilson, Section 19.4.C 'Liability for unintended consequences' and explain why the Court of Appeal arrives at a different conclusion in the case of *Willett* (2010).

A classic statement governing this area of liability was made in *Anderson and Morris* [1966] 2 QB 110. Anderson and V had a fight because V had hurt Anderson's wife. Anderson told Morris, a friend, what had happened so they both went to find V. When they found V another fight ensued. Anderson punched V in the presence of Morris, although Morris himself did not take part. Anderson then stabbed V, causing his death. Morris denied knowing that Anderson had a knife.

In his summing-up, the trial judge told the jury that it could convict Morris of manslaughter even though he had no idea that Anderson had armed himself with a knife. The Court of Appeal held that this was a misdirection in respect of Morris and quashed his conviction for manslaughter. The correct direction would have distinguished between what the joint enterprise was (beating up V) and what it became (stabbing V to death). Morris could not be liable for that if he did not contemplate the use of a knife (you cannot help or encourage what you do not know about). If V had died as a result of a blow from a fist or foot, such blows would have been contemplated and so would have properly resulted in a conviction for

manslaughter. Mr Geoffrey Lane QC, who later became the Lord Chief Justice, explained the principle as:

> Where two persons embark on a joint enterprise, each is liable for the acts done in pursuance of that joint enterprise, that includes liability for unusual consequences if they arise from the execution of the agreed joint enterprise but...if one of the adventurers goes beyond what has been tacitly agreed as part of the common enterprise, his co-adventurer is not liable for the consequences of that unauthorised act...It is for the jury to decide whether what was done was part of the joint enterprise, or went beyond it.

The above principle governing liability for joint enterprise covers three separate cases.

- Liability for unforeseen consequences of executing the joint enterprise.
- Liability for accidental deviations in the execution of the joint enterprise.
- Liability for deliberate deviations in the execution of the joint enterprise.

15.3.2 Liability for the unforeseen consequences of executing the joint enterprise

The first case covered by the above principle is where an unexpected consequence arises from the execution of the joint enterprise. Here the position is exactly as for accessoryship generally (see Illustration 15.5). For example, if – in a variation of *Anderson and Morris* – V died as a result of blows landed by Anderson in furtherance of a joint plan to cause actual bodily harm to V, Anderson is guilty of manslaughter and so is Morris, as accessory. His liability derives from that of Anderson, as principal.

Further, if the joint enterprise or common purpose is to cause V grievous bodily harm then Anderson will be guilty of murder and Morris will be guilty of murder, as accessory. Once again, his liability derives from that of Anderson. A similar result would follow if A and P agreed to commit arson on a building and, unknown to both of them, someone was in the building and was killed. If P did the 'torching', he would be liable for manslaughter and A would also be liable for manslaughter, as accessory.

15.3.3 Liability for accidental deviations in the course of executing the joint enterprise

Closely related to the above case is where P accidentally deviates in the execution of the joint enterprise. Here again the position is generally the same as for accessoryship (see Illustrations 15.3 and 15.4).

ILLUSTRATION 15.9

A and P are engaged in a joint enterprise to kill C by shooting. P pulls the trigger, misses C and hits V, killing him.

P is guilty of murder, by the transferred malice principle. A is complicit by virtue of the same principle since the killing arose from the execution of the joint enterprise.

15.3.4 Deliberate deviations in the execution of the joint enterprise

It is with respect to **deliberate** variations that doctrine in the field of complicity has been subjected to strain. There are both evidential and moral reasons for this. As a matter of evidence, if P commits a crime other than the crime at the core of the joint enterprise, it is easy for A to claim that this was not what they signed up for, and difficult for the prosecution to disprove. The moral reasons are that active participation in potentially dangerous criminal ventures with others is a reason in itself to hold participants accountable when the dangers materialise. The courts have therefore struggled to ensure that the derivative liability of the accomplice stays in line with the retributive ethics underlying criminal conviction and punishment. This is particularly the case where the principal commits murder. As Lord Steyn in *R* v *Powell*; *English* (1997), put it:

> Experience has shown that joint criminal enterprises only too often escalate into commission of greater offences. In order to deal with this important social problem, the accessory principle is needed and cannot be abolished or relaxed.

15.3.5 Doctrinal strain revealed

Until 2016 the basis of liability for those involved in a joint enterprise differed significantly from that of accessoryship generally. In the specific context of murder, for example, to be guilty as **an accessory** to murder, the prosecution had to show that the secondary party intended to assist or encourage the principal to commit murder (i.e. to kill with the intention to kill or cause serious injury). So, in an example given in the case of *NCB* v *Gamble*, a person who supplies a gun to another who then uses it to commit murder will only be guilty of murder as accessory if they intended, by that act of supply, to assist or encourage the commission of murder. This 'intention' does not require them to desire that this offence be committed. It is enough that they know **for certain** that he will do so. This standard basis for liability did not apply in cases of joint enterprise, that is, in cases where, unlike our gun supplier, the parties involved were part of a gang bent on committing an offence. In cases of joint enterprise, for example a burglary, or a punch up at a football match, all parties to the joint enterprise were not only guilty of burglary (or assault) but also **any other crime committed by any of them which they contemplated one of their number might commit**. It was not necessary for them to desire this or know it for certain.

Illustration 15.10

A, B and C decide that B and C will commit the burglary and A will dispose of the proceeds. In the course of that burglary C kills V, a householder, with a gun or knife supplied by D and which A and B knew he was carrying. Until 2016 A and B were complicit in the murder simply upon proof that they contemplated that C might kill someone in the course of the burglary with the *mens rea* for murder. The fact that A and B knew that C was carrying the gun would be strong evidence of this contemplation. D, however, would only be liable if (s)he knew for certain that this was C's intention as (s)he, unlike A and B, is not a party to the joint enterprise.

The rules governing accessorial liability for deliberate deviations in cases of joint enterprise were thus as follows:

- P and A must have embarked upon the commission of an agreed crime (crime X).
- At the time of or during the commission of this offence A must contemplate that P, in addition to or in substitution for crime X, might commit a further crime (crime Y).
- Notwithstanding this contemplation, A must have continued to give support and encouragement to P in the commission of crime X.
- The crime actually committed did not differ substantially in nature or execution from that contemplated.

The leading case in the area was, until 2016, *R* v *Powell; Daniels* [1999] 1 AC 1, [1997] 4 All ER, which confirmed the approach adopted by the Privy Council in the earlier case of *Chan Wing Siu* (1985). Three men, including the two appellants, Powell and Daniels, went to purchase drugs from a drug dealer (the joint enterprise), but having gone to his house for that purpose, the drug dealer was shot dead when he came to the door. The Crown was unable to prove which of the three men fired the gun that killed the drug dealer. The defence argued that this meant that all three must be acquitted since two of them did not pull the trigger. The Crown argued, (developing the successful argument in *Giannetto* discussed in **Section 15.1,** above), that this lack of proof was not fatal to the conviction of all three for murder. Whoever it was that fired the gun was guilty of murder as principal, and the other two must also be guilty as accessories because they knew that the third man was armed with a gun and contemplated that he might use it to kill or cause really serious injury to the drug dealer. Powell and Daniels were convicted of murder and their appeals were rejected by the Court of Appeal. The question certified for the opinion of the House of Lords was:

> Is it sufficient to found a conviction for murder for a secondary party to a killing to have realised that the primary party might kill with intent to do so (or with intent to do GBH) or must the secondary party have held such intention himself?

The House of Lords answered yes to the certified question, dismissing the appeal. The fact that whoever did not kill V knew that the other was carrying a gun was evidence that its murderous use was contemplated and that was sufficient to hold the secondary party liable for the murder. Their Lordships rejected the argument that it was unfair that a principal to murder could only be liable upon proof of an intention to kill or cause serious injury whereas a secondary party, who was subject to the same mandatory penalty, was guilty upon proof only of foresight (that P might kill with the *mens rea* for murder). There was one small mitigation of the harshness of this rule, namely where, although A contemplated that P might kill with the *mens rea* for murder without intending this to occur, P's action in doing the killing was fundamentally different from the actions contemplated that P would use. So, in *English*, decided at the same time as *Powell and Daniels,* the joint enterprise was to attack V with wooden posts. P went further and stabbed V to death with a knife, which A had not known about. At first instance, the judge ruled that this lack of knowledge of the knife was not material because A contemplated that P might kill with the *mens rea* for murder (here the intention to cause grievous bodily harm by hitting V with the wooden stakes). The House of Lords quashed the conviction. Given that the joint enterprise was not to kill V but to attack him, A could not be held to have intentionally assisted or encouraged P to do something so **fundamentally different** from the planned attack. Whether the mode of killing was 'fundamentally different or not' was stated to be a matter for the jury in which the prime consideration was, as it was in *English*, the relative degree of lethality of the weapon contemplated and the weapon actually used. In effect, P's deviation from the joint enterprise by using a weapon unknown to A would exculpate A only if the weapon used was more lethal than the means agreed or contemplated. So A would be complicit for the use of a knife when A contemplated only that P might be carrying a gun or vice versa. But A would not be complicit if P produces a gun or a knife when A contemplated only that P might produce a baseball bat or a snooker cue (*Uddin* [1999] QB 431).

In *Mendez* [2010] EWCA Crim 516 it was confirmed that the fundamental difference rule does not apply where A and P share a common purpose to kill. Where there is a common purpose to kill it does not matter at all how P does the killing. For example, if A and P agree to kill V by suffocating him with a pillow and P kills V with a gun, A is liable as an accessory to murder. Since the common purpose is to kill, it does not matter that P kills in a fundamentally different way than that agreed.

The contemplation rule suffered a great degree of criticism. Consider the following case.

Illustration 15.11

A, B C, D and P, a group of football supporters, decide to have a fight with a gang of rival supporters. P loses his cool, takes out a knife and intentionally stabs V to death.

P is guilty of murder upon proof that he intended, at least, to commit GBH. A, B, C, and D were also guilty of murder simply upon proof that they knew one of their number was carrying a knife, gun or other lethal weapon and might use it. This state of affairs poses a number of problems. First, they are liable although they did not intend to assist or encourage the murder, which is the fault element usually required to convict an accessory. Secondly, although the killer has to be shown to have intended death or grievous bodily harm, they, as accessories to murder, are liable simply upon proof of foresight of the possibility that one of their number might commit murder. The problem with this is that a conviction for murder in such circumstances misrepresents the nature of the secondary parties' wrongdoing. Criminal justice requires something more than the acquittal of the innocent and the conviction of the guilty. It also requires the correct label to be assigned to the defendant's wrongdoing and for the sentence to be a fair reflection of the defendant's culpability.

Neither of these requirements is satisfied here. Where a person signs up to a criminal venture believing it might (not would) result in a co-adventurer committing murder, the correct label is manslaughter since the co-adventurer is signing up to doing something dangerous not to something lethal. As for the sentence, it is patently unfair, given that murder carries a mandatory life sentence, for a person to receive a life sentence when their degree of fault and wrongdoing is so far removed from that of the killer. Sadly, it is all too common for youths to participate in fights alongside someone they know to be carrying a dangerous weapon.

In *R* v *Jogee* [2016] 2 WLR 681 the Supreme Court agreed with these criticisms. It ruled that in cases of joint enterprise in murder the contemplation basis for liability established in *Chan Wing Siu* (1985) and approved in *Powell* (1999) was a wrong turning. It was insufficient that the secondary party contemplated that the principal might commit murder. Rather it had to be shown, as in accessoryship generally, that the secondary party intended to assist or encourage that murder. Rather, it had to be shown, as in accessoryship generally, that the secondary party intended to assist or encourage that murder. Contemplation is not the fault element in accessoryship. Intention is. However, if the secondary party can be shown to have contemplated the commission of murder and carried on regardless, this could of course be used by the prosecution as evidence that it was indeed intended or intended if the occasion arose. Jogee was retried at Leicester Crown Court. His conviction was quashed and replaced by a conviction for manslaughter. The jury found that there was insufficient evidence that the defendant intended to encourage the principal to kill or cause serious injury. There was, however, sufficient evidence that he intended to encourage a lesser harm. In such circumstances a conviction for manslaughter is proper. The main thrust of the Supreme Court's decision is to be found in paragraphs 89–90 summarised in the following press statement:

> The court holds, in a unanimous judgment, that the law must be set back on the correct footing which stood before *Chan Wing-Siu*. The mental element for secondary liability is intention to assist or encourage the crime. Sometimes the encouragement or assistance is given to a specific crime, and sometimes to a range of crimes, one of which is committed; either will suffice. Sometimes the encouragement or assistance involves an agreement between the parties, but in other cases it takes the form of more or less spontaneous joining in a criminal enterprise; again, either will suffice. Intention to assist is not the same as desiring the crime to be committed. On the contrary, the intention to assist may sometimes be conditional, in the sense that the secondary party hopes that the further crime will not be necessary, but if he nevertheless gives his intentional assistance on the basis that it may be committed if the necessity for it arises, he will be guilty. In many cases, the intention to assist will be co-terminous with the intention (perhaps conditional) that crime B be committed, but there may be some where it exists without that latter intention. It will remain relevant to enquire in most cases whether the principal and secondary party shared a common criminal purpose, for often this will demonstrate the secondary party's intention to assist. The error was to treat foresight of crime B as automatic authorisation of it, whereas the correct rule is that foresight is simply evidence (albeit sometimes strong evidence) of intent to assist or encourage. It is a question for the jury in every case whether the intention to assist or encourage is shown.

A number of points need to be made to clarify this summary. First, the reference to conditional intent. A person who, hoping that crime A, say burglary, does not lead to crime B, say murder, nevertheless accepts that the commission of murder by the principal may become necessary to achieve the criminal purpose and intentionally encourages or assists the commission of burglary on that basis also (conditionally) intends to assist P to commit murder.

Illustration 15.12

P and A agree to commit a burglary. P takes a gun. A asks him not to take it. P tells A that he is going to take it and will not use it unless it is their only means of escape. A reluctantly takes part in the burglary, hoping the gun will not be necessary. When the householder unexpectedly returns, P kills the householder.

P is guilty of murder. A, under the new approach, is also guilty of murder as secondary party, not because he simply contemplates that P mighty commit murder but because by his actions he shows his intention to assist and encourage the murder, conditional upon it being necessary.

Often, of course, the most important evidence that such an intention existed will be evidence that A contemplated or foresaw P's commission of crime B, for example because he knew P was carrying a lethal weapon and was prepared to use it. As Lords Hughes and Toulson for the Court put it at para.94:

> If the jury is satisfied that there was an agreed common purpose to commit crime A, and if it is satisfied also that D2 must have foreseen that, in the course of committing crime A, D1 might well commit crime B, it may in appropriate cases be justified in drawing the conclusion that D2 had the necessary conditional intent that crime B should be committed, if the occasion arose; or in other words that it was within the scope of the plan to which D2 gave his assent and intentional support. But that will be a question of fact for the jury in all the circumstances.

The second point in need of clarification is the idea that an intention to assist P to commit murder (crime B) is coterminous in most cases with an intention that P commits that crime. In other words, it would not be a mistake for a judge, in directing the jury in a case where P committed murder by shooting a bank teller in the course of a bank robbery in which A was a participant, to tell the jury that they may convict A also of murder as a secondary party if convinced that A intended P to shoot a bank teller if the necessity arose. This is, no doubt, an easier concept for the jury to grasp than a direction which tells them to convict if convinced that A intended to assist or encourage P to shoot a bank teller if the necessity arose.

Since the Supreme Court decision, a number of appeals have been lodged by prisoners previously convicted of murder on the basis of the *Chan Wing Siu*/*Powell* joint enterprise principle and serving a life term. Significantly, almost all of these have to date been unsuccessful. The latest, *R* v *Johnson-Haynes* [2019] EWCA Crim 1217, explains the reason for this. An appeal based on a post-conviction change in the law will only be successful if a substantial injustice would attach to upholding the conviction (s.2 Criminal Appeal Act 1968). No such injustice would occur if, for example, on the proven facts the jury would be unlikely to have reached a different verdict had the original trial judge directed it in accordance with the changed law. Given, as explained above, that *Jogee* replaces a rule of law (contemplation is culpability) with a rule of evidence (contemplation is evidence of intention/culpability) it is not surprising that the Court of Appeal were not inclined to quash the convictions. The average juror will not take much convincing that a person who robs a bank with a person whom he knows is carrying a lethal weapon and may use it, actually intended it to be used if the occasion arose. This does not mean of course that the law has not changed. It means rather that convictions based upon the **pre-*Jogee* law** will not be overturned unless it was likely that the jury would not have convicted if they had been directed as they now should be. The sole case in which this has happened is *Crilly* [2018] EWCA Crim 168. The applicant had participated in a burglary in the course of which, along with his partner, he was discovered by the occupier who was unexpectedly at home. His partner, P, punched the occupier when he failed to deliver to them anything of value. This caused his death. At trial, P was found guilty of murder as principal and Crilly as accessory. The Court of Appeal ruled that a *Jogee*-compliant judicial direction would have been unlikely to result in a conviction for murder and so quashed the conviction. The Court concluded, taking into account the completely unexpected turn of events, that the evidence against Mr Crilly 'was not so strong that we can safely and fairly infer the jury would have found the requisite intent to cause really serious bodily harm'.

In cases of joint enterprise committed post-*Jogee*, the true effect of *Jogee* has yet to be worked out. In particular, it would have been helpful if the Supreme Court had made clear how exactly the jury could infer intention from contemplation. Ideally, this will follow the approach considered above in relation to *Moloney* and *Woollin* (see Section 7.2.3).

As applied to Illustration 15.10, the jury might be given a direction something like this if *Woollin* is to be applied, as it should be applied, to cases of joint enterprise:

> members of the jury, for A and B to be guilty of murder as accessories you must be sure that they intended C to kill V or intended C to cause V serious injury or to do so if it became necessary. If you think that they knew C was likely to use the gun in these circumstances and yet carried on regardless then this might mean that they not only foresaw this possible outcome but intended it. But you will have to be sure that this was indeed their intention. Contemplation alone is not enough, but obviously, the greater level of risk the defendant foresaw, the more likely it is that he actually intended it to happen. On the other

> hand, you have been told that they knew C had the gun but had made it clear that they did not approve its potential use. If you think that this may have been the case then you must acquit of murder as accessories unless you feel sure that, whatever they may have desired, they still knew it was virtually certain that V would use the gun in this way if it became necessary. If you are not sure that they had this knowledge or intention but you are sure that they contemplated the possibility that this gun might be put to murderous use then you should bring in a verdict of manslaughter rather than murder.

It should be noted that *Jogee* has not gone down well in other common law jurisdictions. In *Miller* v *The Queen*; *Smith* v *The Queen*; *Presley* v *DPP for the State of South Australia* 334 ALR 1 *Jogee* was not followed by the High Court of Australia, approving the law as articulated in *Chan Wing Siu* and *Powell*. A similar rejection of *Jogee* was made by the Hong Kong Court of Final Appeal, approving the reasoning in *Miller* (*HKSAR* v *Chan Kam Shing* [2016] HKCFA 87).

Activity 15.10

Read Ormerod, D. and K. Laird '*Jogee*: not the end of a legal saga but the start of one?' (2016) *Crim LR* 539 (available in Westlaw).

On the basis of this article, is the change of approach to joint enterprise liability more apparent than real?

No feedback provided.

15.3.6 The strange case of *Gnango*

Strangely, it seems there can be a joint enterprise even where there exists no degree of cooperation between the parties and even where they are antagonists. This strange state of affairs is the result of the Supreme Court decision in *Gnango* [2012] 2 WLR 17. A and P engaged in a gunfight in public, each intending to kill or cause serious injury to the other. P accidentally shot and killed a passerby. The Supreme Court decided (Lord Kerr dissenting) that both A and P were guilty of murder. This is a very strange decision. Before reading on, think why.

In this case, clearly P was guilty of murder on the transferred malice principle. A will also be guilty of murder if the prosecution can show that he was party to a joint enterprise to commit murder. There are a number of ways of arguing this. One is to claim that they were both principals in a joint enterprise to commit murder on each other...

The second possible basis for joint enterprise liability, similar to the murder variation in Illustration 15.7, is that they were participating in a joint enterprise to commit some other crime (Crime X) contemplating that murder (crime Y) might be committed by the other when they shot at each other. Crime X in this alternative is the crime of affray which is committed when people use violence in a public place. This includes shooting guns. The Court of Appeal rejected this argument also. Although both **committed the offence of affray** they were not part of a **joint venture** to commit an affray since they were acting **independently** of each other. If A and B decide independently to buy an ice cream from a vendor it would be strange indeed to describe them as being part of a joint enterprise/having a common purpose to buy an ice cream. The Supreme Court, by a majority, accepted the first argument, namely that there was a joint enterprise to commit murder, and were not discomfited by the prospect of a person being convicted of aiding and abetting his own attempted murder! Needless to say, the Supreme Court's decision and reasoning in *Gnango* has not met with universal approval.

15.4 Difference in offence or liability

15.4.1 Conviction of accessory for a different offence than that of the principal

In principle, it by no means follows that if A and P agree to commit crime X and P commits a greater offence than crime X, for which A is not complicit, A should be liable for the lesser offence (here manslaughter). In *Gamble*, the court held that the

deviation was so substantial that there was no basis upon which to hold that A had aided or abetted any offence of P's. This was so although A and P both agreed to commit an act of violence (kneecapping V), where P had deliberately varied the plan and slit V's throat. Whether *Gamble* survives *Jogee* is not clear. But it seems probable that the effect of *Jogee* is to render A guilty of manslaughter in this and all cases where the jury are convinced A contemplated, without intending it, that P might commit violence, whether lethal or not. As the Supreme Court said '[The decision does not] affect the law that a person who joins in a crime which any reasonable person would realise involves a risk of harm, and death results, is guilty at least of manslaughter.' This approach was adopted in *R* v *Tas* [2018] EWCA Crim 2603. The appellant had participated in a joint enterprise to attack another, being unaware that his co-defendant had been carrying a knife. The co-defendant was found guilty of murder and the appellant of manslaughter. He appealed on the ground that what the co-defendant did was so far removed from the joint enterprise that the jury could find the chain of causation to be broken, an argument that was successful in *Anderson and Morris* and *Rafferty* (see Section 4.4.1). The Court of Appeal upheld the trial judge's decision to remove the question of causation from the jury on the ground that there was no evidence on which a reasonable jury properly directed could conclude that there had been an overwhelming supervening act.

15.4.2 Mismatch of liability

In some cases, there is a possibility of a mismatch between the liability of the principal and that of the accessory. As has been explained, to be guilty as an accessory, a crime must have been committed. If P does not go on to commit the crime encouraged or assisted, the party cannot be guilty as an accessory but can be guilty of the inchoate crime of assisting or encouraging the commission of an offence under the Serious Crimes Act 2007. An exception is where P commits the *actus reus* of the crime but is acquitted for lack of *mens rea* or because of the presence of a defence. In such a case, if A has the *mens rea* that P lacks, or lacks the defence which P has, A's conviction may survive the acquittal of P (see *Cogan and Leak* and *Bourne,* above). In principle, it should also be possible to convict A of the offence where P, by reason of lack of *mens rea* or availability of a defence, is guilty of a lesser offence so long as the *actus reus* of the greater offence is committed.

ACTIVITY 15.11

Read Wilson, Section 19.5.B 'Level of liability' and then answer the following questions.

a. **A procures P to kill C. P, not wanting to kill C but wanting to demonstrate his loyalty to A, shoots at C without aiming. C suffers a minor wound. Assuming P is charged here with either s.20 (for the wound) or s.47 (for the actual bodily harm) under OAPA 1861 can/should A be guilty as an accessory to attempted murder?**

b. **A, wishing to procure C's death, tells P that C has raped his (P's) child. P loses his self-control and kills C. If P were charged with murder of C he would likely be able to avail himself of the partial defence of loss of self-control. Is/should A be liable for murder for having procured this intentional killing?**

15.4.3 Accessories as victims

As a general rule, a person cannot be convicted as an accomplice to an offence created for their protection. So in *Tyrell* (1894), a girl who incited a man to have sex with her when she was under age, was not guilty of aiding and abetting unlawful sexual intercourse since she could not, as the victim which this prohibition was designed to protect, commit this offence against herself.

Note: On the basis of *Gnango* (2012), it seems that murder is not an offence created for the victim's protection, since it was no answer to A's conviction as an accessory that the act he supposedly encouraged was his own murder. This is another strange aspect of *Gnango*!

15.5 Withdrawal

Once having signed up to assisting or encouraging the commission of a criminal offence, it is nevertheless possible for A to withdraw their assistance and/or encouragement and thus escape liability as an accessory to that offence. A may remain liable for any inchoate offence, such as conspiracy, which they may have committed.

The main question surrounding withdrawal is how it is done. Is it enough for the accessory to refrain from any further involvement in the criminal enterprise, or should they have to report the principal to the police or otherwise frustrate the accomplishment of the crime? The legal position is that the mode of withdrawal varies according to the circumstances of the case, taking into account the nature and extent of A's involvement, the nature of the offence, and the degree to which the joint enterprise has advanced.

15.5.1 Nature and extent of A's involvement

In cases where A's involvement is spontaneous rather than considered, it seems that all A needs to do to withdraw is simply to walk away. It is not necessary for withdrawal to be communicated to the principal. So said the Court of Appeal in *Mitchell* [1999] Crim LR 496. In this case A, B and C started a fight with a waiter outside an Indian restaurant, kicking and punching him repeatedly. A, B and C then walked away only for C to return and hit the victim again several times with a stick. V died and A, B and C were charged with murder. A and B claimed they had withdrawn from the joint enterprise. The trial judge directed the jury that withdrawal required communication rather than simply walking away and the jury convicted. A and B's appeals were allowed. Communication was not required in cases of spontaneous rather than pre-planned violence.

In *Rook* [1993] 1 WLR 1005, by contrast, it was held that simply not turning up to participate in a planned murder was not enough to withdraw and so A remained complicit. It was said in this case: 'if participation is confined to advice or encouragement [he] must at least communicate his change of mind to the other'. The Court of Appeal left it open as to whether, in view of the seriousness of the offence, more should have been done, such as informing the victim or the police.

Communication means either a verbal countermand of the former encouragement or assistance, or otherwise making it clear that there has been a change of mind. So in *Grundy* [1977] Crim LR 543, A gave details of the layout of a flat to P, who intended to burgle it. Two weeks before the planned burglary, A sought to dissuade P from committing it. It was held that this was sufficient to amount to a withdrawal.

In cases where A incites or procures the offence, it is arguable that A should do more to countermand the initial incitement or procurement. So in Illustration 15.13, it is not merely the nature of the offence that lends support to a more robust withdrawal being necessary but also the fact that A, by procuring an offence which would not have otherwise taken place, has a degree of causal responsibility for its commission which other aiders and abetters do not have.

15.5.2 Nature of the offence

It is plausible that the more serious the offence to which advice, assistance or encouragement is given the more A must do to countermand this participation.

Illustration 15.13

A procures P to kill C for a fee. A later changes her mind and tells P not to proceed. P insists on going through with it to earn his fee. A does nothing to stop P except trying to dissuade him and insisting he will not get paid. P kills C.

There is a strong argument here that A should remain complicit, given the nature of the offence procured. One might argue that the police or, at the very least, the victim should be alerted.

15.5.3 In cases of joint enterprise, how far the enterprise has advanced

If the crime is already well underway, then a party will normally need to do more than merely communicate withdrawal for it to be effective. What more needs to be done depends, again, on the circumstances of the case. What is clear is that a party to a joint enterprise to murder cannot withdraw by saying, just as the principal is about to pull the trigger, 'Don't do it. I've changed my mind.' This was the conclusion reached in the leading case of *Becerra and Cooper* (1976) 62 Cr App R 212 in which B, G and C took part in a burglary. In the course of the burglary C gave B a knife. They were discovered by the tenant, at which point C said 'Come on, let's go', climbed out of a window (followed by G) and ran away. The court concluded that by giving B the knife, C was taken to contemplate the use of the knife to kill or cause grievous bodily harm and so would be complicit in murder. The question for the court was whether such complicity could be avoided by C having withdrawn from the joint enterprise.

The Court of Appeal, upholding C's conviction, said not. Roskill LJ said that if C wanted to withdraw at that stage, he would have to do so by doing something 'vastly different and vastly more effective than merely to say "Come on, let's go" and go out through the window'. What these steps were Roskill LJ did not explain, but the implication was that little short of physical intervention would have been enough, given the nature of C's involvement (he gave B the knife) and the degree to which the joint enterprise had advanced (the risk of a killing had crystallised and was imminent).

15.6 Relationship between accessorial liability and inchoate liability

You do not need to know in detail the provisions of Part 2 of the Serious Crime Act 2007, but it might be helpful to understand the relationship between liability as an accessory and liability under this Act's provisions. Essentially, the Serious Crime Act covers those cases of encouragement and assistance **where the principal does not go on to commit the offence**. Strictly speaking, the prosecution can charge under the Serious Crime Act in substitution for complicity, even where the offence does take place, but for our purposes, this should be understood as providing 'back-up offences' to criminalise the activities of those who willingly give help or assistance to potential criminals. The Serious Crime Act 2007 creates three (inchoate) offences.

1. Cases where A intentionally encourages or assists the commission of an offence, as where A procures B to kill his wife, C (see *Calhaem*). If B does not commit the offence, A will be guilty under s.44 of the Act. This form of conduct used to be known as incitement.

2. Cases where A encourages or assists P to commit an offence, believing that the offence will be committed and that their acts will encourage or assist that offence, but not giving the encouragement or assistance with that intention. This is designed to cover cases where (as in *Grundy*), A supplies articles or information useful in the commission of crime. A provides the articles or advice not because they intend to be helpful or be encouraging, but because they have their own reason for doing this, for example making money.

3. Cases where, like in *Maxwell* or *Bainbridge*, A encourages or assists the commission of an offence, of which they do not know the precise details, knowing only that it is one of a number of possible offences that the other intends to commit.

Have I understood this chapter?

Have you understood this chapter? You have if – without referring to the module guide or Wilson – you can answer the following questions.

1. Explain what derivative liability means and what effect it has on complicity doctrine.
2. Reduce the words 'aid, abet, counsel or procure' to two words.
3. Explain and illustrate when it would be proper to use the word 'procure' rather than aid, abet or counsel.
4. Explain the legal effect of being convicted as an accessory.
5. State whether an accessory's liability depends upon causation.
6. State the circumstances when a person can be guilty as an accessory while the principal is guilty of nothing.
7. If A and B set out to kill C by shooting, which they do, but it is impossible for the prosecution to prove which of them fired the gun, are they both guilty of murder or neither?
8. Explain when, if ever, a person can be guilty as an accomplice by doing nothing.
9. State the *mens rea* for accessoryship.
10. How detailed does A's knowledge have to be of P's criminal intentions for A to be complicit in P's crime?
11. If A strongly suspects, without knowing, that P intends to commit a crime and that A's acts would be of assistance in the commission of that crime, can they be guilty as an accessory?
12. Which of the following represents a correct statement of law in cases not involving joint enterprise?
    a. To be guilty as an accessory to the murder of V, A must intend P to kill or cause grievous bodily harm to V.
    b. To be guilty as an accessory to the murder of V, A must intend to assist or encourage P to kill V.
    c. To be guilty as an accessory to the murder of V, A must intend to assist P to intentionally kill V.
    d. To be guilty as an accessory to the murder of V, A must intend to assist P to intentionally kill V or kill V with the intention of causing V grievous bodily harm.
13. Explain and illustrate the meaning of a joint enterprise.
14. State the principles governing an accessory's liability for the unforeseen acts or consequences of their principal in cases of joint enterprise.
15. Under what circumstances, if any, can a party to a joint enterprise escape liability for murder although they contemplated that their principal might kill with the intention (kill/grievous bodily harm) necessary for murder?
16. If A and P agree to kill V by means of an attack with fists and feet and P kills V with a gun, A cannot be liable because this is a fundamentally different way of killing than that envisaged by the joint enterprise. True or false?
17. What is A liable for if, although the joint enterprise is to harm V, P deliberately varies the joint enterprise to deliberately kill V?
18. What are the principles governing withdrawal from complicity?

NOTES

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